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## **Report of the Working Group on Arbitration on the work of its fortieth session (New York, 23-27 February 2004)**

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\* The late submission of the document is a reflection of the current shortage of staffing resources in the secretariat.



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## I. Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission generally considered that the time had come to, inter alia, evaluate in the universal forum of the Commission the acceptability of ideas and proposals for the improvement of arbitration laws, rules and practices. The Commission entrusted the work to the Working Group on Arbitration and decided that the priority items for the Working Group should include, among other matters, enforceability of interim measures of protection. The Working Group's deliberations on the topic of interim measures of protection began at its thirty-second session (Vienna, 21-30 March 2000), when the Working Group expressed general support for a legal regime governing enforcement of interim measures of protection ordered by the arbitral tribunal (A/CN.9/468, paras. 60-79). At that session, the Working Group also undertook a preliminary analysis of whether there was a need for a uniform rule on court-ordered interim measures of protection in support of arbitration (A/CN.9/468, paras. 85-87).

2. The Working Group agreed, at its thirty-third session (Vienna, 20 November-1 December 2000), that the proposed new article to the UNCITRAL Model Law on International Commercial Arbitration ("the UNCITRAL Model Law") on enforcement of interim measures of protection (tentatively numbered article 17 bis) should include an obligation on courts to enforce interim measures if prescribed conditions were met (see A/CN.9/485, paras. 78-106). At its thirty-fourth session (New York, 21 May-1 June 2001), in addition to continuing its review of draft article 17bis, the Working Group proceeded to consider a text revising article 17 of the UNCITRAL Model Law, which defined the scope of an arbitral tribunal's power to order interim measures and included an additional provision on the granting of interim measures on an *ex parte* basis (see A/CN.9/487, paras. 64-76). Discussions in relation to revised drafts of article 17 and 17 bis of the UNCITRAL Model Law continued at the thirty-sixth (New York, 4-8 March 2002) (see A/CN.9/508, paras. 51-94), thirty-seventh (Vienna, 7-11 October 2002) (see A/CN.9/523, paras. 15-76, 78-80), thirty-eighth (New York, 12-16 May 2003) (see A/CN.9/524, paras. 16-75) and thirty-ninth (Vienna, 10-14 November 2003) (see A/CN.9/545, paras. 19-112) sessions of the Working Group. The Secretariat was asked to prepare a revised version of these texts for consideration by the Working Group at its fortieth session.

3. The Working Group on Arbitration which was composed of all States members of the Commission, held its fortieth session in New York, from 23 to 27 February 2004. The session was attended by the following States members of the Working Group: Austria, Brazil, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Morocco, Paraguay, Russian Federation, Sierra Leone, Singapore, Spain, Sweden, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

4. The session was attended by observers from the following States: Albania, Belarus, Congo, Croatia, Cuba, Denmark, Egypt, Finland, Gabon, Ireland, Libyan Arab Jamahiriya, Madagascar, Malaysia, Myanmar, Pakistan, Peru, Philippines, Poland, Qatar, Republic of Korea, Serbia and Montenegro, South Africa, Switzerland, Timor Leste, Turkey, United Republic of Tanzania, Venezuela and Viet Nam.

5. The session was also attended by a non-member State maintaining observer mission at Headquarters: Holy See.
6. The session was also attended by observers from the following intergovernmental organizations: International Cotton Advisory Committee (ICAC), NAFTA Article 2022 Advisory Committee and the Permanent Court of Arbitration.
7. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Arbitration Association (AAA), Association Suisse de l'Arbitrage (ASA), Association of the Bar of the City of New York (ABCNY), Cairo Regional Centre for International Commercial Arbitration, Center for International Legal Studies, Club of Arbitrators of the Milan Chamber of Arbitration, Global Center for Dispute Resolution Research, International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), Regional Centre for International Commercial Arbitration (Lagos, Nigeria), School of International Arbitration and Union des Avocats Européens.
8. The Working Group elected the following officers:
  - Chairman:* Mr. José María ABASCAL ZAMORA (Mexico)
  - Rapporteur:* Mr. Sundaresh MENON (Singapore).
9. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.126); (b) a revised draft provision on enforcement and recognition of interim measures of protection pursuant to the decisions made by the Working Group at its thirty-eighth session (A/CN.9/WG.II/WP.125); (c) a note by the Secretariat containing a newly revised text of a draft provision on the power of an arbitral tribunal to order interim measures pursuant to the decisions made by the Working Group at its thirty-ninth session (A/CN.9/WG.II/WP.128); (d) a note by the Secretariat containing the information communicated by the delegations on the liability regime in the context of interim measures of protection (A/CN.9/WG.II/WP.127); (e) a proposal by the International Chamber of Commerce on articles 17 and 17 bis (A/CN.9/WG.II/WP. 129); and (f) the reports of the Working Group on its thirty-eighth and thirty-ninth sessions (A/CN.9/524 and 545).
10. The Working Group adopted the following agenda:
  1. Scheduling of meetings.
  2. Election of officers.
  3. Adoption of the agenda.
  4. Preparation of uniform provisions on interim measures of protection for inclusion in the UNCITRAL Model Law on International Commercial Arbitration.
  5. Other business.
  6. Adoption of the report.

## II. Summary of deliberations and decisions

11. The Working Group discussed agenda item 4 on the basis of the text contained in the notes prepared by the Secretariat (A/CN.9/WG.II/WP. 125, 127 and 128) and the proposal by the International Chamber of Commerce (A/CN.9/WG.II/WP. 129). The deliberations and conclusions of the Working Group with respect to that item are reflected in chapters III and IV below. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group.

## III. Draft provision on the recognition and enforcement of interim measures of protection (for insertion as a new article of the UNCITRAL Model Law on International Commercial Arbitration, tentatively numbered 17 bis)

12. The Working Group recalled that it had commenced considering a newly revised version of the provision on recognition and enforcement of interim measures of protection (hereinafter referred to as “draft article 17 bis”) at its thirty-ninth session (Vienna, 10-14 November 2003) (see A/CN.9/545, paras. 93-112). The Working Group proceeded to continue its discussion of article 17 bis which read as follows (as set out in para. 4 of A/CN.9/WG.II/WP.125 and reproduced in para. 94 of A/CN.9/545):

“(1) An interim measure of protection issued by an arbitral tribunal, that satisfies the requirements of article 17, shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application [in writing] to the competent court, irrespective of the country in which it was issued, subject to the provisions of this article.\*

“(2) The court may only refuse to recognize [and] [or] enforce an interim measure of protection:

“(a) If, at the request of the party against whom it is invoked, the court is satisfied that:

“(i) *Variant 1:* There is a substantial issue as to the jurisdiction of the tribunal [[of such a nature as to make recognition or enforcement inappropriate] [of such a nature as to make the interim measure unenforceable]] [and no appropriate security was ordered by the arbitral tribunal in respect of that interim measure];

*Variant 2:* There is a substantial question relating to any grounds for such refusal set forth in article 36, paragraphs (1) (a) (i), (iii) or (iv); or

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\* The conditions set forth in this article are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure of protection. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

“(ii) *Variant 1*: That party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings [, in which case the court may suspend the enforcement proceedings [until the parties have been heard by the arbitral tribunal] [until the parties have had an opportunity to be heard by the arbitral tribunal] [until the parties have been properly notified]]];

*Variant 2*: Such refusal is warranted on the grounds set forth in article 36, paragraph (1) (a) (ii); or

“(iii) *Variant 1*: That party was unable to present its case with respect to the interim measure [in which case the court [may] [shall] suspend the enforcement proceedings until the parties have been heard by the arbitral tribunal]; or

*Variant 2*: Such refusal is warranted on the grounds set forth in article 36, paragraph (1) (a) (ii); or

“(iv) The interim measure has been terminated or suspended by the arbitral tribunal or by order of a competent court; or

“(b) If the court finds that:

“(i) The interim measure requested is incompatible with the powers conferred upon the court by its laws, unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

“(ii) *Variant 1*: The recognition or enforcement of the interim measure would be contrary to the public policy recognized by the court.

*Variant 2*: Any of the grounds set forth in article 36, paragraphs (1) (b) (i) or (ii) apply to the recognition and enforcement of the interim measure.

“(3) Any determination made by the court on any ground in paragraph (2) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure of protection.

“(4) The party who is seeking or has obtained enforcement of an interim measure of protection shall promptly inform the court of any termination, suspension or amendment of that interim measure.

“(5) *Variant A*: The court where recognition or enforcement is sought may, if it considers it proper, order the other party to provide appropriate security for costs [unless the tribunal has already made an order with respect to security for costs] [unless the tribunal has already made an order with respect to security for costs, except when the court finds that the order is inappropriate or insufficient in the circumstances].

*Variant B*: The court where recognition or enforcement is sought may, if it considers it proper, order security for costs.

*Variant C:* The court where recognition or enforcement is sought shall not, in exercising that power, undertake a review of the substance of the interim measure of protection.

*Variant D:* The court where recognition or enforcement is sought may only order security for costs where such an order is necessary to protect the rights of third parties.

“(6) Paragraph (2) (a) (ii) does not apply.

*Variant X:* To an interim measure of protection that was ordered without notice to the party against whom the interim measure is invoked provided that the interim measure was ordered to be effective for a period not exceeding [thirty] days and the enforcement of the interim measure is requested before the expiry of that period.

*Variant Y:* To an interim measure of protection that was ordered without notice to the party against whom the interim measure is invoked provided that such interim measure is confirmed by the arbitral tribunal after the other party has been able to present its case with respect to the interim measure.

*Variant Z:* If the arbitral tribunal, in its discretion, determines that, in light of the circumstances referred to in article 17 (2), the interim measure of protection can be effective only if the enforcement order is issued by the court without notice to the party against whom the interim measure is invoked.”

### **General remarks**

13. The Working Group recalled that, at its thirty-ninth session, it had reached a number of decisions in respect of draft article 17 bis, namely to delete the bracketed text “in writing” from draft paragraph (1) (A/CN.9/545, para. 96), to delete the reference to the words “that satisfies the requirements of article 17” from draft paragraph (1) and to add another ground on which the court might refuse to recognize and enforce an interim measure under paragraph (2) (A/CN.9/545, para. 102 and also paras. 107-110). As well, the Working Group recalled that it had found the substance of the footnote to paragraph 1 to be generally acceptable (A/CN.9/545, para. 97).

14. The view was expressed that the text of draft article 17 bis was problematic and unnecessarily complex. On that basis, an alternative text was proposed in the following terms (hereafter “the proposed shorter draft”):

“(1) An interim measure of protection issued by an arbitral tribunal shall be recognized as binding and [unless otherwise provided by the arbitral tribunal] enforced upon application to the competent court, irrespective of the country in which it was issued.

“(2) The competent court may refuse to recognize [and] [or] enforce an interim measure of protection only if:

“(a) Upon the request of the party against whom the measure is directed, the court is satisfied that:

“(i) The party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings;

“(ii) The party against whom the measure is directed was unable to present its case under the conditions of article 17;

“(iii) The arbitral tribunal was not entitled to order an interim measure of protection.

“(3) The court finds that:

“(a) The interim measure is incompatible with the powers conferred upon the court by its laws, unless the court decides to reformulate the interim measures in order to adapt it with its powers.

“(b) The recognition or enforcement of the interim measure would be contrary to the public policy recognized by the court.”

15. It was stated that the proposed shorter draft provided greater clarity and also avoided the possibility of creating rules for the recognition and enforcement of interim measures that were stricter than the rules governing recognition and enforcement of an award on the merits of the case. Some support was expressed for the proposed shorter draft on the basis that it was concise and set forth rules that were specifically geared to the recognition and enforcement of interim measures, as opposed to the text of draft article 17 bis, which essentially mirrored rules established in the New York Convention in respect of the recognition and enforcement of arbitral awards.

16. However, reservations were expressed against the general policy reflected in the proposed shorter draft, which was said to exclude a number of important details that were set out in draft article 17 bis. It was recalled that the Working Group had earlier agreed that, given the difference between the characteristics of interim measures and those of final awards, interim measures ought to be treated differently from awards. It was stated that one reason for that distinction was that interim measures, unlike final awards, could be changed during the course of the arbitral proceeding. Thus, in expressing the rules to be followed by courts in enforcing such measures, the Working Group had agreed that it was important to accommodate this distinctive temporary character. As well, it was stated that the proposed shorter draft did not address matters such as security (as addressed in para. (2) (a) (i) of draft article 17 bis) or the obligation to inform the court of any termination, suspension or amendment of that interim measure (as addressed by para. (4) of draft article 17 bis).

#### **Paragraph (1)**

17. The Working Group noted that the text in paragraph (1) of draft article 17 bis and the proposed shorter draft were substantially the same and the former text should be adopted with the deletions referred to in paragraph 13 above.

#### **Paragraph (2) (a)**

##### *Subparagraph (a) (i)*

18. The Working Group recalled that, at its thirty-ninth session, of the two variants included in the draft subparagraph, preference was expressed for the

retention of Variant 2 (A/CN.9/545, paras. 105-106). It was suggested that the variant reflected the policy of the Working Group to bring the grounds for refusing enforcement of an interim measure issued by an arbitral tribunal somewhat closer to the grounds listed in articles 35 and 36 of the Model Law and those listed in article V of the New York Convention for refusing enforcement of an award (see A/CN.9/WGII/WP.125, para. 12 and A/CN.9/524, para. 57).

19. It was generally agreed that Variant 2 should be adopted, since that variant contained a straightforward reference to article 36, instead of replicating the contents of article 36 with slight changes, as did Variant 1, in a way that was described as likely to generate ambiguity and confusion. As a matter of drafting, a suggestion was made that the words “for such refusal” should be deleted, since they could be misinterpreted as referring to a refusal to recognize or enforce a final arbitral award under article 36. It was generally felt that the text should indicate more clearly that the reference to refusal was to the refusal to recognize or enforce an interim measure. To clarify that point it was agreed to delete the word “such”.

20. A reservation was expressed as to the use of the words “there is a substantial question” and it was suggested that, for the sake of consistency and clarity it would be better to mirror the language used elsewhere in draft paragraph 17 bis, namely, “Such refusal is warranted on the grounds”.

21. A suggestion was made that reference should be made to the question of security which was expressly addressed in Variant 1 but not in Variant 2. Strong support was expressed for the idea that, if an order for security made by the arbitral tribunal had not been complied with, such non-compliance should be a ground for the court refusing enforcement of the interim measure. It was agreed that the idea should be reflected at an appropriate place in the text of draft article 17 bis, possibly in paragraph (5).

*Subparagraph (a) (ii)*

22. The Working Group considered Variants 1 and 2 of subparagraph (a) (ii). It was pointed out that Variant 1 contained a mechanism, which was not reflected under article 36 (1) (a) (ii) of the Model Law, in that it allowed for suspension of the enforcement of an interim measure until proper notification was made to the parties. However, for the sake of consistency with the approach already agreed to by the Working Group that the legal framework for enforcement of interim measures should be similar to that existing for the enforcement of arbitral awards under article 36 of the Model Law, the Working Group agreed to retain Variant 2, without modification.

*Subparagraph (a) (iii)*

23. The Working Group agreed to retain Variant 2 of subparagraph (a) (iii).

24. As the Working Group had agreed to retain reference to article 36 (1) (a) (i), (ii), (iii) and (iv) of the Model Law under paragraph 2 (a) of draft article 17 bis, the question whether to merge subparagraphs (i), (ii) and (iii) of that paragraph was considered. It was agreed that subparagraphs (a) (ii) and (iii) should be merged. The view was expressed that it was crucial that the power of the arbitral tribunal to decide its own jurisdiction should be preserved and that courts should not pre-empt determination by the arbitral tribunal of its competence in the first instance. For that

reason, it was suggested that the wording under Variant 2 of paragraph (a) (i) should be maintained as currently drafted. In that context, it also was suggested that, when discussing paragraph (3) of draft article 17 bis, the Working Group might need to review the various grounds for refusing enforcement set forth in article 36 (1) (a) (ii) of the Model Law, to avoid suggesting that the decision made when a court was called upon to enforce an interim measure (for example, a decision as to whether the party against whom the interim measure was invoked had received proper notice of the appointment of the arbitrator) could have an effect beyond the limited sphere of recognition and enforcement of the interim measure.

*Subparagraph (a) (iv)*

*Distinction between subparagraph (iv) and article 36 (1) (a) (v) of the Model Law*

25. A suggestion was made that the text of subparagraph (iv) should be replaced by a reference to article 36(1) (a) (v) of the Model Law. It was pointed out in response that such a reference would be misleading, since those two provisions served two different purposes and referred to two different situations. Article 36 (1) (a) (v) of the Model Law was intended to refer to the situation where a final award had been set aside or was subject to some form of appeal under the law under which it was made. By contrast, subparagraph (iv) reflected the ephemeral nature of an interim measure, which could be suspended or terminated by the arbitral tribunal itself.

*Effect of subparagraph (iv)*

26. A question was raised as to whether the effect of subparagraph (iv) would be to allow the court to set aside an interim measure issued by the arbitral tribunal. In response, it was recalled that, at its previous session, the Working Group had decided to delete the general reference to the requirements of article 17 from paragraph (1), precisely to avoid creating an additional and hidden ground for the refusal to recognize and enforce an interim measure (A/CN.9/545, paras. 101-102). It had been agreed that the enforcing court should not be required or encouraged to undertake a review *de novo* of whether the interim measure satisfied the requirements of article 17 (*ibid.*, para. 99). The Working Group reaffirmed that decision in the context of subparagraph (iv), which should not be misinterpreted as creating a ground for the court to set aside the interim measure issued by the arbitral tribunal. It was recalled that the general purpose of article 17 bis was to establish rules for the recognition and enforcement of interim measures, but not to parallel article 34 of the Model Law with provisions on setting aside such interim measures. A suggestion was made that the issue of whether an interim measure issued in the form of an award could be set aside under article 34 of the Model Law might require further consideration by the Working Group. The Working Group took note of that suggestion.

27. In the context of that discussion, it was widely felt that the operation of subparagraph (iv) should be considered both from the perspective of a country having enacted the Model Law and from that of a country whose legislation was not based on that model. In particular, since no direct link existed between articles 17 and 17 bis, no implication should be made that the operation of article 17 bis would presuppose the existence of a provision along the lines of article 17. Along the same lines, an effort should be made to avoid the implication that court recognition and

enforcement of an interim measure ordered by an arbitral tribunal would be available only where the interim measure had been issued by an arbitral tribunal operating under the Model Law.

*“Or by order of a competent court”*

28. The Working Group proceeded to consider whether the reference to a situation where an interim measure had been set aside “by a competent court” was necessary. It was recalled that article 5 of the Model Law provided that “in matters governed by this Law, no court shall intervene except where so provided in this Law”. Accordingly, legislation in countries having adopted the Model Law would not empower courts to proceed with a review of compliance of an interim measure with article 17. However, a widely held view was that article 17 bis should provide a rule for the situation where the interim measure was issued under the law of a country that had not adopted the Model Law and that law permitted courts to review the interim measure issued by the arbitral tribunal for possible setting aside.

29. One consequence of that situation was that courts operating under article 17 bis might be faced with the case where an interim measure would be presented for enforcement, even if it had been set aside by a court in another country. It was widely agreed that, in such a situation where the interim measure had been set aside in its country of origin, the courts of the enacting State should be permitted to refuse recognition and enforcement. It was also agreed that, since article 17 bis provided an exhaustive set of grounds for refusing recognition and enforcement, that situation should be addressed in that article.

30. Various suggestions were made as to how that situation should be addressed. One suggestion was made to amend subparagraph (a) (iv) in such a manner that it would not mention the body which had terminated or suspended the interim measure. Under that suggestion, subparagraph (iv) would read along the following lines: “The interim measure has been terminated or suspended”. A concern was expressed that this wording would encourage forum shopping.

31. Another suggestion, based on the proposed shorter draft, was to delete subparagraph (iv) altogether. It was explained that there was no need to deal expressly with the suspension or termination of an interim measure by an arbitral tribunal, since no ground could be invoked for the recognition and enforcement of such a measure, and no need for specific provisions on setting aside of the interim measure by a competent court, since such setting aside would be governed by applicable rules of domestic procedural law. No support was expressed for that suggestion.

32. Yet another suggestion was that subparagraph (iv) should be amended along the following lines:

“(iv) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by a court of the country in which, or under the law of which, that interim measure was granted.”

33. Although doubts were expressed about the manner in which the amended text would operate in practice, that suggestion was found generally acceptable for continuation of the discussion at a later stage. It was observed that the words “or

under the law of which, that interim measure was granted” might need to be replaced by a reference to the country of the seat of the arbitral tribunal.

*Proposals for including additional provisions under paragraph (2) (a)*

*Arbitral tribunal not entitled to issue an interim measure*

34. At its previous session, the Working Group had taken note of a proposal to add a ground on which the court might refuse to recognize and enforce an interim measure, based on the arbitral tribunal being prohibited from issuing the interim measure, as a result of either the agreement of the parties or the law of the country where the arbitration took place (A/CN.9/545, para. 107). At the current session, support was expressed for retaining such an additional ground. Along the same lines, the proposed shorter draft was considered. In support of retaining a provision along those lines, it was stated that the addition was necessary as a result of the deletion of the reference to the requirements of article 17 in paragraph (1). It was also stated that the issue was not sufficiently covered by the reference to article 36 (1) (a) (iv) of the Model Law, which referred to procedural issues, and not to the *lex arbitri*. The proposal was objected to on the grounds that it could open the door to a review on the merits of the case by courts. Preference was expressed for not including the proposed additional wording, since the issue was considered to be sufficiently covered by the reference to article 36(1) (a) and the choice of Variant 2 under subparagraphs (a) (i), (ii) and (iii).

*Jurisdictional immunities of States*

35. It was proposed to consider inserting a provision on the issue of jurisdictional immunities of States and their property, based on a proposal made during the previous session in the context of the discussion of article 17 (A/CN.9/545, para. 51). It was observed that this question might need to be considered more broadly, for example in the context of possible future work by UNCITRAL, but that it should not be debated in the limited context of interim measures.

**Paragraph (2) (b)**

*Subparagraph (b) (i)*

36. The Working Group found the substance of subparagraph (b) (i) to be generally acceptable.

*Subparagraph (b) (ii)*

37. The Working Group proceeded to consider the two Variants contained in paragraph (b) (ii). A widely shared view was that Variant 2 should be retained, since it was consistent with the approach adopted under paragraph (2) (a). It was pointed out that Variant 1 contained wording that differed slightly from that of article 36 (1) (b) (ii) of the Model Law in a manner that might be difficult to interpret. For example, subparagraph (b) (ii) referred to the “public policy recognised by the court”, whereas article 36 (1) (b) (ii) of the Model Law referred to the “public policy of this State”. It was said that referring to the “public policy of that State” was preferable to a reference to “public policy recognised by the court”, as this latter wording might be understood as conferring excessive powers upon the court.

38. The question was raised whether reference should be made to both subparagraphs (i) and (ii) of article 36 (1) (b) of the Model Law, or whether the matters covered under these two provisions, namely arbitrability and public policy, should receive separate treatment under article 17 bis.

39. A suggestion was made that the reference to subparagraph (i) of article 36 (1) (b) of the Model Law should be excluded from paragraph (b) (ii). In support of that suggestion, it was said that, at the time when enforcement of an interim measure was sought, a court might not be able to fully determine the subject matter of the dispute. Therefore, allowing a court to make a decision on the arbitrability of the subject matter in dispute might not be appropriate at that stage of the procedure. However, it was said that, when the matter of the dispute was clearly established, and when that subject matter was not capable of settlement by arbitration under the law of the enforcing State, it would be inconsistent for State courts in that context, to enforce such an interim measure. Therefore, it was proposed that, instead of removing any reference to subparagraph (i) of article 36 (1) (b) of the Model Law, Variant 2 should be revised along the lines of paragraph 2 (a) (i), i.e. “There is a substantial question relating to any grounds for such refusal set forth in article 36 (1) (b) (i) or (ii)”.

40. The view was expressed that the concerns expressed about determining arbitrability at the point of enforcement was already addressed by paragraph (3), which ensured that any determination by a court to enforce an interim measure was effective only for the purpose of the application to recognize and enforce the interim measure.

41. After discussion, the Working Group adopted the text of Variant 2 without modification, subject to further consideration of the wording used in relation to references to article 36 (1) (a) and (b) of the Model Law in paragraphs (2) (a) and (b) after the Working Group had completed its review of article 17 bis.

42. At the close of the discussion, the Working Group took note of the view that, in any case, the reference in subparagraph (ii) to article 36 (1) (b) (i) of the Model Law should not be interpreted as obliging the court to request information on the subject matter in dispute to determine questions of arbitrability.

43. It was observed that, in paragraph (2), the Working Group had maintained reference to article 36 (1) of the Model Law and that that article spoke in terms of awards. Given that the Working Group had taken the decision not to define the form in which an interim measure should be made, a suggestion was made to clarify that the term “award” under article 36 (1) should be interpreted as covering all types of interim measures, with no implied restriction that the grounds in article 36 (1) applied only to those interim measures issued in the form of an award.

44. It was said that in preparing a revised draft for further consideration by the Working Group, the Secretariat should seek to produce a consolidated text with wording in harmony with that used in the Model Law. For example, it was said that in the phrase “the powers conferred upon the court by its laws” under paragraph 2 (b) (i), the reference to “by its law” should be replaced by a reference to either “the law” or “procedural rules”.

*Possible additional grounds for refusing recognition and enforcement*

45. The Working Group considered whether any other grounds for refusing recognition and enforcement of an interim measure should be added under paragraph (2). The Working Group recalled the suggestion that, if an order for security made by the arbitral tribunal had not been complied with, such non-compliance should be a ground for the court to refuse enforcement of the interim measure (see above, para. 21). Strong support was expressed for that suggestion. It was recalled that the consequences of non-compliance with an order for security should be reflected at an appropriate place in the text of draft article 17 bis.

46. Against including non-compliance with an injunction to provide security to the list contained in paragraph (2), it was said that article 17 (4) of the Model Law ensured that, if an arbitral tribunal decided to order that the party seeking the measure provided security, such condition should be interpreted as a condition precedent to the granting of the measure.

47. It was suggested that this interpretation of article 17 (4) was not consistent with the practical approach that an arbitral tribunal might adopt in ordering an interim measure. It was said that whilst an interim measure might need to take immediate effect, the arbitral tribunal could, in the order for security, allow a period of time for the requesting party to organize the provision of the security. To address that practical reality, it was suggested that the provision of security should be interpreted as encompassing a condition subsequent under article 17 (4), and not merely a condition precedent.

48. It was said that, where the interim measure had been granted, but the security had not been provided as requested by the arbitral tribunal, the current draft of paragraph (2) of article 17 bis did not allow a court to refuse recognition and enforcement. It was suggested that this matter should be addressed under both paragraph (4) of draft article 17 and paragraph (2) of article 17 bis, as these two articles might be applied independently by national courts.

**Paragraph (3)**

49. The Working Group found the substance of paragraph (3) to be generally acceptable.

50. It was suggested that Variant C of paragraph (5), which expressed the important principle that the court where enforcement of the interim measure was sought should not review the substance of the interim measure, should be included in paragraph (3). The Working Group agreed to further consider this matter when reviewing paragraph (5).

**Paragraph (4)**

51. It was recalled that paragraph (4) was based on the principle that a party seeking enforcement of an interim measure should be obliged to inform the court of any termination, suspension or amendment of that measure. It was recalled that broad support had been expressed by the Working Group for that principle at its thirty-eighth session (A/CN.9/524, paras. 35-39).

52. The relevance of the paragraph was questioned. It was suggested that if the interim measure had been suspended or terminated, the enforcement procedure itself

no longer served any purpose. Instead of requesting the party who had sought or obtained the interim measure to inform the court of any termination, suspension or amendment of the interim measure, it was suggested that it would be preferable to request a court not to enforce such an interim measure. No support was expressed for that suggestion.

53. The Working Group found the substance of paragraph (4) to be generally acceptable. As a matter of drafting, the view was expressed that there appeared to be a discrepancy between the language used in paragraph (4), which referred to “termination, suspension or amendment”, and the language used earlier in the text in paragraph (2) (a) (iv), which referred only to “terminated or suspended”. It was suggested that the draft provision should be revised to achieve greater consistency in the overall text. It was further suggested that the omission of the term “recognition” from paragraph (4) appeared to be inconsistent with the language used in other provisions of the text. The Working Group agreed that these matters of drafting should be further considered in the final stages of the preparation of draft article 17 bis.

#### **Paragraph (5)**

54. The Working Group recalled that paragraph (5) dealt with the important question of whether, and to what extent, a court, when faced with an application to enforce an interim measure, ought to be able to order the applicant to provide security. That provision had been the subject of discussion at its thirty-eighth session (A/CN.9/524, paras. 72-75). It was further recalled that the four variants, Variants A to D, reflected the differing views expressed at its thirty-eighth session on that question.

#### *Variants A and B*

55. The view was expressed that Variant B and the second bracketed text of Variant A appeared to allow a court to second-guess an arbitral tribunal’s orders in respect of security. For that reason, Variant A and the first bracketed text, namely, “unless the tribunal had already made an order with respect to security for costs”, was to be preferred. Broad support was expressed for that view.

56. It was stated that, as a general principle, a court should not have the power to review the merits of a decision taken by an arbitral tribunal as to whether or not security should be ordered in respect of the granting of an interim measure. However, it was suggested that, as presently drafted, the first bracketed text could be understood to suggest that, if the tribunal had not considered it appropriate to issue an order for security, the court could still review that decision. It was said that if the policy of the Working Group was to entirely exclude the possibility of a court undertaking a review of a tribunal’s decision to grant or not grant security, then the language in Variant A needed to be clarified. To achieve such clarification, it was suggested that the words “an order” be replaced by the words “a determination” to emphasize that a court should not second-guess a tribunal’s determination on whether or not to grant security. That suggestion was adopted.

57. A suggestion was made that the possibility for the court to review *ex officio* the question of whether or not to grant security should not be completely excluded. In that respect, it was said that the approach taken in the second bracketed text of

Variant A, which allowed the court to make an order with respect to security for costs where it found that the order in that respect was “inappropriate or insufficient in the circumstances” was to be preferred. It was said that inclusion of this power for courts could in fact facilitate the enforcement of interim measures and also could provide courts with an additional opportunity to take account of the interests of third parties in making orders with respect to security. A contrary suggestion was that the text should clarify that the order to provide security should be made “at the request of the party against whom the interim measure is invoked” or “on the application of the party against whom the interim measure is directed or who is affected by the measure”. After discussion, those suggestions were not adopted by the Working Group.

*“Security for costs”*

58. It was agreed that the term “security for costs” was too narrow and should, consistently with the approach taken in draft article 17, be replaced by a reference to “security” or “appropriate security” as provided in paragraph (4) of draft article 17.

*“The other party”*

59. It was stated that there was uncertainty in the present text of paragraph (5) as to which party was referred to as “the other party”. It was explained that, in the context of certain situations involving multi-party arbitration, the party ordered to provide security might be distinct from the party requesting the interim measure. However, in view of the fact that, in most conceivable cases, the party ordered to provide security would be the party requesting the interim measure, the text should refer more clearly to the requesting party. It was proposed that the words “the other party” should be replaced by “the requesting party”. After discussion, the Working Group adopted that proposal.

*Variant C*

60. It was stated that Variant C supported the general philosophy that the grounds for refusing to recognize or enforce an interim measure should be restricted to procedural matters and exclude the possibility of the court reviewing the substance of the measure *de novo*. It was suggested that Variant C dealt with a broader issue than security for costs and should therefore be located in a separate article (see above, para. 50). After discussion, the Working Group decided that wording along the lines of Variant C should be placed as a second sentence in paragraph (3).

*Variant D*

61. It was stated that Variant D, being limited to orders necessary to protect the rights of third parties, was too narrow. It was suggested that interim measures ordered by an arbitral tribunal were only binding on the parties to the arbitral proceedings, whereas a court decision could have wider application and apply to third parties. It was suggested that Variant D dealt with an important issue of third-party protection, which could perhaps be built into Variant A. It was agreed that the Secretariat should consider an appropriate location to reflect the principle set forth in Variant D.

### Paragraph (6)

62. It was recalled by the Working Group that, given the potential adverse impact of an *ex parte* measure against the affected party, empowering an arbitral tribunal to issue such an order would only be acceptable if strict conditions were imposed to ensure that the power was not subject to abuse (A/CN.9/523, para. 17).

63. Bearing that concern in mind, a proposed revised draft for paragraph (6) was made as follows:

“An interim measure issued by an arbitral tribunal under standards substantially equivalent to those set forth in paragraph (7) of article 17 will not be denied enforcement pursuant to paragraph 2 (a) (ii) of this article because of the measure’s *ex parte* status, provided that any court action to enforce such measure must be issued within twenty (20) days after the date on which the tribunal issued the measure”.

64. It was explained that the term “substantially similar” was proposed in order to take into account the slight variations that countries might introduce when adopting the Model Law. It was highlighted that the time frame of twenty days provided in the proposed draft related to the issuance of the court action to enforce the measure after the arbitral tribunal made the decision, and not, as in Variant X of the current draft, to the time limit within which a party might request a court to enforce an interim measure.

65. Among the Variants proposed for consideration by the Working Group in the current draft, Variant X was the preferred option. Support was also expressed for the proposed revised draft. The references to the safeguards laid down under article 17 were considered crucial by the Working Group.

66. Given the temporary nature of an *ex parte* interim measure, which would either lapse after twenty days or be converted into an *inter partes* measure, the necessity for including specific provisions for enforcement of *ex parte* interim measures contained in the proposal was questioned.

67. After discussion, the Working Group decided that the discussion on paragraph (6) would be continued on the basis of the proposed revised draft, which would be placed in square brackets, after the review of draft article 17 had been completed.

## IV. Draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration regarding the power of an arbitral tribunal to grant interim measures of protection

### General remarks

68. Having completed a review of draft article 17 bis, the Working Group turned its attention to the newly revised draft of article 17 of the Model Law regarding the power of an arbitral tribunal to grant interim measures of protection contained in A/CN.9/WG.II/WP.128 in the following terms:

“(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection.

“(2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

“(a) Maintain or restore the status quo pending determination of the dispute;

“(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm;

“(c) Provide a [preliminary] means of [securing] [preserving] assets out of which a subsequent award may be satisfied; or

“(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

“(3) The party requesting the interim measure of protection shall satisfy the arbitral tribunal that:

“(a) [Irreparable harm] is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

“(b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

“(4) The arbitral tribunal may require the requesting party and any other party to provide appropriate security as a condition to granting an interim measure of protection.

“(5) The requesting party shall inform the arbitral tribunal promptly of any material change in the circumstances on the basis of which the party made the request for, or the arbitral tribunal granted, the interim measure of protection. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party.

“(6) The arbitral tribunal may modify, suspend or terminate an interim measure of protection [it has granted], at any time, upon application of any party or, in exceptional circumstances, on the tribunal’s own initiative, upon prior notice to the parties.

“[(6 bis) The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed from the date the measure has been granted and for as long as it is in effect [to the extent appropriate, taking into account all of the circumstances of the case, in light of the final disposition of the claims on the merits]. The arbitral tribunal may order an immediate award of damages.]

“(7) “(a) [Unless otherwise agreed by the parties] [If expressly agreed by the parties], the arbitral tribunal may [in exceptional circumstances,] grant an

interim measure of protection, without notice to the party against whom the measure is directed, [when] [if the requesting party shows that]:

“(i) There is an urgent need for the measure;

“(ii) [The conditions set out in paragraph (3) are met]; and

“(iii) The requesting party [shows] [satisfies the arbitral tribunal] that it is necessary to proceed in that manner in order to ensure that the purpose of the measure is not frustrated before it is granted;

“(b) The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed from the date the measure has been granted and for as long as it is in effect [to the extent appropriate, taking into account all of the circumstances of the case, in light of the final disposition of the claims on the merits]. The arbitral tribunal may order an immediate award of damages;

“(c) The arbitral tribunal shall require the requesting party and any other party to provide appropriate security as a condition to granting an interim measure of protection;

“(d) *Variant 1:* The arbitral tribunal shall have jurisdiction, inter alia, to determine all issues arising out of or relating to subparagraph (b) [and (c)] above, [at any time during the arbitration proceedings];

*Variant 2:* A party may, at any time during the arbitration proceedings, bring a claim under subparagraph (b);

“(e) *Variant A:* The party against whom the interim measure of protection is directed shall be given immediate notice of the measure and an opportunity to present its case before the arbitral tribunal at the earliest possible time and in any event no later than [forty-eight] hours after that notice, or on such other date and time as is appropriate in the circumstances;

*Variant B:* Any party affected by the interim measure of protection granted under this paragraph shall be given immediate notice of the measure and an opportunity to present its case before the arbitral tribunal within [forty-eight] hours of the notice, or on such other date and time as is appropriate in the circumstances;

“(f) Any interim measure of protection ordered under this paragraph shall expire after twenty days from the date on which the arbitral tribunal orders the measure, unless that measure has been confirmed, extended or modified by the arbitral tribunal [, upon application by the requesting party and] after the party against whom the measure is directed has been given notice and an opportunity to present its case. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party;

“(g) A party requesting an interim measure of protection under this paragraph shall [inform the arbitral tribunal of] [place before the arbitral tribunal information relating to] all circumstances that the arbitral tribunal is likely to find relevant and material to its determination [whether the

requirements of this paragraph have been met] [whether the arbitral tribunal should grant the measure].”

**Paragraph (1)**

69. The Working Group found the substance of paragraph (1) to be generally acceptable.

**Paragraph (2)**

*Chapeau “whether in the form of an award or in another form”*

70. It was suggested that the phrase “whether in the form of an award or in another form” should be deleted. It was stated that, in many legal systems, an interim measure would never take the form of an award and was most likely to be issued in the form of a procedural order. It was also stated that the reference to an award as the only expressed example of the form such a measure could take could create the false impression that an award was the most appropriate form for an interim measure. It was said that the inclusion of the term “award” in the definition of interim measure would be inappropriate to those jurisdictions whose legislation defined an award as a decision of the arbitral tribunal on the substance of the dispute. In addition, it was suggested that the deletion of the phrase from subparagraph (2) (b) would not take away from the effectiveness of the provision. A proposal was made to delete the phrase and replace it with more neutral words, such as “irrespective of the name and form of that measure”.

71. A contrary view was that the phrase should be maintained to acknowledge the fact that in some legal systems, in order to be recognized and enforced, an interim measure was required to be issued in the form of an award. As well, it was said that the phrase had been understood as being broad enough to encompass any interim measure, regardless of the title given to it. In support of retention of the phrase, it was said that the wording used to refer to the form of interim measures originated from the UNCITRAL Arbitration Rules and that the language was sufficiently neutral to reflect the intention of the Working Group not to create any preferred form in which an interim measure should be issued.

72. The Working Group recalled that these words had been the subject of discussion at its thirty-fifth session in 2002 (see A/CN.9/508, paras. 65-68) and thirty-sixth session in 2003 (see A/CN.9/523, para. 36) and that they had generally been accepted. After discussion, the Working Group decided not to modify the chapeau of paragraph (2). In the context of that discussion, it was suggested that any explanatory material to be prepared at a later stage, possibly in the form of a guide to enactment of draft article 17, should make it clear that the wording adopted regarding the form in which an interim measure might be issued should not be misinterpreted as taking a stand in respect of the controversial issue as to whether or not an interim measure issued in the form of an award would qualify for enforcement under the New York Convention.

*Subparagraph (c)**[Preliminary]*

73. The Working Group agreed to delete the word “preliminary” on the basis that it was confusing and added nothing to the meaning of the provision.

*[Securing] [preserving]*

74. The Working Group expressed its preference for the retention of the word “preserving” rather than “securing” because the latter term could be interpreted as a particular method for protecting assets. It was agreed to delete the word “securing” from the text and retain the word “preserving”.

*Anti-suit injunctions*

75. A question was raised whether paragraph (2) of article 17, as presently drafted, could be interpreted as encompassing a power of an arbitral tribunal to order an anti-suit injunction (i.e. an interim measure by which an arbitral tribunal would order a party not to pursue court proceedings or separate arbitral proceedings). In view of the fact that article 17 (2) contained a generic exhaustive list of provisional measures (see A/CN.9/545, para. 21), it was suggested that the Working Group should clarify whether it was its intention that this list should encompass the ordering of such an anti-suit injunction.

76. As a matter of general policy, reservations were expressed against article 17 directly or indirectly allowing the use of anti-suit injunctions. It was said that these types of injunctions were rather uncommon in international legal practice, unknown or not familiar to many legal systems, and, under some national laws, would be regarded as contradicting the fundamental constitutional right of a party to apply for court action. It was also stated that there might be a danger in proposing a specific provision to cover anti-suit injunctions and in descending into too much detail in this provision. Notwithstanding the express aim of the Working Group to promote harmonization in international arbitration law, there was a risk inherent in endorsing a juridical practice that was not yet settled. It was said that inclusion of such a provision might jeopardize the chances of it being implemented, or indeed jeopardize the overall acceptability of the Model Law, particularly in those countries that did not recognize anti-suit injunctions. From a different perspective, it was pointed out that, while the issue of anti-suit injunctions might be of growing importance in the practice of international arbitration, it deserved careful study, including possible consideration for the preparation of a discrete set of rules by UNCITRAL, but that it should not be dealt with in an indirect and incomplete manner in the context of a provision dealing with interim measures of protection, which might not do justice to the issue and lead to the mistaken conclusion that anti-suit injunctions were merely a subset of interim measures as defined in draft article 17.

77. In favour of dealing with anti-suit injunctions under draft article 17, it was stated that these injunctions were becoming more common and served an important purpose in international trade. It was suggested that the fact that such injunctions were not yet familiar to some legal systems spoke in favour of covering such injunctions in the Model Law, with a view to promoting the modernization and harmonization of legal practices. It was stated that, notwithstanding that, in a

number of countries, the law did not recognize these injunctions, there was evidence that arbitral tribunals sitting in such countries were increasingly considering such injunctions. It was also stated that anti-suit injunctions were designed to protect the arbitral process and that it was legitimate for arbitral tribunals to seek to protect their own process. It was pointed out that the issuance of an anti-suit injunction was not to be understood as preventing a party from making an application to the court of the seat of the arbitration seeking a decision as to whether there was a valid arbitration agreement. It was also pointed out that, to the extent there existed concerns about the overall acceptability of anti-suit injunctions, other provisions of the Model Law might offer adequate safeguards, for example in the nature of grounds for refusal of recognition and enforcement, notably through the reference to the law governing the powers conferred upon the court in draft article 17 bis (2) (b) (i), or the reference to public policy in draft article 17 bis (2) (b) (ii).

78. It was stated that, at previous sessions, the Working Group had expressed a degree of preference for not disallowing anti-suit injunctions in draft article 17. It was suggested that, even if no express words were included in paragraph (2) (b) regarding the power to issue anti-suit injunctions, there would nevertheless be implicit support for the existence of such a power, particularly where the UNCITRAL Arbitration Rules applied. It was said that paragraph (2) (a) of draft article 17 was flexible and open-ended and was probably broad enough to encompass anti-suit injunctions. It was said that that interpretation had been strengthened by the fact that the requirement that the interim measure be connected to the subject matter of the dispute (as contained in the original version of article 17 of the Model Law) had been deleted from draft article 17 at a previous session. It was noted that the requirement that interim measures should be linked to the subject matter of the dispute also appeared in article 26 of the UNCITRAL Arbitration Rules and had been understood in some jurisdictions as limiting the availability of anti-suit injunctions. However, some delegations recalled that the linking of interim measures to the “subject matter of the dispute” had nevertheless permitted the ordering of anti-suit injunctions by arbitral tribunals under the UNCITRAL Arbitration Rules.

79. For the sake of clarity, it was suggested that paragraph (2) should expressly confer a power on arbitral tribunals to issue anti-suit injunctions. A number of proposals were made regarding the manner in which anti-suit injunctions should be expressly covered in draft article 17. One proposal was to insert a provision expressly allowing an arbitral tribunal to issue such an injunction, together with an explanatory note stating that that provision would only apply to the extent that such injunctions were permissible under the procedural laws of the country concerned. However, it was said that a drawback of that proposal was that, for countries that did not adopt the express provision, paragraph (2) could be understood as forbidding the issuance of anti-suit injunctions.

80. Another proposal was to address the issue of anti-suit injunctions by adding to paragraph (2) (b) of draft article 17 words along the lines of “or would seriously aggravate the dispute between the parties”. It was stated that that formulation was recognized in certain jurisdictions and had been used in a number of international arbitrations including arbitrations undertaken pursuant to the UNCITRAL Arbitration Rules.

81. Yet another proposal was that the words “or prejudice the arbitral process itself” could be added to the end of paragraph (2) (b) of article 17. It was stated that that proposal would clarify and put beyond doubt the understanding expressed by a number of delegations that the phrase “take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm”, in paragraph (2) (b), already covered anti-suit injunctions.

82. The view was expressed that the debate on the question of coverage of anti-suit injunctions had proceeded largely on the basis that such injunctions would prevent a party from bringing an action before a court. However, in some cases, these injunctions had been used to prevent a party from bringing an action before another arbitral tribunal. It was suggested that the draft text should encompass both situations.

83. After discussion, the Working Group agreed to amend subparagraph (2) (b) as follows: “Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm, or to prejudice the arbitral process itself”. However, noting that the Working Group had not fully considered the implications of the proposed wording, it was agreed that this proposal should be retained in square brackets for further consideration at a future session.

### **Paragraph (3)**

#### *Subparagraph (a)—“Irreparable harm”*

84. Concerns were expressed about the use of the term “irreparable harm” in subparagraph (a). The Working Group recalled that the term had already been discussed at its thirty-fifth session (A/CN.9/508, para. 56) and thirty-ninth session (A/CN.9/545, para. 29).

85. A suggestion was made that the term “irreparable” was not a well-known concept in all legal systems, was subject to divergent interpretations, and should be deleted. Another suggestion was that the term “irreparable” should be replaced by the term “substantial”. It was stated that a reference to “substantial harm” would more easily lend itself to balancing the degree of harm suffered by the applicant if the interim measure was not granted against the degree of harm suffered by the party opposing the measure if that measure was granted.

86. However, strong support was expressed for the retention of the reference to “irreparable harm”. It was stated that paragraph (3) (a) was intended to apply to a particular type of harm occurring in a situation where, even at a preliminary stage when all the facts of the dispute were not before the tribunal, it could be shown that the requesting party should be protected against harm that could not be remedied by an award of damages. By contrast, a reference to “substantial harm” would suggest that it could be remedied by way of substantial damages. It was pointed out that the notion of “irreparable harm” did not refer in quantitative terms to the magnitude of damages, but in qualitative terms to the very nature of the harm. Various examples of “irreparable harm” were given. In addition to the loss of a priceless or unique work of art already mentioned at the previous session (A/CN.9/545, para. 29), it was explained that “irreparable harm” would occur, for example, in situations such as a business becoming insolvent, essential evidence being lost, an essential business opportunity (such as the conclusion of a large contract) being lost, or harm being caused to the reputation of a business as a result of a trademark infringement.

87. Notwithstanding that the notion of “irreparable harm” was well recognized in some legal systems and constituted an ordinary pre-requisite for ordering an interim measure, it was acknowledged, however, that the notion of irreparable harm might lend itself to various interpretations, namely in countries which were not familiar with this notion. It was proposed to replace the expression “irreparable harm” with a more neutral and descriptive phrase. A number of proposals were suggested as follows: “harm that cannot be adequately compensated or that cannot be compensated by an award of money”; “damage that is difficult to repair”; “harm that cannot be compensated”, “important harm which cannot be compensated by damages”, “inevitable harm”, “unavoidable harm” or “serious harm”.

88. In addition to the concerns expressed above, it was stated that, if the Model Law was to provide that interim measures of protection could be granted only to avoid harm that could not be compensated for in monetary terms, there would be a risk that the provision would be interpreted in a very restrictive manner. As a result, interim measures in arbitration might be more difficult to obtain than similar measures in court proceedings, while parties seeking enforcement of such interim measures would still need to engage in additional proceedings before the competent court. The question was raised as to whether it was the intention of the Working Group to adopt such a restrictive approach as to potentially exclude from the field of interim measures any loss that might be cured by an award of damages. It was also stated that, in current practice, it was not uncommon for an arbitral tribunal to issue an interim measure merely in circumstances where it would be comparatively complicated to compensate the harm with an award of damages.

89. With a view to providing a more flexible criterion, another proposal was made to replace the words “irreparable harm” by the words: “harm not adequately reparable by an award of damages”. It was stated that that proposal addressed the concerns that irreparable harm might present too high a threshold and would more clearly establish the discretion of the arbitral tribunal in deciding upon the issuance of an interim measure. The Working Group found that proposal generally acceptable.

*Subparagraph (a)—interplay with paragraph (2)*

90. Comments were made in relation to the content of paragraph (3), when read in conjunction with paragraph (2). A view was expressed that the reference to “harm” in paragraph (3) might lend itself to confusion with the words “current or imminent harm” in subparagraph (b) of paragraph (2), thus creating the risk that the criteria set forth in paragraph (3) might be read as applying only to those measures granted for the purposes of subparagraph (b) of paragraph (2).

91. More generally, a concern was expressed that the general requirements set forth in paragraph (3) might not adequately apply to all types of interim measures listed under paragraph (2). For example, it was stated that it would not be appropriate to require in all circumstances that a party applying simply for an interim measure to preserve evidence under paragraph (2) (d) should necessarily demonstrate that exceptional harm would be caused if the interim measure was not ordered, or to require that requesting party to otherwise meet the very high threshold established in paragraph (3). The Working Group took note of that concern and agreed that the matter might need to be further considered at a later stage.

**Paragraph (4)**

92. It was recalled that the Working Group had, when discussing paragraph (5) of article 17 bis (see above, paras. 54-60), examined the question whether security should be a condition for the granting of an interim measure. A general view emerged that the granting of security should not be a condition precedent to the granting of an interim measure. It was pointed out that article 17 of the Model Law as well as article 26 (2) of the UNCITRAL Arbitration Rules did not include such a requirement. Various proposals were made to amend paragraph (4) accordingly.

93. One proposal was to adopt wording along the following lines: “The arbitral tribunal may grant an interim measure of protection by having appropriate security furnished by the requesting party and any other party”, or simply by providing that, “appropriate security may be required to be provided by the requesting party and any other party before the arbitral tribunal grants an interim measure”. That proposal was objected to on the ground that requiring security to be provided before an interim measure could be granted was said to be too strict a condition. Another proposal was that the words “as a condition for granting an interim measure of protection” should be deleted from paragraph (4). However, the view was expressed that the mere deletion of those words should be avoided, since those words served a useful role as they provided guidance for practitioners. In addition, it was pointed out that the above proposals gave the impression that the tribunal had an independent authority to grant security at any time of the procedure.

94. To address the concern that the provision of security should not be interpreted as a free-standing provision allowing the tribunal to order security at any time during the procedure, a proposal was made to redraft paragraph (4) as follows: “The arbitral tribunal may require the requesting party and any other party to provide appropriate security at the time the arbitral tribunal grants the interim measure”. Yet another proposal was made along the following lines: “The arbitral tribunal may require the requesting party and/or any other party to provide appropriate security in connection with such interim measure of protection”. It was said that, not only did this proposal address the concern raised, but also ensured that the arbitral tribunal would not be limited to ordering security only at the time that the application was brought. It was pointed out that the term “in connection with” should be interpreted in a narrow manner to ensure that the fate of the interim measure was linked to the provision of security. After discussion, that proposal was found acceptable by the Working Group.

95. As a matter of drafting, it was stated that the use of the word “or” was more appropriate than the word “and” to indicate that the arbitral tribunal could require either the requesting party or any other party to provide appropriate security. The Working Group agreed to that proposal.

96. Regarding the possibility for the arbitral tribunal to require “any party” to provide appropriate security, it was pointed out that it was essential to preserve the possibility of requiring the defendant (i.e. the party against whom the interim measure was directed) to provide such security. It was said that that was in line with the principle of equality of treatment between the parties underlying arbitration proceedings. While, admittedly, the defendant would rarely be required to provide security, examples were given of situations where, to obtain the lifting of an interim measure such as an arrest of ship, the defendant would deposit security.

**Paragraph (5)**

97. A question was raised whether the second sentence of paragraph (5), which referred to the communication by one party to the other of all statements, documents or other information supplied to the arbitral tribunal, should be retained. It was suggested that that obligation duplicated an obligation that already applied under article 24 (3) of the Model Law. It was noted that, to the extent the current text would form part of the Model Law, it was not necessary to duplicate any obligation already contained in the Model Law. However, the view was expressed that the obligation of a party to inform the arbitral tribunal was mentioned in article 17 and not in any other part of the Model Law. Thus, for the sake of clarity, it was appropriate to link the obligation to inform the tribunal to the general obligation to inform the other party.

98. Various proposals were made in respect of that provision. It was suggested that, following the word “promptly”, words along the lines of “with copies to all other parties” should be added and the second sentence of paragraph (5) should be deleted. Another suggestion was that the opening words of the paragraph should be redrafted in the following terms: “The requesting party shall promptly make disclosure of any material change (...)” and that the second sentence of paragraph (5) should be deleted. It was suggested that that approach expressed the obligation in a more neutral way and avoided any inference being drawn that the paragraph excluded an obligation under article 24 (3) of the Model Law. After discussion, the Working Group found the latter proposal to be generally acceptable.

*Sanction for non-compliance*

99. It was remarked that, as drafted, paragraph (5) provided no sanction in case of non-compliance with the obligation to inform. It was suggested that such a sanction could be included in paragraph (6) such that a failure to comply with the obligation to disclose would be a ground for modification, suspension or termination of the interim measure.

100. It was stated that the express inclusion of a sanction under paragraph (6) was not necessary, as in any case the usual sanction for non-compliance with the obligation to disclose was either the suspension or termination of the measure, or the award of damages. It was noted, however, that an award of damages might not be a solution in all cases, particularly where the other party was not capable of paying damages. It was suggested that, to better reflect that reality, the following text could be added to the end of paragraph (5): “and any failure to do so may be a ground for suspension or termination under paragraph (6) of this article”. After discussion, the Working Group agreed that it was not necessary to include a provision regarding sanctions in paragraph (5).

**Paragraph (6)**

101. As a matter of drafting, it was pointed out that, whereas article 17 bis (4) referred to “termination, suspension or amendment of that interim measure”, paragraph (6) referred to “modify, suspend or terminate an interim measure”. It was agreed that the texts should be aligned. Preference was expressed for the word “modify” instead of “amend”.

*“It has granted”*

102. It was recalled that the words “it has granted” were inserted to reflect the decision of the Working Group that the arbitral tribunal could only modify or terminate the interim measure issued by that tribunal (A/CN.9/545, para. 41). On that basis, it was agreed that the words “it has granted” should be retained without square brackets.

103. A question was raised whether an arbitral tribunal should be prohibited from modifying an interim measure issued by a court given that a party to an arbitration agreement could apply for an interim measure to a court before the arbitral tribunal had been established. It was suggested that, in such circumstances, there could be good reasons for allowing the tribunal, once constituted, to modify such measures. Some support was expressed for that view.

104. It was noted that the issue of allowing an arbitral tribunal to review a court-ordered interim measure was a contentious matter and raised sensitive issues regarding the role of courts and balancing the role of private arbitral bodies against that of courts, which had sovereign powers and an appellate regime. The Working Group noted that article 9 of the Model Law appropriately addressed the concurrent jurisdiction of the arbitral tribunal and the courts and unambiguously provided for the right of the parties to request an interim measure of protection from a court, before or during the arbitral proceedings. The Working Group agreed that that issue of possible review of a court-ordered interim measure by an arbitral tribunal should not be dealt with in the Model Law. In that connection, it was pointed out that there existed various techniques to address the issue. For example, parties could, of their own initiative, revert to the court that had issued the measure to seek review of that measure, or the parties could ask the court to include within the interim measure, the right for the arbitral tribunal to modify that measure once it was established. In addition, it was always open to the arbitral tribunal to require the parties to revert to the court with the decision made by the arbitral tribunal.

#### **Paragraph (6 bis)**

105. The Working Group recalled that, in order to assist deliberations on subparagraph (6 bis), the Secretariat had prepared a note (A/CN.9/WG.II/WP.127) containing information received from States on the liability regimes that applied under their national laws in respect of interim measures of protection. It was observed that, of the legislation contained therein, the national laws did not distinguish between *inter partes* and *ex parte* measures in relation to the liability regimes that applied. It was suggested that, for that reason, the square brackets around that subparagraph should be deleted and the Working Group should consider possible improvements to the text therein.

106. It was suggested that the words providing that liability for costs and damages arose “from the date the measure has been granted and for as long as it is in effect” was unnecessary because the requirement that costs and damages be ‘caused by’ the measure already limited their scope”. It was also suggested that the present conditions set out in paragraph (6 bis) might be confusing and the requirement that made liability dependent on the final disposition of the claims on the merits might be inappropriate. In this respect, the Working Group was reminded that, at its thirty-ninth session, it was strongly felt that the final decision on the merits should not be

an essential element in determining whether the interim measure was justified or not (A/CN.9/545, para. 68). For these reasons, a first proposal was made to replace the first sentence of paragraph (6 bis) by the words “The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed, if the arbitral tribunal later determines that, in the circumstances, the interim measure should not have been granted.” Support was expressed for that proposal.

107. A concern was expressed that paragraph (6 bis) appeared to provide that the power of the tribunal to order damages was triggered if the tribunal found that the interim measure should not have been ordered, which might not provide a broad enough discretion, for example, to allow an arbitral tribunal to exercise that power where it found that the measure had been made on incorrect facts. To achieve that broader discretion, a second alternative proposal was made to replace the entire text of paragraph (6 bis) by the following: “The requesting party shall be liable for such costs and damages that is caused by the interim measure of protection to the party against whom it is directed, as may be awarded by the arbitral tribunal, at such time in the course of the proceedings and to such extent as it considers appropriate having regard to all the relevant circumstances.” It was stated that, if that formulation were accepted, the second sentence of paragraph (6 bis) could be deleted. That proposal received little support. Preference was expressed for the first proposal, which was said to address the concerns expressed and to provide more guidance than the second proposal.

108. With respect to the last sentence of paragraph (6 bis) it was suggested that the term “immediate” should be deleted as it could be misinterpreted as suggesting that the damages would be awarded simultaneously with the interim measure. It was suggested that the sentence be replaced by the following words: “The arbitral tribunal may order an award of costs and damages at any point during the proceedings following the termination of the interim measure.” It was suggested that the words “following the termination of the interim measure” were unduly narrow given that they restricted the award of damages to the time after the termination of the interim measure. It was agreed that the words “following the termination of the interim measure” should be deleted. It was also agreed that any explanatory material accompanying paragraph (6 bis) should clarify that the reference to “proceedings” therein referred to the arbitral proceedings and not to the proceedings relating to the interim measure. Subject to these modifications, the proposed text was adopted in substance by the Working Group.

### **Paragraph (7)**

#### *Ex parte measures*

109. The Working Group recalled that, at previous sessions, the question whether to include a provision allowing for interim measures to be ordered *ex parte* by an arbitral tribunal had been extensively discussed and that opposing views had been expressed as to whether this matter should be included in draft article 17. The Working Group also recalled that the Commission, at its thirty-sixth session, noted the suggestion that the issue of *ex parte* interim measures, which the Commission agreed remained a point of controversy, should not delay progress on the finalization of draft article 17 (A/58/17, para. 203).

110. At its thirty-ninth session, the Working Group proceeded with a detailed review of paragraph (7), and agreed that discussions as to whether, as a matter of general policy, a provision on interim measures granted *ex parte* should be retained in draft article 17, should be held at its next session (A/CN.9/545, para. 50). It was also pointed out that *ex parte* interim measures were not dealt with extensively in national laws, general principles of law and international commercial practice. It was pointed out that it might be counter-productive for an UNCITRAL instrument to attempt to regulate an issue for which little recognition existed.

111. Comments made during the current session indicated that there remained strongly opposing opinions on the question of including a provision granting the arbitral tribunal the power to grant *ex parte* measures. On the one hand, it was said that there was no worldwide consensus with respect to the standards and practices concerning the granting of *ex parte* interim measures by arbitral tribunals and that inclusion of such a provision in the absence of such consensus could undermine the role of the Model Law as an international standard reflecting worldwide consensus.

112. On the other hand, it was said that the role of UNCITRAL went beyond merely harmonizing existing laws and that it had regularly taken the lead in developing new and modern rules, looking at their potential economic impact and evaluating the best practice. It was stated that the Working Group had an opportunity to address the emerging reality that *ex parte* orders were being requested and a failure to include such rules would not diminish their importance. The view was expressed that, while the need to regulate *ex parte* measures might be questioned, attention should be given to avoid introducing into the Model Law provisions that could inhibit the possible future development of practice relying on such measures. Support was expressed for the idea that, notwithstanding the absence of consensus, the Working Group could take account of the existing body of opinion in favour of *ex parte* measures and produce a text for use by those jurisdictions that wished to adopt legislation on that matter. It was also pointed out that a number of international arbitral institutions had adopted emergency rules for arbitrators to accommodate the increasing demand for such orders, for example, in the field of sport arbitration.

113. The view was expressed that the current draft of paragraph (7), which had strengthened and increased the safeguards against misuse of *ex parte* measures, might be acceptable to the Working Group.

114. A number of alternative proposals were made to the present draft paragraph (7). One proposal, as contained and explained in the proposal by the International Chamber of Commerce (A/CN.9/WG.II/WP.129), read as follows:

“(a) Unless otherwise agreed by the parties, the arbitral tribunal grant an interim measure of protection, without giving the party [against whom the measure is directed] [affected by the measure] an opportunity [to oppose the measure] [to be heard], when:

“(i) There is an urgent need for the measure;

“(ii) The circumstances set out in paragraph (3) are met; and

“(iii) The requesting party shows that it is necessary to proceed in that manner in order to ensure that the purpose of the measure is not frustrated before it is granted;

“(b) The requesting party shall:

“(i) Be liable for any costs and damages caused by the measure to the party [against whom it is directed] [affected by the measure] [to the extent appropriate, taking into account all of the circumstances of the case, in light of the final disposition of the claims on the merits]; and

“(ii) Provide security in such form as the arbitral tribunal considers appropriate [, for any costs and damages referred to under subparagraph (i).] [as a condition to granting a measure under this paragraph];

“(iii) Give notice of the application for the measure to the party [against whom it is directed] [affected by the measure] at the time such application is made;

“(c) [For the avoidance of doubt,] the arbitral tribunal shall have jurisdiction, inter alia, to determine all issues arising out of or relating to [subparagraph (b)], above;]

“(d) [The party [against whom the interim measure of protection is directed] [affected by the measure granted] under this paragraph shall be given an opportunity to [oppose the measure and to] be heard by the arbitral tribunal [within forty-eight hours of the notice, or on such other date and time as is appropriate in the circumstances];]

“(e) [Any interim measure of protection ordered under this paragraph shall be effective for no more than twenty days [from the date on which the arbitral tribunal orders the measure] [from the date on which the measure takes effect against the other party], which period cannot be extended. This subparagraph shall not affect the authority of the arbitral tribunal to grant, confirm, extend, or modify an interim measure of protection under paragraph (1) after the party [against whom the measure is directed] [affected by the measure] has been given an opportunity [to oppose the measure] [and be heard];]

“(f) [A party requesting an interim measure of protection under this paragraph shall have an obligation to inform the arbitral tribunal of all circumstances that the arbitral tribunal is likely to find relevant and material to its determination whether the requirements of this paragraph have been met;]

*Suggested changes to article 17 bis, paragraphs 1 and 6*

“(1) An interim measure of protection issued by an arbitral tribunal, that satisfies the requirements of article 17 shall, with the exception of an interim measure of protection issued under article 17 (7), be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application [in writing] to the competent court, irrespective of the country in which it was issued, subject to the provisions of this article.

“Paragraph (6) of article 17 bis should be deleted in its entirety.”

115. An additional proposal for the replacement of paragraph (7) read as follows:

“In cases where the prior disclosure of the requested measure to the party having to perform it risks prejudicing its implementation, the requesting party

may file its application without communicating it to any other party. Upon receipt of such an application, the arbitral tribunal shall communicate it to the other parties inviting their response. The arbitral tribunal may accompany this communication with a provisional [order preventing the frustration of the requested measures]/[for preserving the status quo] until it has heard the other parties and has ruled on the application [provided that such provisional order shall remain in force no longer than X days].”

116. Due to the absence of sufficient time, the Working Group did not discuss those proposals in detail. The Working Group took note of the proposals and decided that the discussion would be continued at its next session on the basis of the documentation prepared for the current session and of the additional proposal, as well as any further proposal that might be communicated to the Secretariat for the preparation of the next session of the Working Group. It was pointed out that, in addition to discussing the contents of a provision on *ex parte* measures, the Working Group would need to focus its attention on the placement of such a provision. Suggestions for the placement included a footnote to article 17, either in the form of an opt-in or opt-out provision, for consideration by national legislators.

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