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Proposal by the Government of the United States regarding UNCITRAL future work: Provisional agenda item 16[1]

Note by the Secretariat

Contents

[1] Provisional Agenda Item 16 is entitled "Planned and possible future work, including in the areas of arbitration and conciliation, commercial fraud, electronic commerce, insolvency law, international contract law, microfinance, online dispute resolution, public procurement and infrastructure development, including public-private partnerships, and security interests." United Nations document A/CN.9/759 (2013).

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I. Introduction

1. The forty-sixth session of the Commission will consider, under provisional agenda item 16, planned and possible future work by UNCITRAL, and will have before it a note by the Secretariat (A/CN.9/752 and Add.1) and an additional note by the Secretariat on planned and possible future work by UNCITRAL (A/CN.9/774). In that regard, the Government of the United States of America submitted a proposal regarding UNCITRAL future work, the text of which is reproduced below in the form in which it was received by the Secretariat.

II. Proposal by the Government of the United States

The United States greatly appreciates the notes prepared by the Secretariat on planned and possible future work,[2] designed to bring to the attention of States the important concerns regarding the organization's priorities and resource constraints. The United States has consistently supported the provision of adequate resources to support the important work being done by UNCITRAL, and we believe that it has been one of the most productive bodies in the United Nations system. The high level of output the UNCITRAL secretariat produces for all the meetings is even more impressive when considering the small number of officers working in the Secretariat and the vast scope of the work that UNCITRAL addresses. It is regrettable, as was reported at the last session of the Commission, that "UNCITRAL cannot continue, with its existing resources, to generate legal texts at the current rate and work toward the implementation and use of all UNCITRAL texts to the extent necessary."[3]

At its 2012 session, the Commission took note of the following strategic considerations:

(a) The subject areas that should be accorded the highest priority, by reference to the role and relevance of UNCITRAL;

(b) Achieving the optimal balance of activities given current resources;

(c) The sustainability of the existing modus operandi, i.e. current emphasis on formal rather than informal negotiations when developing texts, given current resources;

(d) The mobilization of additional resources and the extent to which UNCITRAL should seek external resources for its activities, such as through joint activities and cooperation with other bodies.[4]

The Commission agreed to "provide further guidance on inter alia, those matters at its forty-sixth session."[5]

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[2] Notes by the Secretariat, A Strategic Direction for UNCITRAL, United Nations document A/CN.9/752 and Add.1 (2012); Planned and Possible Future Work, United Nations document A/CN.9/774 (2013).

[3] A/CN.9/752/Add.1, para. 25.

[4] Report of the United Nations Commission on International Trade Law, forty-fifth session (25 June-6 July 2012), United Nations document A/67/17, para. 229.

[5] Id., para. 231.

Sustainability of existing modus operandi

For a number of years, States have proposed that UNCITRAL should adopt a more flexible approach to methods of work to address resource concerns and ensure that the highest-priority, most valuable projects are able to proceed.[6] The Secretariat has suggested that more than one topic might be given to a specific working group. We submit that another way of achieving a more flexible work plan would be for UNCITRAL to focus on authorizing individual projects and allocating the needed resources to them, rather than maintaining six working groups that are generally devoted exclusively to one area of law for many years. We thus suggest that UNCITRAL should no longer structure its work priorities using a system of six semi-permanent working groups devoted to a particular area of law, each of which are expected to receive two weeks of meeting time every year.[7]

For example, instead of having a standing entity labelled as "Working Group IV — Electronic Commerce", the Commission would approve further work on the in-progress instrument on electronic transferable records and determine the resources that the project will require in the next year (in terms of Secretariat attention and conference resources). Taking into account UNCITRAL's current annual entitlement to 14 weeks of conference services (including meeting space and interpretation),[8] those resources could then be allocated to specific projects as needed — rather than, by default, assuming that each working group devoted to a particular topic will receive two weeks of meeting time. (A proposed allocation of resources for the next year is provided below.)

This approach would require the Commission to evaluate whether the topics being addressed continue to remain the highest priorities when resources become available upon the completion of a project. By contrast, the use of semi-permanent working groups that propose their own future areas of work means that only rarely will a working group deem its useful work to be exhausted. Understandably, experts in each area of law will often continue to believe that further valuable work can be done in their area of expertise. Even where that may be the case, such work may not be more valuable — in terms of furthering the mandate of UNCITRAL — than new work in areas that are not currently so fortunate as to have a working group assigned to them. Given the scarcity of resources, UNCITRAL cannot afford to continue operating under the implicit presumption that the conclusion of one project in an area of law will be followed by further work on that same topic.

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[6] See e.g., Report of the United Nations Commission on International Trade Law, forty-fourth session (27 June-8 July 2011), United Nations document A/66/17, para. 343.

[7] At its 2003 session, the Commission agreed that working groups should normally meet for a one-week session twice a year, but that extra time could be allocated to a working group if another working group did not make full use of its entitlement. Report of the United Nations Commission on International Trade Law, thirty-sixth session (30 June-11 July 2003), United Nations document A/58/17, paras. 273, 275.

[8] The United States does not support a further reduction in the allocation of conference resources. At its 2011 session, the Commission agreed to a reduction in the habitual 15-week total entitlement per year in view of the extraordinary constraints placed on the Commission and its secretariat to reduce regular budget expenditures during the 2012-2013 biennium. Report of the forty-fourth session, supra note 5, para. 347.

As another method of conserving resources, we also believe that the Commission should consider, in appropriate cases, the development of draft instruments outside of the full intergovernmental discussions used by working groups. Formal review by UNCITRAL Member States is, of course, necessary for the approval and finalization of any instruments. However, in the past, the Commission itself has at times considered a text developed by the Secretariat (with input from experts) without prior negotiations in a working group context.[9] The United States encourages UNCITRAL to consider the use of such an approach when appropriate, as well as other tools including expanded use of experts' meetings, regional meetings (including those where host government resources may be available), and use of special rapporteurs who, working closely with the Secretariat, could facilitate preparation of draft materials for consideration.[10]

Mobilization of additional resources

States have also recognized that, as another tool for tackling additional areas of work in an efficient manner, UNCITRAL should seek to increase cooperation with other international organizations, consistent with its primary mandate.[11] A project-based resource allocation approach as described above would make it easier for UNCITRAL to engage in joint projects with other organizations such as UNIDROIT or the Hague Conference, as such collaboration would not have to wait for an existing working group to become "vacant". Given that these other private law bodies face similar resource constraints, all three organizations should analyse their work programmes to identify projects that could be jointly developed. Indeed, at this year's Governing Council meeting, UNIDROIT strongly supported the idea of substantive cooperation with UNCITRAL on future projects, with the two organizations developing instruments jointly.

Moving forward, we believe that UNCITRAL should make such collaboration a priority. We welcome recent efforts at cooperation such as the joint publication of the paper on "UNCITRAL, Hague Conference and UNIDROIT Texts on Security Interests".[12] However, we believe that collaboration should not be limited to joint studies and attendance of Secretariat staff at meetings of the other organizations. Rather, we recommend that the organizations' Secretariats seek to identify projects

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[9] See A Strategic Direction for UNCITRAL, supra note 1, para. 33 (noting that "the Secretariat has undertaken substantial preparation of a text on several occasions," such as when "a draft text was developed by the Secretariat and referred directly to the Commission as there was no existing working group with the relevant expertise (e.g. the Legal Guide on Electronic Funds Transfers (1987) and the Legislative Guide on Privately Financed Infrastructure Projects (2000)" and when "preparation of the draft text was entrusted to the Secretariat and referred directly to the Commission (e.g. Recommendations on the use of the UNCITRAL Arbitration Rules (2012))".

[10] See Note by the Secretariat, UNCITRAL rules of procedure and methods of work, A/CN.9/638/Add.1, paras. 31-33, 36-42 (2007).

[11] See Establishment of the United Nations Commission on International Trade Law, General Assembly resolution 2205 (XXI), A/RES/2205 (Dec. 17, 1966), para. 8 ("The Commission shall further the progressive harmonization and unification of the law of international trade by: (a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them...").

[12] See Report of the forty-fifth session, supra note 3, paras. 165-66.

that could be developed jointly, in ways that maximize the comparative advantages of each organization.

Subject matters that should be accorded highest priority

In terms of evaluating future work, the Commission has repeatedly decided that assessment of specific projects should be based on the need for and feasibility of future work as it relates to the development of international trade law.[13] A key criterion in assessing need in this context is the effect that a proposal will have on inclusive economic development and the rule of law, particularly in developing countries.[14] As the Commission has also decided, "[a]s a general rule, the Commission should not refer subject-matters to a working group until after preparatory studies had been made by the Secretariat and the consideration of these studies by the Commission had indicated not only that the subject-matter was a suitable one but that the preparatory work was sufficiently advanced for a working group to commence work in a profitable manner."[15]

Allocating resources to projects

Taking into account the above considerations, and assuming that 14 weeks of meeting time will again be available, the United States proposes that resources might be allocated as follows for the upcoming year:

Project	*Allocation of Meeting Time*
Follow-on transparency work, as needed, and/or new arbitration topics	Two weeks
Preparation of legal standards for online dispute resolution for cross-border electronic transactions	Two weeks
Development of an instrument on electronic transferable records	Two weeks
Preparation of a model law on secured transactions	Two weeks

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[13] As the Secretariat notes (A/CN.9/774, para. 19), the focus on need and feasibility dates back to the original report of the Secretary-General concerning the formation of UNCITRAL. Report of the Secretary-General, A/6396 (1966). That report notes that "the unification process is desirable per se only when there is an economic need and when unifying measures would have a beneficial effect on the development of international trade." Id., para. 204. It also addresses feasibility, noting that "[i]t should therefore be less difficult to adopt national rules to the needs of international trade, than to unify rules on such matters as family law, succession, personal status, and other subjects deeply rooted in national or religious traditions." Id., para. 222.

[14] The role of UNCITRAL in promoting the rule of law had been on the agenda of the Commission since 2008, in response to a request from the General Assembly. In 2012, UNCITRAL participated in a high level meeting of the General Assembly, where the role of UNCITRAL in promoting the rule of law was highlighted. See Report of the forty-fifth session, supra note 3, paras. 195-227.

[15] Report of the United Nations Commission on International Trade Law, eleventh session (30 May-16 June 1978), United Nations document A/33/17, paras. 67-68; Note by the Secretariat, UNCITRAL rules of procedure and methods of work, A/CN.9/638, para. 20 (2007).

Project	*Allocation of Meeting Time*
Development of a legislative guide or model law on the creation of an enabling environment for microbusiness and small and medium-sized enterprises (microfinance)	Two weeks
Colloquium on cross-border insolvency to identify specific projects for future work (including projects related to general topics already under discussion)	One-half week
Colloquium on commercial fraud	One-half week
Drafting of a model law on public-private partnerships (PPPs)	No meetings – work by Secretariat and experts
2014 Commission meeting, including review of work by Secretariat and experts on a model law on PPPs (if appropriate)	Three weeks

The Secretariat paper suggests the possible reduction of the six existing working groups to five. However, we believe that using the more flexible approach outlined above — with resources allocated to specific projects rather than semi-permanent working groups — could permit UNCITRAL to conserve resources without eliminating useful topics. Only five projects would be the subject of full intergovernmental negotiations, thus reducing the burden on the Secretariat; at the same time, UNCITRAL could remain engaged on several other topics and be undertaking the necessary preparatory work for launching new projects in the future.

This suggested allocation of resources would entail a slightly different approach to several areas in which new or continued work has been proposed, including through use of some of the more flexible methods of work described above. The impact on particular projects is discussed below.

Microfinance and related topics

Consistent with the decision of the Commission at its last session and the recommendation of the January 2013 colloquium on microfinance and related topics, we believe that, consistent with the proposal made by the Government of Colombia, work should begin on a legislative guide or model law addressing the elements necessary for the creation of an enabling legal environment relating to the life cycle of micro and small businesses: simplified business incorporation, dispute resolution, access to credit, mobile payments, and insolvency.

At its forty-fifth session, the Commission decided that holding a second colloquium on microfinance and related topics "should rank as a first priority for UNCITRAL".[16] The Commission decided that the colloquium should focus on "facilitating simplified business incorporation and registration; access to credit for micro-businesses and small and medium-sized enterprises; dispute resolution applicable to microfinance transactions; and other topics related to creating an enabling legal environment for micro-businesses and small and medium-sized enterprises."[17] That colloquium, held in January 2013, developed a "broad

[16] Report of the forty-fifth session, supra note 3, para. 126.
[17] Id.

consensus among participants" that UNCITRAL should "address the legal aspects necessary for the creation of an enabling legal environment for MSMEs. It was stressed that work in establishing such an environment would be consistent with the Commission's primary mandate to promote coordination and cooperation in the field of international trade, including regional cross-border trade."[18]

The Secretariat report underscores the crucial importance of establishing an enabling legal environment for micro and small businesses in developing countries to effectively reach international markets through electronic and mobile commerce.[19] Moreover, "[t]he creation of an enabling legal environment also contributes to reinforcing the rule of law at country level which, as stressed by the General Assembly in its Resolution on the Rule of Law, is conducive to the growth of a fair, stable and predictable system for generating inclusive, sustainable, and equitable development."[20] Thus, consistent with the colloquium's recommendation, we believe that work should begin on a legislative guide or model law addressing these topics.[21]

Insolvency

The United States suggests that a colloquium to identify specific projects and possible future areas of work be scheduled in lieu of any full intergovernmental meetings on insolvency for the next year. Then, under the flexible approach to resource allocation outlined in the first section of this paper, work on insolvency could be resumed once an appropriately specific project is identified and approved by the Commission.

With respect to insolvency, Working Group V has now completed the two projects to which it has been devoting its time for the last several years. It has completed a set of revisions to the Guide to Enactment for the Model Law on Cross-Border Insolvency, and has also completed a new section of text for the Legislative Guide

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[18] Note by the Secretariat, Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises, A/CN.9/780, para. 50 (2013). The Secretariat report points out that "cross-border recognition of these new and varied legislative issues and emerging structures [is] needed for MSMEs operating in regional markets in order to provide a recognizable international basis for transactions and avoid problems that can arise because of a lack of business recognition." Id.

[19] Id., para. 52 (noting that "[g]lobally, Internet usage has increased by 528 percent over the last decade: approximately one third of the world's population is now connected to the Internet" and that this "number is expected to increase to forty seven per cent by 2016"); see also Note by the Secretariat, Possible future work on online dispute resolution in cross-border electronic commerce transactions, United Nations document A/CN.9/706, para. 9 (2010) (observing that "[o]ne of the main drivers underlying e-commerce growth is the rising number of individuals connected to the Internet").

[20] Microfinance, supra note 17, para. 13 (footnote omitted).

[21] With respect to the report of the Secretary-General discussed in footnote 12 above, certain aspects of corporate law affecting international trade are cited as an example of work that might be pursued. United Nations document A/6396, para. 207 (noting that "it would be beneficial to international trade if more efforts were made in the direction of ... rules relating to corporations entering into foreign trade relations"). The General Assembly also requested UNCITRAL to engage in work on legal problems related to different kinds of multinational enterprises. See General Assembly resolution 2928, A/RES/2928 (XXVII), para. 5 (1972).

on Insolvency. Both of these documents are being presented to the Commission for finalization and approval. The most recent report of Working Group V notes that, although the Working Group may not have technically exhausted its mandate in terms of the legal issues that may be worth considering, it does not have a plan for what its work on those topics would produce.[22] Thus, the Working Group has concluded that a colloquium could be useful to determine what future projects (on currently-planned topics as well as other proposed topics) could be the most valuable.[23]

We agree with the Working Group's conclusion that a colloquium would be appropriate; the valuable instruments that Working Group V has developed in this area of law have been extremely influential, and UNCITRAL should consider additional projects that could utilize the extraordinary expertise of the delegates and observers who have participated in these past efforts. However, in light of the uncertainty regarding what concrete projects would be suitable for immediate work, we do not believe that working group meetings would be a prudent use of increasingly scarce resources while those projects are being identified.

Public-private partnerships (PPPs)

While further work on PPPs may be useful, it can be advanced through alternative methods of work led by the Secretariat. Such an approach would be consistent with the successful practice of the Commission in developing the Legislative Guide on Privately Finance Infrastructure Projects and the Model Law of Public Procurement.[24]

In May 2013, UNCITRAL held a colloquium on PPP issues to discuss the possible value of future work that would expand on the closely-related instruments that Working Group I has produced in the past — namely, the Legislative Guide on Privately Finance Infrastructure Projects (which includes a set of legislative recommendation) and a set of Model Legislative Provisions on Privately Financed Infrastructure Projects. The colloquium concluded that, in light of increasing use of PPPs and developments in recent years, further work in this area might be useful.

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[22] Report of Working Group V (Insolvency Law) on the work of its forty-third session (New York, 15-19 April 2013), United Nations document A/CN.9/766, para. 108 (noting that while the working group "had not yet completed its work on implementing the mandate received from the Commission," it nevertheless "was not yet clear how that part of the mandate could best be pursued").

[23] Id. ("The Working Group heard a proposal to hold a colloquium to examine how and by what type of instrument that remaining part of the mandate might be addressed, as well as to identic possible topics for future work. The Working Group agreed that such a colloquium could be useful; however, the suggestion that it should take the place of the Working Group sessions necessary to complete the mandate granted by the Commission did not attract sufficient support. Several delegations suggested that Commission approval should be sought for any future projects but that view did not attract sufficient support.").

[24] As noted above, supra note 8, a draft text was developed by the Secretariat and referred directly to the Commission concerning the Legislative Guide on Privately Financed Infrastructure Projects (2000). At the 2011 session of the Commission, States called for the utilization of "drafting groups for finalizing text, as had successfully been done during the current session in respect of the Model Law on Public Procurement." Report of the forty-fourth session, supra note 5, para. 343.

The most likely candidate for a future project would be a model law, which many colloquium participants noted would have greater visibility — and would be easier to promote — than the existing instruments.

Because of the work that has already been done on legislative recommendations and model legislative provisions, a basic model law could be developed without the expenditure of the resources that would be entailed by full intergovernmental negotiations in a working group. As noted above and in the Secretariat paper, the development of a text outside of a working group — with subsequent review by the Commission — could permit UNCITRAL to maximize its productivity despite the serious resource constraints. Based on the discussions at the colloquium, the United States believes that such an approach would be the ideal method for developing a model law on PPPs. As the Commission has previously approved the instruments developed by Working Group I, which cover most issues that a model law would need to address, the primary task remaining is merely a technical drafting exercise. The draft of a model law could be developed through an experts' group led by the Secretariat; then at a Commission session, Member States could review the document and either make any edits necessary to finalize it or, if needed, refer it for further work.

Commercial fraud

We support the organizing of a colloquium on commercial fraud in coordination with UNODC, as proposed at the last session of the Commission.[25] At the April 2013 UNCITRAL Expert Group Meeting on Commercial Fraud, there was broad support for holding another colloquium as a follow-up to the 2004 Colloquium and updating the work that UNCITRAL had previously done on commercial fraud indicators.[26] It was widely felt that given the vital role of the private sector in combating commercial fraud, UNCITRAL was in a unique position to coordinate ongoing efforts in that field and thereby help draw the attention of legislators and policymakers to that important issue.[27] In particular, it was pointed out that developments in electronic telecommunications pose new challenges and that the consequences of such developments impact every aspect of business, finance, and trade. It was further suggested that it might be useful to focus separately on the potential for commercial fraud in the areas on which UNCITRAL working groups are currently focused, such as online dispute resolution and electronic transferability of records. While these texts may attempt to address issues of fraud, the expertise necessary to formulate normative rules of commercial law in

[25] Report of the forty-fifth session, supra note 3, para. 232.
[26] Note by the Secretariat, Commercial Fraud, A/CN.9/788, paras. 8-12, 18 (2013).
[27] Id., paras. 13-17.

these fields may not necessarily be the same expertise required to identify possibilities of commercial fraud or how to address them in an instrument.[28]

International contract law

We also support organizing a colloquium celebrating the 35th anniversary of the Convention on the International Sale of Goods in 2015. At the 2005 UNCITRAL Colloquium celebrating the 25th Anniversary of the CISG, the Convention was recognized as probably the single most successful treaty in the history of modern commercial law.[29] Since that colloquium, 16 more States have become party to the Convention, bringing the total number of parties to 79.[30]

A proposal at the last session of the Commission called for consideration of a new global initiative on international contract law.[31] A number of delegations, including the United States, expressed clear opposition to any effort to develop a new global framework for international contract law. Nonetheless, the Secretariat was requested "to organize symposiums and other meetings ... to assist the Commission in the assessment of the desirability and feasibility of future work in the field of general contract law."[32] To fulfil this mandate, UNCITRAL co-sponsored a symposium in January 2013 at Villanova Law School on "Assessing the CISG and Other International Endeavours to Unify International Contract Law," and held an expert meeting on contract law in February 2013 at the UNCITRAL Regional Centre for Asia and the Pacific.[33]

Based on the discussions at those meetings, the United States continues to oppose a new global initiative on international contract law, as an initiative of the scale proposed would be an enormous project, consuming considerable resources for many years, with limited likelihood of success. The scope of the CISG was

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[28] Id., para. 11. At the 2004 session of the Commission (following the 2004 Colloquium on international commercial fraud), it was decided that "it would be useful if, wherever appropriate, examples of commercial fraud were to be discussed in the particular contexts of projects worked on by the Commission so as to enable delegates involved in those projects to take the problem of fraud into account in their deliberations." The Secretariat "was requested to facilitate such discussions where it seemed appropriate." Report of United Nations Commission on International Trade Law on its thirty-seventh session (14-25 June 2004), United Nations document A/59/17, para. 111.

[29] Hebert Kronke, The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond, 25 J. L. & Comm. 451 (2005).

[30] For the parties to the CISG see Status 1980 — United Nations Convention on Contracts for the International Sale of Goods, available at www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

[31] Possible future work in the area of international contract law: Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law, United Nations document A/CN.9/758 (2012).

[32] A summary of the debate is contained in the report of the forty-fifth session, supra note 3, paras. 127-32.

[33] Information concerning the symposium is available at www.law.villanova.edu/Flash%20Stories/Norman%20J%20Shachoy%20Symposium.aspx. The papers relating to the symposium will be published in Issue 58:4 of the Villanova Law Review. The papers relating to the regional Expert Meeting held in Songdo, Incheon in South Korea will be published in an issue of the Comparative Law Journal of the Pacific — Journal de Droit Comparé du Pacifique (CLJP-JDCP).

intentionally limited to exclude issues on which a consensus could not be reached, and we have seen no evidence that those differences have fundamentally changed in recent years. Moreover, the UNIDROIT Principles of International Commercial Contracts already provide a useful complement to the CISG. At both its 2007 and 2012 sessions, the Commission endorsed the UNIDROIT Contract Principles — commending them for their intended purposes, identifying them as complementary to the CISG, and congratulating UNIDROIT on preparing "general rules for international commercial contracts."[34] Thus, we believe that there are more practical, positive, and forward-looking alternatives that build on the existing platform of the CISG and the UNIDROIT Principles, and that UNCITRAL should focus on these alternatives.

[34] Report of forty-fifth session, supra note 3, para. 140; Report of the United Nations Commission on International Trade Law on the work of its fortieth session (25 June-12 July 2007), United Nations document A/67/17 (Part I), para. 213.