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## **A strategic direction for UNCITRAL**

### **Note by the Secretariat**

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## A. Introduction

1. This note by the Secretariat responds to a request at the forty-fourth session of the Commission for a note on strategic planning.<sup>1</sup> It sets out the considerations that the Commission may wish to take into account in setting the parameters for a strategic plan for UNCITRAL; it therefore addresses, first, the state of play within UNCITRAL and its Secretariat, and, secondly, the harmonization mandate given to UNCITRAL by the General Assembly as it may be expressed in terms of a strategic goal and strategic priorities.

2. The note is arranged by reference to the key areas of work in the mandate. It considers the work programme of the Commission, the role of the various bodies of UNCITRAL (Commission, working groups and Secretariat) in realizing that programme, the methods of work employed, allocation of resources and strategic issues for consideration.

3. The mandate establishes the basic agenda of the Commission. Three principal areas of activity can be identified: legislative activity (para. (c));<sup>2</sup> technical cooperation and assistance, which covers both promotion<sup>3</sup> of the adoption of a text (para. (b)) and its application and interpretation (paras. (d) and (e)); and coordination (paras. (a), (f) and (g)), which relates to both of the other activities. These three areas are supplemented by paragraph (h), which authorizes the Commission to take any other action it may deem useful to fulfil its functions. Harmonization in its true sense requires that all of these areas be addressed for each text that UNCITRAL adopts.

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<sup>1</sup> *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 343.

<sup>2</sup> The mandate provides as follows:

- (a) Coordinating the work of organizations active in this field and encouraging cooperation among them;
- (b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws;
- (c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field;
- (d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;
- (e) Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;
- (f) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;
- (g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade; and
- (h) Taking any other action it may deem useful to fulfil its functions.

<sup>3</sup> While the term “promotion” is traditionally used and is part of the mandate, it may not fully do justice to what UNCITRAL does or should be doing. It focuses on marketing and may also be vulnerable to the view that other United Nations bodies are more specifically tasked with, and funded for, the promotion of United Nations standards. It is therefore important to emphasize that, as understood by the UNCITRAL secretariat, the activity summarized in the term “promotion” can more accurately be described along the lines of facilitating the enactment and use of UNCITRAL texts, an activity that may be considered essential to the fulfilment of UNCITRAL’s mandate.

4. Although all three areas of the mandate are covered by the activities conducted on behalf of the Commission, the Commission itself and its working groups are actively involved only in the conduct of legislative activity. Technical cooperation and assistance activities (referred to as TA activities) and coordination activities are largely/exclusively conducted by the Secretariat, with reports of that activity being provided annually to the Commission.

5. The three key areas of the mandate essentially cover the life cycle of a text from (a) identification of the topic, (b) legislative drafting, (c) promotion of the text once it has been adopted, to (d) monitoring the interpretation and application of the text with a view to promoting uniformity, and identifying areas where possible review and follow-up work may be required. Coordination is relevant at each of these stages. The following section considers the life cycle of a text.

## **B. The life cycle of a text**

### **1. Identification of topics**

#### **(a) Background**

6. At its first session in 1968, the Commission adopted nine subject areas as the basis of its work programme: international sale of goods; international commercial arbitration; transportation; insurance; international payments; intellectual property; elimination of discrimination in laws affecting international trade; agency; and legalization of documents. Some of these subjects have not been taken up, for example, insurance, elimination of discrimination in laws affecting international trade, agency and legalization of documents. Priority status initially was accorded to international sale of goods, international commercial arbitration and international payments. Other topics, such as trade financing contracts, maritime transport, electronic commerce, procurement, international commercial conciliation, insolvency, security interests, online dispute resolution and microfinance have subsequently been added.

7. The above broad subject-areas and the topics within them can therefore be split into three: those within the initial work programme but that have never been active;<sup>4</sup> those within that work programme that have generated texts (or that are currently the subject of legislative or other activity) and those that were not within that initial work programme.

8. Proposals for consideration of new topics have arisen in a number of ways: from government proposals made directly to the Commission (e.g. the proposal for work on transparency in treaty-based investor-State arbitration in 2008); from consultation with various international organizations (e.g. with the International Maritime Committee on international carriage of goods); from special colloquiums and seminars (such as the 1992 Congress on International Trade Law,

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<sup>4</sup> Some of these topics have been taken up by other organizations e.g. agency by Unidroit and legalization of documents by the Hague Conference on Private International Law. Some have been included within other topics, such as legalization of documents within procurement, and elimination of discrimination in laws affecting international trade in various topics, such as e-commerce.

the 1998 New York Convention Day and various colloquiums on other topics convened in recent years); or as topics that are related to subjects already under discussion in the working groups (e.g. the need for a text on electronic signatures was identified during development of the Model Law on Electronic Commerce). Topics have also arisen from the experience gained in the implementation and application of existing texts, which may suggest the need for revision of an existing text (e.g. the Model Law on Public Procurement, and the UNCITRAL Arbitration Rules) or further development of the explanatory material accompanying an existing text, such as a guide to enactment (e.g. the Guide to Enactment of the Model Law on Cross-Border Insolvency).

9. In considering whether particular topics should be added to the programme, factors such as global significance; special interest to developing countries; developments in technology; changing trends in business practice; international trends and developments; economic and financial crises; and other forces affecting and shaping international trade and commerce have been taken into account. Nonetheless, there has not been a more general articulation of a strategic direction to UNCITRAL's work programme that is the basis for setting priorities among topics to be addressed. Moreover, the allocation of legislative activity to one or another Working Group reflects capacity rather than the identification of a Working Group with one main subject-area.

10. The Commission initially considered some of the topics currently on the programme as not likely to produce an agreed, harmonized legal text. However, developments in international trade law and practices, as well as the successful conclusion by UNCITRAL of work on related topics, have since created a demand for reconsideration of those topics and made the development of legal texts feasible (for example harmonization of national insolvency and secured transaction law). Aspects of other topics that generally fall within the mandate of specialized international organizations, such as intellectual property, have been the subject of coordinated work. The types of text produced by UNCITRAL have changed over the decades, with increased attention being given to soft law legislative texts such as model laws and legislative guides.

**(b) Current position and possible future work**

11. A number of topics have been identified by the Commission and by working groups as possible future work in subject areas covered by an existing working group.

*(i) Procurement*

12. The Commission is expected to consider possible future work in 2012. The topics include: updating and expanding the UNCITRAL Legislative Guide on Privately-Financed Infrastructure Projects (2000) to include public-private partnerships; considering the appropriate form and scope of any future text; ensuring consistency between relevant provisions in such a text and procurement methods under the Model Law, and reviewing dispute resolution mechanisms with a view to identifying weak points and elaborating models responding to the needs of PFIPs.

*(ii) Arbitration*

13. The Commission is expected to consider possible future work once Working Group II has completed the preparation of a legal standard on transparency in treaty-based investor-State arbitration. Topics approved for possible future work include a revision of the Notes on Organizing Arbitral Proceedings and arbitrability.

*(iii) Online dispute resolution*

14. Once the current consideration of the draft ODR procedural rules is concluded, Working Group III is expected (possibly beginning at its December 2012 meeting) to turn its attention to the other documents which it has agreed to produce (see para. 29 below), starting with guidelines for ODR providers and neutrals.

*(iv) Electronic commerce*

15. In addition to current work on electronic transferable records, topics identified for possible future work include identity management (IdM) and mobile commerce (m-commerce).

*(v) Insolvency*

16. Several topics, proposed in 2010, but not approved at that time include the development of a Model Law based on the Legislative Guide on Insolvency Law, sovereign insolvency and the insolvency of public or state-owned entities.

*(vi) Security interests*

17. Working Group VI is expected to consider its future work on the basis of the agenda approved by the Commission in 2010. Topics mentioned for possible future work include: a model law on secured transactions; a supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in non-intermediated securities; a contractual guide on secured transactions; and a text on intellectual property licensing. Other possible topics that may be added to the agenda include: a supplement to the Guide on security rights in a microfinance context and a set of principles for establishing effective and efficient secured transactions systems.

*(vii) Other topics of current work*

18. The Secretariat is also developing work on microfinance, with a view to possible future reference to a working group.

**(c) Issues**

19. Historically, the Commission has based the identification of its work programme on the broad range of factors indicated above. Recently, however, there may have been a tendency to look within existing subject areas for future work, on the basis of suggestions arising within a working group, with the result that existing areas of work tend to become permanent, as do the respective working groups. Refining and building on completed work in a working group has some important advantages, in particular in UNCITRAL, where some working groups have developed unique collective expertise while not losing the intergovernmental and

political nature of the work. However, the fact that UNCITRAL working groups are ideally placed to refine their earlier work should not result in crystallizing the existing working group structure at the expense of the flexibility UNCITRAL needs to preserve to adapt to newly emerging priorities.

20. The Commission may wish to consider how future topics are identified and whether greater emphasis should be given to a broad range of factors such as those discussed above, as well as to strategic considerations such as: (a) identifying potential users of a text if developed; (b) articulating the importance of the development of that text and of UNCITRAL undertaking the work within the United Nations context, as well as the context of the above factors; (c) specifying the priority that States attach to that work; and (d) quantifying the economic impact or necessity of that work.

21. Such factors may be of particular relevance when choosing between topics if there are insufficient resources to undertake more than one additional issue. A related consideration falls within the coordination aspect of the mandate, namely the desirability of examining the work of other organizations that might be relevant to topics under consideration for future work by the Commission.

22. The Commission may also wish to emphasize the desirability of a strategic approach in responding to global events, developments in technology, and changes in commercial trends. It may be suggested, for example, that the global financial crisis has pointed to several new topics that might be considered, including various means of engaging private capital for satisfying public needs, for example through public-private partnerships and private sector provision of State services, financial contracts and consumer insolvency.

## **2. Text development/legislative drafting**

### **(a) Background**

23. The legislative activity of UNCITRAL has the greatest visibility and forms the basis of the other activities of the mandate. Following a decision by the Commission in 2001, the number of working groups was expanded from three to six. At the time, the expansion was due to the number of topics suggested for future work; among the strategic factors mentioned above, was the realization that UNCITRAL should become active in areas that were originally not part of its mandate and that concerned national legal systems and not merely cross-border aspects of transactions (secured transactions, insolvency etc.). The six active working groups currently deal with the work programme noted below. Although the total number of meeting days serviced by the Secretariat per year did not change with the expansion to six working groups, the amount of work required to prepare for meetings, including the number of documents prepared, has increased considerably and the Secretariat is generally preparing as much material for a one week meeting as was previously prepared for a two-week meeting.

24. The type of text being prepared may also have some bearing on the quantity of material produced. A greater emphasis in some working groups on legislative and practice guides, which generally include both extensive commentary and recommendations, requires longer working papers that tend to increase in length as

the text develops, notwithstanding official document limitations on what might be included or reproduced in working papers. Moreover, expectations of working groups, particularly with respect to the speed at which the work should develop, have also increased, which tends to require more and better preparation at an early stage of a project and more material for consideration as the project develops.

25. Despite a modest increase in 2004, the size of the Secretariat is essentially the same as it was in the 1970s (14 regular budget legal officers, including the Secretary of the Commission, recently supported by one extrabudgetary programme manager at the Regional Centre for Asia and the Pacific).

**(b) Current status**

26. UNCITRAL has adopted the texts set out in annex 1. In addition, the six working groups currently address the following issues, which should lead to the adoption of additional texts in the short term.

*(i) WG I (Procurement)*

27. The Commission adopted the UNCITRAL Model Law on Public Procurement at its forty-fourth session. Working Group I considered a draft Guide to Enactment to the above Model Law in April 2012 and that text will be submitted to the Commission for consideration and possible adoption at its forty-fifth session (2012). The Working Group has also noted the need to consider more expeditious ways to reform the revised Model Law in the future, to ensure that it accurately reflects evolving practices and regulations (A/CN.9/718, paras. 137-138). It will return to this topic at its next session, together with possible mechanisms for assisting states in enacting the Model Law and ensuring interpretation of the law and administration of contracts in accordance with the Model Law's approach.

*(ii) WG II (Arbitration and conciliation)*

28. In 2010, the Commission entrusted Working Group II with the preparation of a legal standard on transparency in treaty-based investor-State arbitration. The Working Group has considered matters of content, form and applicability of the legal standard on transparency to both future and existing investment treaties over four sessions.

*(iii) WG III (Online dispute resolution)*

29. Online dispute resolution (ODR) was assigned to Working Group III in 2010, with the form of the work (i.e. the eventual text or document to be produced) to be decided after the Working Group had considered the matter. After three Working Group sessions there is broad agreement: (i) to focus on high-volume, low-value cross-border electronic transactions, including business-to-business and business-to-consumer; and (ii) to prepare documents containing generic procedural rules, guidelines for ODR providers and neutrals, substantive principles for the resolution of disputes and a cross-border enforcement mechanism. The generic rules have been drafted and considered at two Working Group sessions and should be substantially completed at the December 2012 session, subject to any changes that may be necessary as a result of the subsequent ODR documents. The Working

Group will then move on to consider the establishment of guidelines and standards of conduct for ODR providers and neutrals.

(iv) *WG IV (Electronic commerce)*

30. The Working Group is dealing with electronic transferable records (ETR). Since it has held only one session on this topic, the possible outcome of that work and a deadline for its finalization remain for future decision.

(v) *WG V (Insolvency law)*

31. Two projects, (a) providing greater definition for “centre of main interests” and related concepts in the UNCITRAL Model Law on Cross-Border Insolvency and (b) directors’ obligations in the period approaching insolvency, were approved by the Commission in 2010 and are progressing concurrently in the Working Group. The topics have been discussed at two sessions and draft texts on both subjects were considered at the session held in April and May 2012. A draft text on the first topic may be ready for finalization and adoption by the Commission at its forty-sixth session (2013). Revisions to The Judicial Perspective (adopted in 2011), which also includes material on centre of main interests, may be considered at the same time. As it involves a new issue, the second topic may take longer to develop. The Secretariat is also working on a study of the insolvency of large and complex financial institutions.

(vi) *WG VI (Security interests)*

32. The Working Group is preparing a draft Technical Legislative Guide on the Implementation of a Security Rights Registry. This is a follow-up project on the UNCITRAL Legislative Guide on Secured Transactions (2007) (the “Guide”), which incorporates the principles of the United Nations Convention on the Assignment of Receivables in International Trade (2001), and the Supplement on Security Rights in Intellectual Property (2010). The Working Group has already held four meetings and is expected to complete the current project in 2013 following another two meetings.

**(c) Development of texts outside the working group structure**

33. In addition to the texts developed via the working group structure, the Secretariat has undertaken substantial preparation of a text on several occasions. Various approaches have been used: 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); a draft text prepared by the Secretariat was reviewed by a working group prior to its adoption by the Commission (e.g. the Practice Guide on Cross-Border Insolvency Cooperation (2009)) and 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). A further example is the publication prepared jointly by the Secretariats of UNCITRAL and Unidroit and the Permanent Bureau of the Hague Conference, with the assistance of outside experts,



comparing and analysing the major features of international instruments relating to secured transactions.<sup>5</sup>

**(d) Issues**

34. The consensus-based manner in which UNCITRAL texts are produced contributes significantly to their acceptability. This means that the process towards adoption should be taken into account as a major operational issue. At its forty-fourth session (2011), the Commission discussed a budget proposal concerning the alternating pattern of UNCITRAL meetings (A/66/17, paras. 334-344). In the course of that discussion, it was noted that servicing six working groups stretched the resources of the Secretariat to the maximum and increased the risk that the quality of the services would be negatively affected. Various options were discussed, including holding only one session of one of the working groups per year, and temporarily suspending the activities of one working group. Other issues raised included prioritizing work on particular topics; clearly defining timetables for the completion of work; rationalizing the volume and contents of documents; and making greater use of informal consultations for resolving controversial issues and of drafting groups for finalizing texts.

*(i) Number of sessions of working groups per year*

35. The Commission may wish to further consider the number of working groups and/or the number of sessions and if adjustment is required, how that might be achieved. As noted above, several options have already been raised. Additional considerations might include: prioritizing between the different topics currently on the work agenda with a view to postponing some topics; and considering whether more work might be undertaken informally (see below) or by the Secretariat, with a view to reducing the amount of formal preparation required for meetings. It should be noted that while the development of texts outside the working group structure has the advantage of saving meeting time, that approach may be appropriate only for certain types of text, such as comparative studies or practice guides, which are descriptive or explanatory in nature and do not require intergovernmental decisions as to policy directions or specific drafting of a legislative nature. Moreover, as noted below, preservation of universal representation is a consideration and work conducted outside a working group would desirably involve a representative sample of the various regions and legal systems.

*(ii) Documentation*

36. As indicated above (see para. 23), the volume of documentation prepared by the Secretariat has increased since 2001, in response not only to the number of working groups, but also to the types of text being developed and to the expectations of the Commission and its working groups. The size of documents already reflects a number of official limitations, including on the number of words/pages permitted per document, reproduction of material already included in

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<sup>5</sup> “Comparison and analysis of major features of international instruments relating to secured transactions”, A/CN.9/720. The document was approved by the Commission in 2011: see *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17) (2011), paras. 280-282.

previous documents, and inclusion of the full text of the instrument being revised. Since some of those limitations already require delegates to refer to numerous documents in order to obtain a clear picture of the development of a particular text, imposing further restrictions on the size of documents related to legislative work is unlikely to contribute to efficiency or effectiveness. However, the Commission may wish to consider other measures, such as whether certain information, currently provided by way of written report, might be the subject of oral reporting at Commission sessions, with the reports of those sessions serving as the only record of that particular matter.

(iii) *Ways of working*

37. It has been suggested that informal methods might be used more often to ensure progress, particularly in Commission sessions. In response, it was noted that any changes proposed should not negatively affect the flexibility of the methods successfully used by the Commission which had proved to be both effective and efficient (A/66/17, para. 343). Greater use of informal consultations and drafting groups nevertheless might enhance the use of meeting time both for the Commission and working groups, provided it does not lead to any decline in the inclusiveness of the process, does not detract from multilingualism, and is conducted in an open and transparent manner. Such an approach might be of particular assistance where the Commission is finalizing a text and might be formalized within the Commission structure by, for example, the establishment of committees for those specific purposes.

38. For some time, the Secretariat has sought the assistance of outside experts from different legal traditions in preparing materials for consideration by working groups. Those expert group meetings have enabled the Secretariat to prepare materials that are more thoroughly researched and developed than might otherwise be the case. More extensive use of such informal methods may save, or enable more effective use of, meeting time for both the Commission and the working groups. However, it may raise concerns about overrepresentation and the excessive influence of those experts and delegates that are able to participate in those informal consultations (participation might be limited by both availability and access to funding). One solution might be to consider holding regional expert group meetings, possibly in association with a regional office.

39. Although the Secretariat has some funding for such informal consultations and often is required to meet some of the costs associated with holding those meetings, greater use of such methods may have the effect of transferring the cost of funding participation in UNCITRAL work from States to the Secretariat. The funding that is currently available to the Secretariat is very limited and, in view of increasing budgetary constraints, is unlikely to be extended in the future. Such a practice may also lead to imbalance in the manner in which the work is conducted and alter the importance attached to the working group/Commission structure. The benefits ascribed to that structure are that it is not only an inclusive process, which contributes significantly to the legitimacy of UNCITRAL texts, but also that it provides a forum for learning about the work being discussed and is a primary repository of relevant expertise.

40. Other informal methods that might be considered include online consultation through circulation of drafts, discussion groups, conference calls and other

collaborative online tools. However, the strategic implications of placing more emphasis on informal methods is a topic that the Commission may wish to consider in some detail.

### **3. Facilitation of enactment and use of texts**

#### **(a) Background**

41. Development of legislative texts forms the backbone of the Commission's activities. By focusing on the use and adoption of those texts, promotional activities give that legislative activity meaning and relevance. Without those activities, the legislative texts remain little more than reference tools. Technical assistance (TA) activities can not only demonstrate the relevance of UNCITRAL texts to States and support their wider adoption and use, they can also inform further legislative activity, for example, by enabling the efficacy of issued texts to be assessed in practice, by pointing to best practices and experience that should be reflected in future texts (or the revision of existing texts) and by identifying areas for future work. Without TA activities, UNCITRAL's goal of harmonization cannot be achieved.

42. The international law scene has greatly changed since the establishment of UNCITRAL. The attention of policymakers is often drawn to other areas, such as environmental law or criminal law, and resources, particularly in developing countries, are seldom available for the consideration of international trade law texts. Moreover, international business law is often perceived as a highly technical matter, involving private sector interests and requiring long-term attention. Local capacity to consider adoption or enactment of texts is often lacking.

43. Although the work of the Commission has seen some change of emphasis from hard law to more soft law instruments, the focus of the Commission has remained on legislative work, which has engaged the majority of the existing resources. While the number of legislative texts completed has increased, a similar increase is not evident in the adoption or enactment of those texts.

44. Moreover, it is apparent that smaller and developing countries have been comparatively more active in adopting UNCITRAL texts than larger and developed ones, even taking into account lack of local capacity and conflicting priorities vis-à-vis limited resources.

45. A specific concern regards coordination with Regional Economic Integration Organizations with normative powers in the field of commercial law. While UNCITRAL texts have often formed the basis of regional legislation, lack of coordination has recently prevented the wider adoption of texts having both regional and global significance in the member States of those Organizations. This matter is particularly serious for adoption of treaties when a State needs de facto to deposit a declaration on the sharing of competence before becoming a party to a treaty. This need may arise in cases similar to those envisaged in article 17(2) of the United Nations Convention on the Use of Electronic Communications in International Contracts (Electronic Communications Convention).

46. The annual report to the Commission on technical cooperation and assistance outlines the activities undertaken by the Secretariat in the previous 12 months with

respect to the promotion of UNCITRAL texts. The Commission typically takes note of those activities, stresses the importance of technical assistance and encourages the Secretariat to continue to provide that assistance to the broadest extent possible and to improve its outreach, in particular to developing countries (A/66/17, para. 253), while noting also that the Secretariat's continuing ability to do so is dependent upon the availability of funds to meet associated costs. The Commission has also requested the Secretariat to continue exploring alternative sources of extrabudgetary funding, in particular by more extensively engaging permanent missions, as well as other possible partners in the public and private sectors (A/66/17, paras. 258-259). The Commission has also agreed on the need for a comprehensive approach to the furtherance of its mandate in this regard (A/66/17, para. 254).

47. For many years, the provision of technical assistance and participation in TA activities has been undertaken by the Secretariat in a reactive manner, in response to specific requests from a range of different sources, involving diverse types of activity and utilizing whatever resources might be readily available. Examples include:

(a) Undertaking briefing missions and participating in seminars and conferences, organized at both regional and national levels;

(b) Assisting countries in assessing their trade law reform needs, including by reviewing existing legislation;

(c) Assisting with the drafting of national legislation to implement UNCITRAL texts;

(d) Assisting multilateral and bilateral development agencies to use UNCITRAL texts in their law reform activities and projects;

(e) Providing advice and assistance to international and other organizations, such as professional associations, organizations of attorneys, chambers of commerce and arbitration centres, on the use of UNCITRAL texts; and

(f) Organizing training activities to facilitate the implementation and interpretation of legislation based on UNCITRAL texts by judges and legal practitioners.

48. Generally, funding for TA activities is provided from either the UNCITRAL trust account for symposia (such activities are indicated with an asterisk (\*) in the annual report) or by the host State or organization. The responsive nature of these activities has made the comprehensive promotion of texts difficult and lack of resources has meant not all requests for assistance can be addressed.

49. Traditionally, most TA activities have been of an ad hoc, one-off nature, occurring only once within a particular reporting period. Increasingly, however, there has been involvement in the provision of technical assistance as part of an ongoing series of activities, whether within a particular region, such as the Asia-Pacific Economic Cooperation (APEC) Ease of Doing Business Project (Enforcing Contracts) (A/CN.9/753, para. 11) and the partnership with the Deutsche Gesellschaft für Internationale Zusammenarbeit ("GIZ") in the Balkans (A/CN.9/753, paras. 12-13) or to promote a particular text, such as the Model Law on Procurement (A/CN.9/753, para. 38).

50. In response to the increasing pressure on its limited resources for conducting TA activities, the Secretariat has developed a more strategic, proactive approach to this work and the relevant stakeholders, prioritizing its activities to focus on:

(a) Delivering technical cooperation and assistance at the regional and subregional levels, including through regional centres established by UNCITRAL;

(b) Promoting the universal adoption of fundamental or framework instruments with near universal adoption (principally the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)); and

(c) Promoting the early entry into force of recently adopted conventions (the Electronic Contracting Convention and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules)), and the enactment of recent model laws.

51. One successful means of delivering TA has been to form strategic partnerships with major law reform agencies (including bilateral aid agencies, international financial institutions and multilateral development banks) for the specific purpose of promoting specific UNCITRAL instruments (e.g., the Model Law on Public Procurement) or to develop standards incorporating UNCITRAL texts that will form the basis of the law reform efforts of those agencies (e.g., World Bank on insolvency and secured transactions). An additional possibility is promoting UNCITRAL texts as an integral part of the reform required under other international instruments (e.g. the Model Law on Public Procurement and the United Nations Convention against Corruption (2003)). These partnerships indicate that resources for these activities are available, and that by adopting a strategic approach to securing them, promotion of relevant texts would be enhanced.

## **(b) Current position**

### *(i) Summary of activities undertaken*

52. The annual note by the Secretariat gives an accurate picture of the types of TA activity being undertaken, the texts being promoted and the regions in which activities are conducted. For the activities conducted in 2011-2012 see A/CN.9/753.

53. In 2009-2010, the Secretariat devoted approximately 193 days to delivering TA activities (including travel time); in 2010-2011 approximately 187 days and in 2011-2012 approximately 289 days (including 55 days relating to the establishment of the regional centre in Korea).

### *(ii) Regional centres*

54. At its forty-fourth session in 2011, the Commission approved the establishment of the UNCITRAL Regional Centre for Asia and the Pacific in Incheon, Republic of Korea. Officially opened in January 2012, the main objectives of the Regional Centre will be to enhance international trade and development in the Asia-Pacific region by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL; to provide bilateral and multilateral technical assistance to States with respect to the adoption and uniform interpretation of

UNCITRAL texts through workshops and seminars; to engage in coordination activities with international and regional organizations active in trade law reform projects in the region; and to function as a channel of communication between States in the region and UNCITRAL.

55. In the short term, because of the work required to establish regional centres and to recruit the necessary staff (both internationally and locally), the establishment of those centres can be expected to have an impact on the Secretariat. A key aspect is the need both for familiarity with the work and working methods of UNCITRAL and coordination between the Secretariat and the regional offices, in terms of activities, use of expertise and quality assurance. This has been managed in the first regional office by seconding a member of the Secretariat; this approach will not be sustainable in the longer term if more regional offices are to be established. Nevertheless, it will be desirable for regional office managers, if recruited from outside the Secretariat, to have some period of time working in the Secretariat to familiarize themselves with the texts developed by UNCITRAL and its working methods.

**(c) Issues**

56. The establishment of the TA section in the Secretariat in 2004 was intended to allow ITLD to take a more strategic approach to its non-legislative activities. As noted above, the Secretariat remains largely the same in size as it was in the 1970s, when no or very few UNCITRAL standards existed. In comparison, there are now more than 25 standards (see annex 1) to be promoted. In addition, the availability of ITLD staff for non-legislative activities is currently limited by the size of the Secretariat in relation to the number of active working groups and also by the Commission's focus on, and direct involvement in, legislative activity; once one legislative text is completed, the focus is swiftly directed to the next such activity. The consequence is that non-legislative activities tend to be underserved in terms of recognition, time and allocation of resources, with expected consequence for their ultimate impact. Moreover, the strict timetabling for the conduct of legislative work often requires TA activities to fit between preparation of documents and servicing of working group sessions. A particularly disturbing illustration of that situation is to be found in the lack of secretariat resources to service such essential texts as the United Nations Convention on Contracts for the International Sale of Goods (CISG) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) as actively as might be required, despite the importance of following up on the implementation of those texts and examining possible follow-up work (see below, A/CN.9/752/Add.1, para. 2).

57. Aside from considering the annual report of the Secretariat, the Commission has traditionally not played an active role in the provision of technical assistance, and accordingly there is a disconnect between its legislative activity and its involvement in the TA activity required to promote that legislative activity. Moreover, States participating actively in the development of a particular text do not necessarily proceed to its adoption as a matter of course. In part, that may be a response to the fact that those participating in the development of a text may not be responsible for its ultimate use or adoption in a particular State. In addition, some States do not regard the texts as being relevant to their own situation and their goal in participating in the working groups is to encourage others to use the texts

developed. Experience shows, however, that that encouragement often is not given and the opportunity to promote UNCITRAL texts as part of a State's bilateral or multilateral aid programme or within their regional groups often is not taken. The Commission has recently acknowledged some of these issues, noting the desirability of ensuring better communication on the mandate and work of UNCITRAL between the Commission and the Secretariat on the one hand and the Commission and decision makers on trade law reform on the other (A/66/17, para. 257).

58. Key issues concerning TA activities include: (a) achieving a balance between developing new texts and administering the body of texts that already exists; (b) developing more efficient ways of conducting TA activities; and (c) defining a more active role in the delivery of TA activities for the Commission and its working groups. In addition, if the Commission considers that a more strategic approach to the subject-areas and topics of its work is appropriate, the relevant priorities would shape TA activities, and the Secretariat would thus be able to take a more proactive rather than reactive approach in conducting those activities, as noted below, subject to the resource constraints also noted below.

(i) *Improving effectiveness and efficiency*

59. Despite the Secretariat's adoption of a more strategic approach to TA activities, lack of resources has meant that a number of texts, especially some older ones, remain largely unpromoted and have not been widely adopted;<sup>6</sup> some conventions have not yet entered into force. Moreover, the focus on legislative instruments such as conventions and model laws has meant other types of text, such as legislative guides and more soft law texts, which require a different promotion strategy and are more difficult to monitor in terms of use and adoption, may not always have received the same or an appropriate amount of attention.

60. The adoption of a more strategic approach in order to make the most of limited staff and financial resources has implied a prioritization of the relative importance of various texts. It is a practical reality that not all texts can be effectively promoted and that at least with respect to some, particularly older texts that are not widely adopted, the Secretariat may rapidly be losing the necessary expertise (and the resources to maintain that expertise). In some instances, the Secretariat has relied upon external expertise, but as time passes after a particular text has been finalized, that expertise becomes increasingly difficult to identify (particularly where there is no current working group dealing with the subject area). Moreover, reliance on external expertise may raise issues concerning the quality of the assistance delivered, and the ability of the Secretariat to maintain the appropriate level of quality control. This may be a constraint even where the Secretariat has formed long-standing partnerships that can be pursued for provision of TA, as it is difficult to monitor the presentation and promotion of its texts by these external partners.

<sup>6</sup> In the view of the Secretariat, striking examples of texts that suffer from insufficient promotion include the United Nations Convention on Independent guarantees and Stand-by Letters of Credit (1995), the UNCITRAL Model Law on International Credit Transfers (1992), the United Nations Convention on the Assignment of Receivables in International Trade (2001), and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).

61. Options for improving effectiveness and efficiency might include:

(a) Developing more strategic partnerships; as noted above, some such partnerships, especially at the regional and subregional levels, have proven successful in promoting UNCITRAL texts;

(b) Promoting increased awareness of UNCITRAL texts within the United Nations system (see below), among bilateral and multilateral donors and among countries that might benefit from their adoption;

(c) Encouraging non-governmental organizations, especially those that participate in the work of UNCITRAL, to take a greater role in publicizing the relevance of UNCITRAL texts and where applicable to promoting their use and adoption in law reform efforts;

(d) Developing alternative strategies for the promotion of texts based upon the nature of the text. Practice guides and other non-legislative texts, for example, might best be promoted by wide dissemination to courts and other specific users;

(e) Using working groups and the Commission as resources to identify appropriate expertise;

(f) Making greater use of video conferencing and other communications technologies to deliver TA materials and training programmes in order to reduce the need for travel and expenditure of associated resources.

(ii) *Role of the working groups and the Commission*

62. The Commission and the working groups might consider playing an expanded role in the conduct of the Commission's TA activities. Various options for an expanded role, subject to resource issues as highlighted below, might include:

(a) In addition to their legislative activities, working groups might function, for example, as a standing advisory or reference group on TA; as a forum for holding discussions on TA and for providing expertise in response to specific requests for assistance; as a forum for identifying activities that States might organize, sponsor or deliver themselves either nationally or on a regional basis;

(b) A review mechanism could be established in working groups so that they might function as a forum for reporting on activity with respect to the adoption of texts. For example, at each working group session (or at least at one per year), a representative of each of the regional groups might be asked to speak on behalf of States in that group as to the progress made (and perhaps obstacles encountered) in implementing relevant texts of that working group. In order to structure such an intervention and keep it on point, the Secretariat might provide a list of standard questions that would elicit the necessary information in brief form. This could be made a regular working group agenda item, the results of which would form part of the working group report to the Commission, which could have an analogous process at its annual meeting. This could help regularise member States' input into the TA process, act as a spur to action by States, and identify areas where TA could be targeted (either by the Secretariat, member States or international bodies). Such a process might commence, for example, by focussing on signatories of conventions with a view to seeing how States could be assisted to move to ratification and examining the use and adoption of model laws and legislative guides;



(c) Taking advantage of the pause between the completion of a text and commencement of the next project for the working group to focus on TA and promotion of the recently completed text. This might include identifying a strategy for promotion of a text and identifying and developing promotional materials. This phase could be regarded as an essential part of the effective production of a legislative text, and therefore related needs could be taken into account as the actual drafting of that text progressed;

(d) Improving communication between the Commission and decision makers on trade law reform in accordance with the need identified by the Commission. This might include the Commission devising ways of reaching out to law reformers both at national level and those focusing on providing services for law reform in other States or through regional groups. This activity might be facilitated by the formation of a TA or strategic planning committee within the Commission.

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