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Report of the Working Group on Arbitration and Conciliation on the work of its forty-third session (Vienna, 3-7 October 2005)

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I. Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission 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 Working Group II (Arbitration and Conciliation) and decided that the priority items for the Working Group should include, among other matters, enforceability of interim measures of protection and the requirement that an arbitration agreement be in writing.

2. The most recent summary of the discussions of the Working Group on interim measures of protection and the written form requirement for the arbitration agreement is contained in document A/CN.9/WG.II/WP.135, paragraphs 5 to 24. The Secretariat was asked to prepare revised versions of draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration ("the Arbitration Model Law") relating to the power of an arbitral tribunal to order interim measures of protection, of a new article to the Arbitration Model Law relating to the recognition and enforcement of interim measures of protection (tentatively numbered article 17 bis), of a new article to the Arbitration Model Law relating to court-ordered interim measures (tentatively numbered article 17 ter), as well as of draft article 7 of the Arbitration Model Law relating to the definition and form of the arbitration agreement, for consideration by the Working Group at its forty-third session.

3. The Working Group, which was composed of all States members of the Commission, held its forty-third session in Vienna, from 3-7 October 2005. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Cameroon, Canada, China, Croatia, Czech Republic, France, Germany, Guatemala, Iran (Islamic Republic of), Italy, Japan, Lithuania, Mexico, Nigeria, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

4. The session was attended by observers from the following States: Finland, Indonesia, Iraq, Ireland, Latvia, Malaysia, Netherlands, New Zealand, Philippines, Romania, Slovakia, United Arab Emirates and Viet Nam.

5. The session was also attended by observers from the following international intergovernmental organizations invited by the Commission: NAFTA Article 2022 Advisory Committee (NAFTA) and Permanent Court of Arbitration.

6. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Arbitration Association (AAA), Asia Pacific Regional Arbitration Group (APRAG), Association Suisse de l'Arbitrage (ASA), Club of Arbitrators of the Milan Chamber of Arbitration, Council of Bars and Law Societies of Europe (CCBE), Forum for International Commercial Arbitration (FICA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), Kuala Lumpur Regional Centre for Arbitration (KLRCA), the Chartered Institute of Arbitrators, the European Law Students Association (ELSA), the London Court of International

Arbitration (LCIA), Regional Centre for International Commercial Arbitration (Lagos) and Vienna International Arbitral Centre (VIAC).

7. The Working Group elected the following officers:

Chairman: Mr. José María ABASCAL ZAMORA (Mexico);

Rapporteur: Ms. Izabela WERESNIAK (Poland).

8. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.135); (b) a note by the Secretariat containing a newly revised draft of article 7, paragraph (2), of the Arbitration Model Law prepared by the Secretariat pursuant to the decisions made by the Working Group at its thirty-sixth session (A/CN.9/WG.II/WP.136); (c) a note by the Secretariat containing a proposal made by a delegation for a revision of article 7, paragraph (2) of the Arbitration Model Law (A/CN.9/WG.II/WP.137); (d) a note by the Secretariat containing newly revised draft provisions on interim measures of protection pursuant to the decisions made by the Working Group at its fortieth, forty-first and forty-third sessions (A/CN.9/WG.II/WP.138); and (e) the report of the Working Group on the work of its forty-second session (A/CN.9/573).

9. The Working Group adopted the following agenda:

1. Opening of the session;
2. Election of officers;
3. Adoption of the agenda;
4. Preparation of uniform provisions on interim measures of protection and on the requirement that an arbitration agreement be in writing;
5. Other business;
6. Adoption of the report.

II. Deliberations and decisions

10. 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.136, A/CN.9/WG.II/WP.137 and A/CN.9/WG.II/WP.138). The deliberations and conclusions of the Working Group with respect to those items are reflected in chapters III to VIII. The Secretariat was requested to prepare revised draft provisions on interim measures of protection and the written form requirement for arbitration agreements, based on the deliberations and conclusions of the Working Group.

III. 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

11. The Working Group noted that the Commission, at its thirty-eighth session (Vienna, 4-15 July 2005), had expressed its expectation that the Working Group would be able to present its proposals for the revision of both articles 7 and 17 of the Arbitration Model Law for final review and adoption to the Commission at its thirty-ninth session in 2006 (A/60/17, paras. 175-177).

12. The Working Group recalled that, at its fortieth session (New York, 23-27 February 2004), it had undertaken a detailed review of the text of the revised version of article 17 ("draft article 17") regarding the power of an arbitral tribunal to grant interim measures of protection. The Working Group resumed discussions on draft article 17, on the basis of the text prepared by the Secretariat to reflect the discussions of the Working Group as set out in A/CN.9/WG.II/WP.138.

Paragraph (1)

13. A proposal was made to add the words "or modify them" at the end of paragraph (1) and to delete paragraph (6). In support of the proposal, it was suggested that these additional words were intended to extend the scope of paragraph (1) to encompass the situation provided for in paragraph (6) where a party requested an arbitral tribunal to modify, suspend or terminate an interim measure. The other situation covered by paragraph (6) namely, the power of an arbitral tribunal to modify, suspend or terminate an interim measure upon its own initiative was said to be inherent to the arbitral process and therefore that part of paragraph (6) was said to be unnecessary.

14. While some support was expressed for that proposal, it was said that paragraphs (1) and (6) dealt with the power of an arbitral tribunal to grant interim measures at the request of the parties at different stages of the arbitral process and therefore both paragraphs should be retained.

15. It was pointed out that the reference to modification, suspension or termination of an interim measure by an arbitral tribunal on its own initiative, as provided for under paragraph (6), was necessary to address the situation of non-participating respondents.

16. In the context of that discussion, it was also stated that the terms "suspend" or "terminate" would not necessarily be encompassed within the term "modify".

17. After discussion, the Working Group agreed to adopt paragraph (1) without modification. It was agreed that the questions raised in relation to paragraph (6) might need to be further discussed (see below, paras. 45 and 46).

Paragraph (2)

Chapeau

18. The Working Group adopted the substance of the chapeau of paragraph (2) without modification.

Subparagraph (a)

19. The Working Group adopted the substance of subparagraph (a) without modification.

Subparagraph (b)

"[, or to prejudice the arbitral process itself]"

20. The Working Group considered whether the bracketed words "or to prejudice the arbitral process itself", at the end of subparagraph (b), should be retained in order to clarify that an arbitral tribunal has the power to prevent obstruction or delay of the arbitral process, including by issuing anti-suit injunctions.

21. The Working Group recalled its earlier discussions on the question whether paragraph (2) of draft article 17 should 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) (A/CN.9/547, paras. 84-92). It was suggested, however, that the bracketed text should not be understood as merely covering injunctions against suits but rather as more broadly covering injunctions against the large variety of actions that existed and were used in practice to obstruct the arbitral process.

22. Reservations were expressed against draft article 17 directly or indirectly allowing the use of anti-suit injunctions given that these types of injunctions were unknown or unfamiliar in many legal systems and that there was no uniformity in practice relating thereto. As well it was said that such anti-suit injunctions did not always have the provisional nature of interim measures and related to the question of the competence of the arbitral tribunal, which was a matter not to be confused with the granting of an interim measure.

23. However, 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 stated that, notwithstanding the fact 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 faced with tactics aimed at obstructing or undermining the arbitral process. It was also stated that it was legitimate for arbitral tribunals to seek to protect their own process.

24. It was stated that, at previous sessions, the Working Group had expressed preference for inclusion of 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. In that respect, it was noted that some State courts had identified the power to order anti-suit injunctions and to prevent other obstructions of the arbitral process as an inherent power of the arbitral tribunal. It was said that paragraph (2) (a) of draft article 17 was flexible, open-ended and

probably broad enough to encompass anti-suit injunctions but for the sake of clarity, it would be preferable to include the proposed words.

25. 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 Arbitration 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.

26. After discussion, the Working Group agreed to retain the bracketed words at the end of paragraph (2) (b) and to delete the brackets, so that paragraph (2) (b) would, in substance, read: "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".

Subparagraph (c)

27. The Working Group adopted the substance of subparagraph (c) without modification.

Subparagraph (d)

28. It was proposed that subparagraph (d) be deleted. It was said that the reference to evidence that "may be relevant and material" was too broadly cast and could open the floodgates of legal arguments relating to whether a matter was relevant but not material or material but not relevant. As well, it was suggested that the question of evidence was already covered by article 19 (2) of the Arbitration Model Law, which provided that the power conferred upon the arbitral tribunal included a power to determine the admissibility, relevance, materiality and weight of any evidence. It was said that the arbitral tribunal should not be requested to prejudge the relevance and materiality of evidence at the stage of a granting of an interim measure.

29. However, the Working Group observed that the phrase "relevant and material" was already included in the IBA Rules on the Taking of Evidence in International Commercial Arbitration (adopted by resolution of the IBA Council, June 1999), which had been the product of much debate. It was noted that the phrase had taken on a meaning such that the term "relevant" required that the evidence be connected to the dispute and the term "material" referred to the significance of the evidence. In support of its retention, it was said that the phrase was commonly used and understood in international arbitration.

30. It was said that subparagraph (d) did not in any way diminish the power contained in article 19 (2) in the Arbitration Model Law but rather dealt with different issues. While article 19 (2) dealt with the power of an arbitral tribunal to assess the admissibility and value of evidence, subparagraph (d) dealt with the right of an arbitral tribunal at an earlier stage to grant an order to preserve evidence.

31. After discussion, the Working Group agreed to retain the text of subparagraph (d) unchanged.

Paragraph (3)

Chapeau—interplay with paragraph (2) (d)

32. A proposal was made that the general requirements contained in paragraph (3) should not apply to all types of interim measures described in paragraph (2). For example, it was said that it would not be appropriate in all circumstances that a party applying for an interim measure to preserve evidence under subparagraph (d) necessarily demonstrate that exceptional harm would be caused if the interim measure was not ordered or to require the requesting party to otherwise meet the very high threshold established in paragraph (3) (A/CN.9/547, para. 91). For that reason, a proposal was made to add, as opening words to paragraph (3), the words: "Except with respect to the measure referred to in subparagraph (d) of paragraph (2),". Support was expressed for that proposal for the reason that the preservation of evidence should not be subject to the tests contained in paragraph (3). An alternative proposal was to phrase the chapeau of paragraph (3) in an affirmative form, so that it would read as follows: "The party requesting the interim measure of protection under subparagraphs (2) (a), (b) and (c) shall satisfy the arbitral tribunal that:". That proposal was agreed to in substance by the Working Group.

33. It was suggested that explanatory material accompanying article 17 could indicate that the fact that the type of measure contained in subparagraph (d) was not subject to paragraph (3) did not mean that an arbitral tribunal would not examine and weigh the circumstances in determining the appropriateness of ordering the measure.

34. An arbitral tribunal having to decide on the granting of an interim measure to preserve evidence would likely engage in balancing the degree of harm suffered by the applicant if the interim measure was not granted with the degree of harm suffered by the party opposing the measure if that measure was granted. It was generally felt by the Working Group that that matter should be dealt with in article 17, instead of being left to explanatory material accompanying article 17. Therefore, it was proposed to add a new paragraph, after paragraph (3) providing as follows: "With regard to requests for interim measures of protection under paragraph (2) (d), the requirements in paragraphs (3) (a) and (3) (b) shall apply only to the extent the arbitral tribunal considers appropriate." That proposal was agreed to, in substance, by the Working Group.

35. It was pointed out that the granting of interim measures to preserve evidence might have a negative effect, and the conditions defined under paragraph (3) (b) should nevertheless apply in relation to the granting of an interim measure of protection on the preservation of evidence. An alternative proposal was to add the proposed opening words "Except with respect to the measure referred to in subparagraph (d) of paragraph (2)," in paragraph (3) (a) instead of adding these words in the chapeau. That proposal did not receive support.

Subparagraph (a)

36. The Working Group recalled that, at its fortieth session, concern had been expressed that subparagraph (a) could be narrowly interpreted as excluding from the field of interim measures any loss that might be cured by an award of damages.

37. The Working Group agreed to retain the word “adequately” and to clarify, in any explanatory material accompanying paragraph (3), that the paragraph should be interpreted in a flexible manner requiring a balancing of 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.

38. Taking account of these views, the Working Group agreed to retain the substance of subparagraph (a) without modification.

Subparagraph (b)

39. Concern was expressed that subparagraph (b) did not sufficiently guard against the danger or the perception that an arbitral tribunal might prejudge the merits of the dispute at the stage of granting an interim measure. In order to address that concern, various proposals were made.

40. A proposal was made to delete the words “provided that” and express the two limbs as two separate sentences. An alternative proposal was to replace the words “provided that” with the word “but” in order to clarify that a determination as to the possible success on the merits of the requesting party should not be considered as a condition for the granting of an interim measure but rather as a conclusion in respect thereof. Those proposals were not widely supported.

41. Yet another proposal was to clarify that the words “any subsequent determination” related to a determination on the merits and therefore to replace the words “any subsequent determination” by words along the following lines: “determination as to the merits”.

42. However, it was pointed out that the words “any subsequent determination” did not only refer to an award as to the merits but also a procedural order. After discussion, it was agreed to retain subparagraph (b) as drafted.

Paragraph (4)

43. The substance of paragraph (4) was adopted without modification.

Paragraph (5)

44. A proposal was made to add as opening words to paragraph (5): “If so ordered by the arbitral tribunal” for the reason that, given the divergent rules in civil and common law systems with respect to the duty of disclosure, it would be unwise to provide for a general rule on that question. That proposal was not supported and the Working Group adopted the substance of paragraph (5) without modification.

Paragraph (6)

45. Taking account of its earlier related discussions under paragraph (1) (see above, paras. 13 to 17), the Working Group agreed that “suspension” or “termination” while possibly encompassed by the term “modification” were special types of modification and thus should be expressly mentioned.

46. In the interests of clarity, it was proposed that paragraph (6) be restructured as follows: “The arbitral tribunal may modify, suspend or terminate an interim measure of protection it has granted, at any time: (a) upon application of any party; or (b) in

exceptional circumstances, on the arbitral tribunal's own initiative, upon prior notice to the parties." That proposal was adopted by the Working Group.

Paragraph (6 bis)

47. It was pointed out that, as drafted, the text did not appear to envisage liability in the situation where the requirements for the granting of the interim measure had been met but the measure was ultimately found to be unjustified. It was proposed that the words "the interim measure should not have been granted" be replaced by the words "the interim measure was unjustified". That proposal was objected to on the ground that it might be seen as inviting discussion about whether or not the arbitral tribunal had been justified in granting the interim measure and potentially creating liability for the arbitral tribunal itself. After discussion, the proposal was not adopted.

48. Another proposal was made to replace the words "order an award of" in the second sentence of paragraph (6 bis) with the words "award" so that it would be clear that the action was an award not an order. The sentence would read: "The arbitral tribunal may award costs and damages at any point during the proceedings". It was said that, in order to permit a challenge of a decision of an arbitral tribunal regarding costs and damages it should be made clear that such a decision should be rendered in the form of an award. That proposal was adopted.

Paragraph (7)

General discussion

49. The Working Group recalled that, at its forty-first (Vienna, 13-17 September 2004), and forty-second (New York, 10-14 January 2005) sessions, it undertook a detailed review of the text of paragraph (7) of draft article 17 regarding the power of an arbitral tribunal to grant protective measures on an ex parte basis. The Working Group also recalled that, notwithstanding a wide divergence of views, it had reached agreement upon a compromise text of paragraph (7) (referred to as "the compromise") on the basis of the principles that, that paragraph would apply unless otherwise agreed by the parties, that it should be made clear that preliminary orders had the nature of procedural orders and not of awards, that no enforcement procedure would be provided for preliminary orders in article 17 bis, and that no footnote would be added (A/CN.9/573, para. 27). That compromise was reflected in the note by the Secretariat (A/CN.9/WG.II/WP.138, para. 5) (referred to as "the compromise text").

50. The Working Group observed that, at its thirty-eighth session, the Commission had noted that the issue of ex parte interim measures remained contentious. While some delegations had expressed the hope that the compromise text reached was the final one, other delegations had expressed doubts as to the value of that compromise, in particular in view of the fact that it did not provide for enforcement of preliminary orders (A/60/17, para. 175).

51. Repeating a proposal that had been made at that session, it was suggested that paragraph (7) be redrafted in the form of an opt-in provision, applying only where the parties had expressly agreed to its application (A/60/17, para. 175). Another proposal was to place the provision on preliminary orders, including any aspect of

an enforcement regime applicable to those measures, in a separate article to draft article 17. It was said that that proposal would also facilitate the adoption of draft article 17 by States that did not wish to adopt provisions relating to preliminary orders (A/60/17, para. 176). In addition to the proposals made at the Commission, it was suggested that paragraph (7) be optional for States, for example, providing for an opt-in mechanism modelled on article X as appended to article 4 of the UNCITRAL Model Law on Conciliation (A/CN.9/WG.II/WP.138, para. 68).

52. Some delegations urged the Working Group to reconsider whether it was still appropriate to retain the compromise text. It was said that there remained strong and enduring opposing views on the notion of interim measures being granted on an ex parte basis and that the Working Group should be careful not to create a controversy in the Commission on that matter, which might be harmful to the reputation of the Arbitration Model Law and that of UNCITRAL. It was also felt that the compromise text might create potential disharmony or confusion for countries having adopted or wishing to adopt the Arbitration Model Law. It was also stated that key bodies, active in the field of arbitration, had voiced concerns on the compromise text.

53. The largest number of delegations who spoke expressed strong opposition to any proposal which sought to revisit and reopen discussion on the compromise text. It was recalled that the compromise text was the result of lengthy discussions, and of significant efforts from both those opposing and those supporting ex parte measures. It was observed that the compromise text represented an innovative approach and provided carefully drafted safeguards, including limiting the availability and duration of measures granted under paragraph (7) which were characterized as preliminary orders rather than as interim measures granted on an ex parte basis. It was said that the doubts and concerns expressed at the Commission, as well as the proposals made at that session reflected debate that had already taken place in the Working Group, but did not raise any new developments or compelling reasons to revisit the compromise.

54. In response to the suggestion that that provision be presented as an “opt-in” provision for States, it was said that it would be unnecessary given that the very nature of a model law provided States with the freedom to adopt certain provisions or not and that such an opt-in format had been discussed and rejected in reaching the compromise.

55. Following a lengthy discussion, the Working Group agreed that the compromise should be retained without modification. The Working Group also agreed that questions relating to the placement of paragraph (7) and the overall structure of draft article 17 would be further considered in the context of the discussion regarding the form in which the revised provisions (comprising draft articles 17, 17 bis and 17 ter) could be presented in the Arbitration Model Law. In determining the final structure of draft article 17 and the placement of paragraph (7), it was suggested that the Working Group keep in mind that the terms “interim measures” and “preliminary orders” represented different legal concepts, and, therefore, it would be advisable to place the provisions dealing with those concepts in separate articles. On the other hand, it was said by some delegations that the provisions regarding preliminary orders should not be separated from the rest of draft article 17 in a way that made them a target for deletion.

Subparagraph (a)

56. To reflect the principle contained in the compromise text that a preliminary order could only be issued as a procedural order and not as an award, a proposal was made that subparagraph (a) should expressly clarify that a preliminary order could only be issued in the form of a procedural order. It was suggested that wording along the lines of "in the form of a procedural order" should be inserted in subparagraph (a). It was said that that clarification would distinguish preliminary orders from interim measures, which, according to draft article 17 (2), could be issued in the form of an award or in another form (eventually inserted in subparagraph (c) by the drafting group: see Annex).

57. It was recalled that the Working Group, at its thirty-second session, already pointed out that the distinction between a procedural order and an interim measure was not only a matter of form but also a matter of substance, since it was said by some that procedural decisions were not enforceable under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") or article 36 of the Arbitration Model Law, and that it was difficult to rule on procedural matters (A/CN.9/573, para. 36). Also, it was pointed out that the meaning of "procedural" was often disputed and therefore the use of that term should be avoided. After discussion, the Working Group agreed that, to avoid any uncertainty regarding the scope and nature of procedural orders, subparagraph (a) should indicate that a preliminary order should not be issued in the form of an award.

Subparagraph (b)

58. The Working Group adopted the substance of subparagraph (b) without modification.

Subparagraph (c)

59. The Working Group noted that, as presently drafted, subparagraph (c) appeared to duplicate the test that the interim measure would be frustrated. To address that concern, a proposal was made to amend subparagraph (c) along the following lines: "The arbitral tribunal may grant a preliminary order provided it considers that there is a reasonable concern that the purpose of the requested interim measure will be frustrated by prior disclosure of the interim measure to the party against whom it is directed." That proposal did not receive support. Another proposal was made to redraft subparagraph (c) to remove the words: "that there is a reasonable concern that the purpose of the requested interim measure will be frustrated where" such that subparagraph (c) would then read: "The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure." After discussion, that proposal was adopted by the Working Group.

Subparagraph (d)

60. The Working Group adopted the substance of subparagraph (d) without modification.

Subparagraph (e)

"at the same time"

61. A proposal was made to delete the words "at the same time" for the reason that the formulation appeared to be redundant in light of the words "at the earliest practicable time," at the end of the first sentence in subparagraph (e). In response, the Working Group was reminded that, when this provision had been discussed at its forty-second session, a distinction had been made between the obligation of the arbitral tribunal to decide on the preliminary order as promptly as required under the circumstances and the obligation of the party against whom the preliminary order was directed to present its case at the earliest practicable time (A/CN.9/573, para. 48). After discussion, the Working Group agreed to retain the words "at the same time".

"any party"—"a preliminary order"

62. For the sake of consistency with subparagraph (d), which referred to "any party", it was proposed that the reference in the first sentence to "the party" should be changed to "any party". Also, given that subparagraph (d) envisaged that an arbitral tribunal might not have granted the preliminary order, it was proposed that the reference to "the preliminary order" be changed to refer to "a preliminary order". Both proposals were agreed to by the Working Group.

"The arbitral tribunal shall decide as promptly as required under the circumstances"

63. It was noted that, as drafted, subparagraph (e) was ambiguous in that it was not clear, in the second sentence, to what decision the words "the arbitral tribunal shall decide as promptly as required under the circumstances" referred. It was widely felt that that matter ought to be clarified. The view was expressed that that sentence was intended to refer to the decision of the arbitral tribunal to adopt or modify the preliminary order after the party against whom it is directed had been given notice and an opportunity to be heard, as provided for under subparagraph (f). Consistent with that view, it was proposed to either include in the second sentence of subparagraph (e) a reference to subparagraph (f) or to merge the second sentence of subparagraph (e) with the second sentence of subparagraph (f). Those proposals did not receive support.

64. The prevailing view was that the words "the arbitral tribunal shall decide as promptly as required under the circumstances" was intended to refer to the decision to be made by the arbitral tribunal in response to any objection that might be raised by the party affected by the preliminary order. In accordance with that view, it was suggested that the second sentence of subparagraph (e) should be expanded in a separate subparagraph and reworded as follows: "The arbitral tribunal shall decide on any objection to the preliminary order as promptly as required under the circumstances."

65. It was pointed out that the drafting of that proposed new subparagraph could be simplified by removing the words "as promptly as required under the circumstances" as, in any case, a decision on a preliminary order ought to be prompt, as shown by the time limit of twenty days for the validity of a preliminary order provided under the existing subparagraph (f). The Working Group adopted the

following text as a new subparagraph: "The arbitral tribunal shall decide promptly on any objection to the preliminary order."

Multi-party arbitration

66. It was suggested that paragraph (7) appeared to contemplate only situations where there were two parties to the arbitration proceedings and thus did not accommodate multi-party arbitrations. For that reason, it was proposed that, for example, in subparagraph (a), the reference to "the other party" could be changed to "any other party". As well, it was pointed out that the communication of information as contemplated under subparagraph (d) only referred to the party against whom the preliminary order was requested. It was pointed out that, in the case of multi-party arbitrations, all parties might have an interest in receiving such information. Similarly, it was said that subparagraph (e) only provided the party against whom the measure was requested the opportunity to be heard and thus did not accommodate multi-party situations. It was suggested that the drafting pattern followed by the text of the Arbitration Model Law, as adopted in 1985, appeared to refer to two-party arbitrations, leaving the question of multi-party arbitrations to the enacting jurisdictions to decide upon. It was suggested that the issues raised by multi-party arbitrations might need to be resolved uniformly in the text of the Arbitration Model Law as a whole and not just in provisions relating to interim measures.

67. While the Working Group agreed that an arbitral tribunal had no jurisdiction to bind parties that were not party to the arbitration agreement, it noted that that matter was of particular importance in the context of granting of preliminary orders. It was highlighted that there had been developments, for example, in a case involving investment arbitration where standing had been given to third parties that might be affected by a decision of the arbitral tribunal. The Working Group agreed that these matters could be considered as items for future work of the Working Group.

Subparagraph (f)

68. The Working Group adopted the substance of subparagraph (f) without modification.

Subparagraph (g)

"shall"—"may"

69. In response to a question as to whether the rules contained in paragraph (4) and subparagraph (g) led to different results in practice, it was explained that there was a difference of emphasis between paragraph (4) and subparagraph (g). Whereas subparagraph (g) provided that the arbitral tribunal "shall" require the provision of security, paragraph (4) provided that the arbitral tribunal "may" require the provision of security. To explain that difference, it was recalled that the Working Group had, in earlier discussions, concluded that the provision of security should be a mandatory requirement, and was an important safeguard, to the granting of a preliminary order (A/CN.9/569, para. 35). It was recalled as well that the Working Group agreed to add discretionary language to subparagraph (g), namely "unless the arbitral tribunal considers it inappropriate to do so" in order to address the concern

that, in some circumstances, requiring security in connection with the granting of a preliminary order would not be feasible (A/CN.9/569, paras. 36 and 37). While it was widely recognized that in practice the two rules might produce largely similar results, it was agreed that the two provisions should be maintained.

"any other party"

70. It was noted that, whereas paragraph (4) of draft article 17 referred to the arbitral tribunal requiring the requesting party "or any other party" to provide appropriate security, subparagraph (g) merely referred to "the requesting party". It was suggested that the words "or any other party" be included following the words "requesting party" in subparagraph (g) to cover situations where it would be appropriate to seek security from a party other than the requesting party, for example, where the requesting party had no funds, was a shell company or was insured. After discussion, that proposal was withdrawn as it was agreed that a decision of the arbitral tribunal could only bind the requesting party regardless of whether a third party, such as a bank or an insurance company, provided that security on behalf of the requesting party.

Subparagraph (h)

Interplay between paragraph (5) and subparagraph (h)

71. The view was expressed that paragraph (5) and subparagraph (h) contained overlapping obligations and that, therefore, subparagraph (h) might be redundant. In response, it was observed that subparagraph (h) established a broad obligation requiring disclosure of all circumstances that the arbitral tribunal was likely to find relevant to its determination, whether or not related to the application, whereas paragraph (5) only referred to any material change in the circumstances on the basis of which the request was made or the interim measure was granted. In addition, it was said that, while paragraph (5) as incorporated by paragraph (7) (b) addressed any material change in the circumstances after the interim measure had been granted, subparagraph (h) provided a broader duty of disclosure that applied from the time the preliminary order was sought until the responding party had presented its case. Given the different purpose and scope of these provisions, the Working Group agreed that subparagraph (h) should be retained to ensure that the requesting party was obliged to provide full disclosure until the other party had been heard (A/CN.9/569, para. 68).

72. It was observed that there appeared to be a lack of clarity concerning the obligation to disclose in that the obligation under subparagraph (h) was described as only applying until the party against whom the preliminary order had been requested had presented its case without stating when the obligation began. As well, it was said that subparagraph (h) did not contemplate the situation where the party against whom the preliminary order was requested was a non-participating party.

73. In order to address those concerns, a proposal was made to amend subparagraph (h) as follows: "Any party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal in reaching its determination whether to grant a preliminary order and such obligation shall continue until the party against whom the preliminary order has been requested has had an opportunity to present its case." It was said that

the proposal did not intend to effect any substantive change in the purpose and scope of subparagraph (h) and paragraph (5) but was intended merely to determine precisely the time when the disclosure obligation in relation to a preliminary order began and ended. As well, the proposal acknowledged the reality that, in certain circumstances, a party might choose not to present its case, and for that reason it would be more appropriate to refer to that party being given an opportunity to present its case. A further proposal was made to include the word "or maintain" after the word "grant".

74. It was suggested that, to better address the uncertainties raised by the interaction between paragraph (5) and subparagraph (h), the following text could be added to the end of the proposal: "Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that the requesting party has with respect to an interim measure under paragraph (5)." It was explained that the term "applying party" had been used in the proposal to be consistent with the fact that the draft provisions referred to an "application" for a preliminary order but referred to a "request" in relation to an interim measure. It was suggested that a consequential amendment flowing from that proposal would be the deletion of the reference to paragraph (5) in paragraph (7) (b).

75. Those proposals were accepted in substance. Subparagraph (h) would therefore read as follows: "Any party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal in reaching its determination whether to grant or maintain a preliminary order and such obligation shall continue until the party against whom the preliminary order has been requested has had an opportunity to present its case. Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that the requesting party has with respect to an interim measure under paragraph (5)."

IV. 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)

Paragraph (1)

76. It was proposed that, having regard to the language used in article 36 (1)(a)(v) of the Arbitration Model Law, paragraph (1) should indicate that an interim measure granted by an arbitral tribunal was binding upon the parties only and the words "on the parties" should therefore be inserted after the term "binding". However, it was pointed out that paragraph (1) of article 17 bis was drafted so as to be consistent with article 35 (1) of the Arbitration Model Law, which did not include any reference to the parties. For that reason, it was agreed that that proposal should not be adopted. The Working Group adopted the substance of paragraph (1) without modification.

Interplay between paragraph 1 and articles 35 and 36

77. A proposal was made to expressly clarify the relationship between the enforcement regime created by article 17 bis and that set out in articles 35 and 36 of the Arbitration Model Law. Diverging views were expressed on the question whether the regime of enforcement under chapter VIII of the Arbitration Model Law could still apply in the context of recognition and enforcement of an interim measure granted by an arbitral tribunal in the form of an award.

78. A view was that, despite the fact that article 17 bis was designed specifically as a regime for recognition and enforcement of interim measures, an award that included an interim measure could nevertheless be subject to enforcement subject to the grounds in articles 35 and 36. It was said that the question whether interim measures granted in the form of an award were included in the scope of the New York Convention had been the subject of diverging opinions in different jurisdictions. Another view was that the form in which an interim measure was issued did not affect its nature and irrespective as to the form, in the area of recognition and enforcement, it would still be considered to be an interim measure to which article 17 bis applied.

79. It was said that the recognition and enforcement regime of interim measures set out in article 17 bis was autonomous but that it might be necessary to expressly exclude the application of articles 35 and 36 to avoid confusion by users. To address that matter, a proposal was made to add, at the end of paragraph (1), the following words: “and excluding the application of articles 35 and 36”. It was said that, if that proposal were to be adopted, the provision contained under article 35 (2) should be expressly included under article 17 bis. Some support was expressed for that proposal on the basis that it clarified the understanding that article 17 bis applied to interim measures to the exclusion of chapter VIII. However, it was said that articles 35 and 36 dealt with recognition and enforcement of awards whereas article 17 bis dealt expressly with recognition and enforcement of interim measures and adding the proposed words might create further ambiguity. The Working Group agreed not to adopt that proposal but noted that the question it raised might need to be further considered at a later stage.

Paragraph (2)

Subparagraph (a)

Chapeau

80. For the sake of consistency with article 36 (1), a proposal was made to replace the chapeau of paragraph (2) by the following words: “Recognition and enforcement of an interim measure may be refused only:”. That proposal was adopted in substance.

Subparagraph (a)(i)

81. The Working Group adopted the substance of subparagraph (a)(i) without modification.

Subparagraph (a)(ii)

82. The Working Group adopted the substance of subparagraph (a)(ii) without modification.

Subparagraph (a)(iii)

83. It was proposed to delete the words "where so empowered" for the reason that it introduced an element that was self-evident and might give the impression that State courts were empowered to review an interim measure de novo. However, that proposal did not receive support as it was considered necessary to retain those words, which limited the possibility of intervention of State courts to situations where they were specifically empowered to revise an interim measure issued by the arbitral tribunal.

84. A proposal was made to delete the words "or where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted". In support of that proposal, it was said that, in the absence of a specific treaty between States, there might be no legal basis for a State court to refuse to recognize an interim measure of protection issued by an arbitral tribunal, which had been terminated or suspended, by the court of another State. That proposal did not receive support.

"modified, terminated or suspended"

85. A proposal was made to add the word "modified" after the word "suspended" for the sake of consistency with the language used under paragraph (4). That proposal did not receive support for the reason that, once an arbitral tribunal had modified an interim measure, the original measure was terminated expressly or impliedly and could no longer be recognized and enforced. However, the Working Group agreed that any explanatory material accompanying article 17 bis should clarify that the enforcement regime set out in article 17 bis applied in respect of any interim measure, whether or not it was modified by the arbitral tribunal.

Subparagraph (b)

Subparagraph (b)(i)

86. The Working Group adopted the substance of subparagraph (b)(i) without modification.

Subparagraph (b)(ii)

87. The Working Group adopted the substance of subparagraph (b)(ii) without modification.

Paragraph (3)

88. A proposal was made to replace the phrase "in exercising that power" with words along the following lines: "in making its determination", so as to be consistent with the language used earlier in that paragraph which referred to "any determination made by the court". That proposal was adopted in substance.

Paragraph (4)

89. The Working Group adopted the substance of paragraph (4) without modification.

Paragraph (5)

90. It was proposed that the conditions to be satisfied in relation to a request for security set out in paragraph (5) be cumulative rather than alternative conditions by replacing ", or" when appearing after the word "security" by the word "and". That proposal was not adopted and the Working Group recalled that it was intended that satisfaction of either of these conditions would permit a request for security.

91. For the sake of consistency with paragraph (4) of draft article 17, which provided that an arbitral tribunal might require not only the requesting party but also any other party to provide security, it was suggested that the words "or any other party" should be added after the words "requesting party" in paragraph (5). That proposal was withdrawn for the reasons set out above in paragraph 70.

Paragraph (6)

92. It was suggested that paragraph (6) could be shortened to reflect the principle, which it was recalled had been agreed as an integral part of the compromise text, that a preliminary order was not enforceable by a State court rather than referring to an interim measure that was issued under standards substantially equivalent to those set forth in paragraph (7). Alternatively, it was proposed that paragraph (6) should simply provide that article 17 bis only applied to interim measures made by an arbitral tribunal under paragraphs (1) to (6) of draft article 17. It was said that that approach respected the principle that preliminary orders would be binding as between the parties and also did not exclude the application of other enforcement regimes to preliminary orders. Yet another approach suggested that inclusion of a statement that preliminary orders were not enforceable sat uncomfortably in article 17 bis, which dealt with recognition and enforcement of interim measures. For that reason it was suggested that that matter be addressed under a new subparagraph to be inserted in paragraph (7) of draft article 17. In addition, it was suggested that in order to deal with an interim measure issued on an ex parte basis which a party sought to enforce in a State that had enacted the Model Law as revised, a new paragraph could be added at the end of article 17 bis along the following lines: "interim measures issued on an ex parte basis will not be enforced".

93. A proposal was made to delete paragraph (6) from article 17 bis and add a new paragraph following paragraph (7) of draft article 17 along the following lines: "a preliminary order made under article 17 (7) shall be binding on the parties but shall not be subject to enforcement by a court". It was suggested that that formulation had the benefit of recognizing that a preliminary order would not be enforceable whether on the basis of the Arbitration Model Law or on any other grounds and avoided the use of the word "unenforceable", which had a further connotation that might undermine the concept of "binding".

94. Various comments of a drafting nature were made on that proposal. It was suggested that the reference to "a court" be changed to "any court" so as to encompass a preliminary order whether made by an arbitral tribunal in the jurisdiction of the court in which enforcement was sought or in any other

jurisdiction. In response, it was said that such a provision could potentially give rise to complex private international law issues and might, in practice, have a very limited effect. Another comment was that the use of the phrase "shall not be subject to enforcement by a court" might have a different meaning from the use of the phrase "shall not be enforceable", namely that that amendment could be interpreted as meaning that the parties had the obligation not to seek enforcement of the preliminary order, but that the preliminary order, of its nature, remained enforceable. It was pointed out that the non-enforceability of preliminary measures was a central feature of the compromise that should be maintained.

95. Concerns were raised that, as drafted, the provision exceeded the competence of the Arbitration Model Law, in that it sought to rule on procedural matters pertaining to State courts and it was said that it was unlikely that the jurisdiction of State courts could be impacted upon by paragraph (6). It was suggested that a better approach would be simply to omit paragraph (6) altogether, which would still have the effect that the preliminary order was not enforceable. A number of delegations stated that this was their preferred solution but that, in the interests of consensus and joint position of all members of the Working Group, they were prepared to accept wording in draft article 17 (7) or article 17 bis (6) by which enforcement of a preliminary order was expressly excluded. It was observed that there was evidence that parties to arbitration agreements were often reluctant to disobey orders of the arbitral tribunal and that there were a series of practical problems in drafting enforcement provisions for a preliminary order, which was expected, in practice, to have a very short lifespan that, in any event, could not exceed 20 days. An alternative proposal was made to include under article 17 bis a provision clarifying that "the provisions of this article are not applicable to preliminary orders issued in accordance with paragraph (7) of article 17". It was said that inclusion of that express language under article 17 bis remained important for the sake of clarity. The Working Group took note of that suggestion.

96. After discussion, the Working Group agreed to delete paragraph (6) from article 17 bis and add a new paragraph following paragraph (7) of draft article 17 along the following lines: "a preliminary order made under article 17 (7) shall be binding on the parties but shall not be subject to enforcement by a court".

Footnote to article 17 bis

97. The footnote was adopted, in substance, by the Working Group.

V. Draft provision on court-ordered interim measures in support of arbitration (for insertion as a new article of the UNCITRAL Model Law on International Commercial Arbitration, tentatively numbered 17 ter)

98. The Working Group recalled that there had been an exchange of views, at its forty-second session, on a possible draft provision expressing the power of State courts to order interim measures of protection in support of arbitration (tentatively numbered article 17 ter). The Working Group resumed discussions on draft article 17, on the basis of the text contained in A/CN.9/WG.II/WP.138.

99. A concern was expressed that the text, as drafted, only empowered a State court to issue an interim measure in support of arbitration if that State court was situated in the same jurisdiction as the place of arbitration. It was said that article 17 ter should be broadened to encompass the situation where a State court was asked to order an interim measure in respect of an arbitration that took place in another jurisdiction. It was stated that it was important from a practical point of view to broaden article 17 ter to clarify that an interim measure could be granted by a State court in a jurisdiction other than that of the place of the arbitration. It was noted that it was a feature of modern practice in international arbitration to seek to secure assets, follow a vessel, preserve evidence, or ask for actions to be taken in a different jurisdiction from that where the arbitration took place.

100. In order to address that concern, a proposal was made to amend article 17 ter by adding the words: "taking place in the country of the court or in another country" after the words "arbitration proceedings". That proposal received support.

101. It was noted that article 1, paragraph (2), of the Arbitration Model Law provided that: "The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State." It was further noted that, given the intention that article 17 ter should apply to arbitrations occurring in a jurisdiction different to that of the State court, article 17 ter should be added to the list contained under article 1, paragraph (2). However, it was pointed out that article (1), paragraph (2), of the Arbitration Model Law defined the scope of the Arbitration Model Law and the Working Group had not been specifically requested by the Commission to work on revisions of that part of the Arbitration Model Law. It was suggested that consistency between article 17 ter and article 1, paragraph (2), of the Arbitration Model Law could still be achieved by adding to the opening words of article 17 ter the following words: "Notwithstanding article 1, paragraph (2)". That proposal was supported.

102. After discussion, the Working Group agreed to adopt, in substance, the following revised version of article 17 ter: "The court shall have the same power of issuing interim measures of protection for the purposes of and in relation to arbitration proceedings taking place in the country of the court or in another country as it has for the purposes of and in relation to proceedings in the courts, and shall exercise that power in accordance with its own rules and procedures insofar as these are relevant to the specific features of an international arbitration. This article shall apply notwithstanding the provisions of article 1, paragraph (2)."

103. A view was expressed that article 17 bis might not fully address the potential problems which might arise with respect to the relationship between the power of State courts to issue interim measures and the power of arbitral tribunals to issue interim orders. It was said that it was unclear whether these powers were coextensive or the exercise of the State court power overrode the power of the arbitral tribunal. That uncertainty could allow parties to defeat the power of arbitral tribunals to issue interim measures by seeking such measures from the State courts. It was suggested that to better delineate the interaction of these powers, article 17 ter could provide that a State court could only act in circumstances where, and to the extent that, the arbitral tribunal did not have the power to so act or was unable to act effectively, for example, if an interim measure was needed to bind a third party or the arbitral tribunal was not yet constituted or the arbitral tribunal had only made a preliminary order. The principle upon which that proposal was based

received some support but it was agreed that that proposal had far-reaching legal and practical implications and raised complex issues that the Working Group might wish to consider at a later stage.

VI. Possible options on the issue of the form in which the current and revised provisions could be presented in the UNCITRAL Model Law on International Commercial Arbitration

104. At its forty-second session, the Working Group requested the Secretariat to consider the issue of the form in which the current and the revised provisions on interim measures could be presented, with possible variants to be considered by the Working Group at a future session (A/CN.9/573, para. 99).

105. The Working Group agreed that the provisions of articles 17, 17 bis and 17 ter be placed in a new chapter, numbered chapter IV bis. Diverging views were expressed on whether the title of that new chapter should refer to "interim measures" only or include as well the words "preliminary orders".

106. It was suggested that paragraph (7) of draft article 17 on preliminary orders be dealt with in a separate article. Another suggestion was that draft articles 17 and 17 bis should be restructured by grouping paragraphs relating to similar issues under separate articles. It was said that the advantage of that presentation would be that the drafting style of the Arbitration Model Law could thereby be preserved and it would allow for a more logical presentation of the provisions. Cautioning that restructuring of these provisions could prove to be a time-consuming exercise, the Working Group requested the Secretariat to prepare a revised draft of articles 17 and 17 bis taking account of these comments and agreed to consider that presentation at its next session.

VII. Report of the drafting group

107. The Working Group having completed its deliberations regarding draft articles 17, 17 bis and 17 ter, a drafting group was established by the Secretariat to implement decisions by the Working Group and ensured consistency between the various language versions of the text. The report of the drafting group, as adopted by the Working Group is annexed to this report.

VIII. Preparation of a model legislative provision on written form for the arbitration agreement

108. The Working Group recalled that it had considered, at its thirty-sixth session (New York, 4-8 March 2002), a draft model legislative provision revising article 7 of the Arbitration Model Law and had discussed a draft interpretative instrument regarding article II, paragraph (2), of the New York Convention. The Working Group agreed to resume discussions with respect to the preparation of that draft legislative provision and had before it a text prepared by the Secretariat on the basis of the discussions in the Working Group held at its thirty-sixth session (A/CN.9/508,

paras. 18-39) ("the revised draft article 7"). The Working Group also considered a proposal by a delegation regarding that issue reproduced in A/CN.9/WG.II/WP.137, as modified by A/CN.9/WG.II/WP.137/Add.1 ("the proposed new text").

109. The proposed new text suggested that the writing requirement for arbitration agreements be omitted from article 7 (2). It was said that, if the proposed new text were adopted, the question of the conclusion of the arbitration agreement and its content would be solely a matter of proof. It was suggested that the proposed new text established a more favourable regime for recognition and enforcement of arbitral awards than was provided for under the New York Convention. It was said that, therefore, by virtue of the "more favourable law provision" contained in article VII of the New York Convention, the Arbitration Model Law would apply instead of article II of the New York Convention. It was noted that, in several jurisdictions that had removed the written form requirement for arbitration agreements, oral arbitration agreements were rarely used and had not given rise to significant disputes as to their validity.

110. While the proposed new text was considered useful to highlight the problems raised by the written form requirements, it was said that removal of the form requirement and of every reference to "writing" could create uncertainty. It was said that the revised draft article 7 reflected the Working Group's understanding of the minimum requirements that should apply in respect of the form of an arbitration agreement, whereas the proposed new text went much further including recognition of the validity of oral arbitration agreements.

111. It was suggested that promoting or recognizing oral agreements too broadly could lead to the generation of awards that would not be capable of being recognized and enforced under the New York Convention for the reason that the arbitration agreement in respect of which the award was made would not fulfil the written form required under article II (2) of that Convention. Another argument was that article VII of the New York Convention expressly referred to "arbitral awards" and, therefore, it was uncertain whether article VII would universally be interpreted as applying in respect of arbitration agreements. It was also suggested that retention of a very flexible type of form requirement mirrored similar provisions that existed in respect of litigation, for example, article 3 (c) of the Convention on Choice of Court Agreements (adopted 30 June 2005) which provided that "an exclusive choice of court agreement is required to be concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference". As well, it was recalled that the Commission had recently agreed to include the New York Convention in a list of international instruments to which the Convention on the Use of Electronic Communications in International Contracting would apply.

112. Views were expressed that both the proposed new text and the revised draft article 7 provided useful options to address concerns relating to the writing requirement. It was suggested that both options might be presented to the Commission as alternative variants. However, it was said that, since both alternatives had the same function to relax the form requirements, it might be possible to reconcile them. One way to achieve that purpose was to amend paragraph (2) of the revised draft by restricting the form requirement to the question of proof rather than validity. That proposal was to include text along the following lines: "The arbitration agreement may be evidenced in writing". Another proposal

was made to amend the revised draft article 7 so that it reflected the wording used in the Convention on Choice of Court Agreements as set out above.

Annex

Report of the drafting group

Chapter IV bis. Interim measures and preliminary orders

Draft article 17

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

(2) An interim measure 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 or prejudice to the arbitral process itself;

(c) Provide a means of 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 under paragraphs (2) (a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages 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) With regard to requests for interim measures under paragraph (2) (d), the requirements in paragraphs (3) (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

(5) The arbitral tribunal may require the requesting party to provide appropriate security in connection with such interim measure.

(6) The requesting party shall promptly disclose 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.

(7) The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunals own initiative.

(8) The requesting party shall be liable for any costs and damages caused by the interim measure 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. The arbitral tribunal may award such costs and damages at any point during the proceedings.

(9) (a) Unless otherwise agreed by the parties, a party may file, without notice to any other party, a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested;

(b) The provisions of paragraphs (3), (4), (7) and (8) of this article relating to interim measures also apply to any preliminary order that the arbitral tribunal may grant pursuant to this paragraph;

(c) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure. Such preliminary order does not constitute an award;

(d) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto;

(e) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time;

(f) The arbitral tribunal shall decide promptly on any objection to the preliminary order;

(g) A preliminary order under this paragraph shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case;

(h) The arbitral tribunal shall require the applying party to provide security in connection with such preliminary order unless the arbitral tribunal considers it inappropriate or unnecessary to do so;

(i) Any party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunals determination whether to grant or maintain a preliminary order, and such obligation shall continue until the party against whom the preliminary order has been requested has had an opportunity to present its case. Thereafter, the applying party shall have the same disclosure obligation with respect to the preliminary order that a requesting party has with respect to an interim measure under paragraph (6);

(j) A preliminary order made under this paragraph shall be binding on the parties, but shall not be subject to enforcement by a court.

Draft article 17 bis

(1) An interim measure 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, subject to the provisions of this article.*

(2) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36, paragraphs (1) (a)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunals decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court 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) 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. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

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

(5) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

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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. 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.

Draft article 17 ter

The court shall have the same power of issuing interim measures for the purposes of and in relation to arbitration proceedings whose place is in the country of the court or in another country as it has for the purposes of and in relation to proceedings in the courts and shall exercise that power in accordance with its own rules and procedures insofar as these are relevant to the specific features of an international arbitration. This article shall apply notwithstanding the provisions of article 1, paragraph (2).