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Summary record of the 910th meeting

Held at Headquarters, New York, on Friday, 25 June 2010, at 3 p.m.

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) (Switzerland)

later: Mr. Moollan (Vice-Chairperson). (Mauritius)

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The meeting was called to order at 3.15 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)

(A/CN.9/703 and Add.1; A/CN.9/704 and Add.1-10; A/CN.9/705)

Report of the Committee of the Whole to the Commission on its consideration of a revised version of the UNCITRAL Arbitration Rules (A/CN.9/XLIII/CRP.1/Add.1-5; A/CN.9/XLIII/CRP.2 and Add.1-3 and A/CN.9/XLIII/CRP.4)

1. **The Chairperson** invited the Committee to consider its draft report to the Commission on its consideration of a revised version of the UNCITRAL Arbitration Rules, contained in documents A/CN.9/XLIII/CRP.1/Add.1-6; A/CN.9/XLIII/CRP.2 and Add.1-3 and A/CN.9/XLIII/CRP.4.

A/CN.9/XLIII/CRP.1/Add.1

2. *Paragraphs 1 to 6 were adopted.*

3. **Mr. Castello** (United States of America), referring to paragraph 7, said that, while States could be described as “sovereign”, intergovernmental organizations could not. He proposed that that word should simply be deleted.

4. **Ms. Montejo** (Office of Legal Affairs) said that she did not oppose the deletion of “sovereign”, but emphasized that such a step should not be construed as affecting the practices and procedures of the United Nations referred to in paragraph 8.

5. *Paragraph 7, as orally amended, and paragraph 8 were adopted.*

6. **Mr. Castello** (United States of America), referring to paragraph 9, said that, by analogy with his proposal to amend paragraph 7, the phrase “sovereign entities” should be replaced with the phrase “States or intergovernmental organizations”.

7. *Paragraph 9, as orally amended, and paragraphs 10 to 18 were adopted.*

8. **Ms. Smyth** (Australia), supported by **Mr. Moollan** (Mauritius), said that the phrase “precluding such consultation, which was said to be usual practice” in paragraph 19 and the phrase “while such consultations were usual in practice” in paragraph 20 were unclear and perhaps did not reflect accurately the Committee’s discussion. She proposed instead using the phrase

“precluding such consultation, which was said to occur in practice” in paragraph 19 and the phrase “while such consultations occurred in practice” in paragraph 20.

9. **Mr. Castello** (United States of America) said that paragraph 20, despite its length, seemed not to reflect completely the Committee’s discussions. He proposed the addition, following the second sentence, of a new sentence reading “It was also suggested that, before adding such language, more precision was required as to how the arbitrators would carry out such consultations.”

10. *Paragraphs 19 and 20, as orally amended, and paragraphs 21 to 24 were adopted.*

11. **Mr. Castello** (United States of America) said that the existing wording of paragraph 25 failed to portray completely the Committee’s discussion of party equality. He proposed that the first sentence should be shortened, ending after “appointing authority”. The following new sentence should be inserted at that point: “However, it was noted that the shifting of all appointing power to the appointing authority safeguarded the principle of equality of the parties”. The remainder of the original first sentence should then be amended to read: “The Committee concluded that there was no need to add such language to the Rules”.

12. *Paragraph 25, as orally amended, was adopted.*

13. **Ms. Smyth** (Australia), referring to paragraph 26, said that, in the first sentence, the phrase “dispense an arbitrator of its obligation” should be replaced by “dispense an arbitrator of his or her obligation”.

14. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that, in the same sentence, the word “dispense” should be replaced by the word “relieve”, which was more appropriate in the context.

15. *Paragraph 26, as orally amended, and paragraphs 27 to 34 were adopted.*

A/CN.9/XLIII/CRP.1/Add.2

16. *Paragraphs 1 to 5 were adopted.*

17. **Mr. Castello** (United States of America), referring to paragraph 6, said that to avoid the risk of inferring that the Committee had independently reached a conclusion as to the immunity against legal process of the President of the Permanent Court of Arbitration (PCA), he suggested rewording the first

two sentences along the following lines. The first sentence would be shortened to read: "The Committee noted that the Secretary-General of the PCA was mentioned as being among those against whom parties would waive liability under the revised Rules." The following wording would then be added to the remainder of the original first sentence in order to clarify that the conclusion had come from the Permanent Court itself: "However, according to the comments of the PCA, it already enjoyed immunity ...".

18. *Paragraph 6, as orally amended, and paragraph 7 were adopted.*

A/CN.9/XLIII/CRP.1/Add.3

19. **Mr. Castello** (United States of America), referring to paragraph 1, proposed that, in order to reflect more accurately the Committee's discussion of the matter, the words "the phrase 'a full opportunity' could be contentious" should be replaced by "the phrase 'a full opportunity' could be invoked to delay proceedings or otherwise misused".

20. *Paragraph 1, as orally amended, and paragraphs 2 to 23 were adopted.*

21. **Ms. Smyth** (Australia), referring to paragraph 24, recalled that, during the Committee's discussion of draft article 23, her delegation had asked whether the Arbitration Rules obliged a respondent to reply to a counterclaim, and that the representative of Greece had pointed out that draft article 24 contained a relevant general provision in that regard. As the Committee's discussion of draft article 24 was covered in paragraph 26, perhaps the latter should be added to paragraph 24.

22. **Ms. Montineri** (International Trade Law Division) said that future readers of the report of the Commission's session would be more likely to look for the background to the Committee's decision in the comments relating to draft article 23 than in those relating to draft article 24.

23. *Paragraphs 24 to 39 were adopted.*

24. **Mr. Castello** (United States of America), referring to paragraph 40, proposed that, in order to reflect more accurately the Committee's discussion of the matter, the final sentence, "That suggestion did not find support" should be replaced by "Since the proposed change continued to provoke a division of opinion, it was not agreed to".

25. *Paragraph 40, as orally amended, and paragraph 41 were adopted.*

26. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York), referring to paragraph 42, said that he wondered why the section of the draft report under discussion omitted any reference to draft article 34 of the revised Rules.

27. **Ms. Montineri** (International Trade Law Division) said that draft article 34 was covered in document A/CN.9/XLIII/CRP.1/Add.4, along with a series of other draft articles which the Committee had originally deferred for finalization.

28. *Paragraphs 42 and 43 were adopted.*

29. **Mr. Castello** (United States of America) said that the references to "the court's public policy" and "the law of the court" in paragraph 44 should more accurately refer to the forum rather than the court.

30. **The Chairperson** said that the word "court" in fact appeared three times in the paragraph, but not with identical meaning. In the first and third instances, "court" meant the court in which enforcement was sought. In the remaining instance, "forum" could be substituted.

31. **Ms. Smyth** (Australia) said that it might be better to refer to the law of the forum of enforcement.

32. **Mr. Loken** (United States of America) said that he wondered if it might be sufficient to refer in each case to the "applicable law".

33. **The Chairperson** said that he was concerned that simply referring to the "applicable law" would not make clear the fact that the applicable law in each situation varied. The current context was not that of the applicable law for the arbitration, but the applicable law regarding legal capacity, arbitrability and public policy.

34. **Mr. Jacquet** (France) said it was important to remember that, as its first sentence indicated, the paragraph in question was attempting to reflect the point raised by the delegation of Norway that the choice of a law to govern an arbitration proceeding was not entirely free. For example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) at times itself indicated which law should be applied. The central issue was therefore one of establishing the applicable law rather than the court or forum.

35. **The Chairperson** said that, in the light of the views expressed, he wished to suggest that the last sentence of the paragraph should be amended to read: "It was highlighted that the law applicable to each of the parties and the law applied by the forum should be taken into consideration regarding legal capacity, arbitrability and public policy". That sentence should be taken in conjunction with the directly previous sentence, on which it expanded.

36. **Mr. Loken** (United States of America) said that the reference in the last sentence of the paragraph to "the law applicable to each of the parties" might also cause confusion. He therefore proposed that the last sentence of the paragraph should read: "It was highlighted that relevant laws regarding legal capacity, arbitrability and public policy should be taken into consideration".

37. **The Chairperson** said that he took it that the Committee wished to amend the last sentence of paragraph 44 in line with the proposal of the United States representative.

38. *It was so decided.*

39. *Paragraph 44, as orally amended, and paragraphs 45 to 52 were adopted.*

The meeting was suspended at 4.05 p.m. and resumed at 4.30 p.m.

A/CN.9/XLIII/CRP.1/Add.4

40. *Paragraphs 1 to 4 were adopted.*

41. **Ms. Thomas** (Observer for the Association of the Bar of the City of New York) suggested that the word "complemented" in paragraph 5 should be replaced by the word "augmented".

42. *Paragraph 5, as orally amended, was adopted.*

43. *Paragraph 6 was adopted.*

44. **Ms. Montineri** (International Trade Law Division) said that the first part of the first sentence of paragraph 7, before the colon, should be replaced by the following: "The Committee considered the following proposal for draft article 2". In paragraph 3 of the proposed text, the word "or" should be inserted before subparagraph "(b)". In paragraph 4, the word "made" should be replaced by the word "effected".

45. *Paragraph 7, as orally amended, was adopted.*

46. **Ms. Montineri** (International Trade Law Division) read out four new paragraphs, to be inserted after paragraph 7, relating in particular to draft article 2, paragraph 5. The new paragraphs reflected the discussion regarding, inter alia, the need for consistency between the revised Rules and other UNCITRAL standards on electronic communication; the drafting of a specific Rule on notice of arbitration; the need to reflect a practice where reliance on electronic communication was still limited; and more generally the pros and cons, in daily arbitration practice, of a Rule relying on deemed receipt of a notification based on dispatch rather than on electronic receipt.

47. The new wording adopted by the Committee, to be inserted at the end of paragraph 5 of draft article 2, would read: "A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address."

48. **Mr. Castello** (United States of America) observed that the deeming rule for time of receipt of electronic transmissions was keyed to sending rather than receipt in order to permit the sender to know with certainty how the time period was calculated, but it was not intended to displace receipt. That should be made clear in the additional text just read out by the secretariat. Also, the reference to general contract terms should indicate that the contract at issue was the one out of which the arbitration had arisen.

49. **Mr. Seweha** (Egypt) said that the report should also reflect the concern expressed at the previous meeting that the term "deemed receipt" included the actual receipt.

50. **The Chairperson** said that the secretariat would draft appropriate wording to cover both those three points.

51. *The new paragraphs relating to draft article 2, as orally proposed by the UNCITRAL secretariat, were adopted pending agreed redrafting.*

52. *Paragraphs 8 and 9 were adopted.*

53. *Paragraph 10 was adopted with a minor drafting change.*

54. *Paragraphs 11 to 14 were adopted.*

55. **Mr. Castello** (United States of America) proposed deleting the words “refusal or” before the words “failure to act” in the first sentence of paragraph 15.

56. *Paragraph 15, as orally amended, was adopted.*

57. *Paragraphs 16 to 22 were adopted.*

58. **Ms. Smyth** (Australia) proposed that the phrase “at the same time” before the words “be communicated” in paragraph 23 should be deleted.

59. *Paragraph 23, as orally amended, was adopted.*

60. **Ms. Smyth** (Australia) proposed deleting the text starting with the words “to empower” to the end of paragraph 24, and replacing it with the following words: “to affect the question of whether an arbitral tribunal may issue orders without hearing the parties. In this respect, one delegation recalled that draft article 17, paragraph 1, requires the arbitral tribunal to treat the parties with equality and provide a fair and efficient process for resolving their dispute.”

61. **Ms. Montineri** (International Trade Law Division) read out an addition to the end of paragraph 24 indicating that the Committee had adopted a proposal clarifying that the Rules remained neutral by reference to applicable law as to whether the arbitral tribunal had the power to permit delayed communications.

62. She also proposed that paragraph 25 should be amended to read: “The Committee adopted the substance of draft article 17, paragraph 4, as it appeared under paragraphs 23 and 24.”

63. *Paragraphs 24 and 25, as orally amended, were adopted.*

64. *Paragraphs 26 and 27 were adopted.*

65. *Paragraph 28 was adopted with a minor drafting change.*

66. *Paragraph 29 was adopted with a minor drafting change.*

67. **Ms. Aguirre** (Argentina) proposed that the word “State” should be inserted before the word “immunity” in the first sentence of paragraph 30.

68. **Ms. Smyth** (Australia) proposed the insertion of a new second sentence reading: “A proposal was also made to include a general provision to the effect that nothing in the Rules should be implied as a waiver of any State immunities.” In the original second sentence, she proposed replacing the word “needed” by the word

“appropriate” and in the last sentence she proposed replacing the word “that”, before the word “nothing”, by the words “to be unnecessary as”.

69. *Paragraph 30, as orally amended, was adopted.*

70. *Paragraph 31 was adopted.*

71. **The Chairperson** suggested inserting the word “prior” before the word “notice” in the first sentence of paragraph 32.

72. **Mr. Castello** (United States of America) said that the diverging views in the Working Group had not focused on the 1976 version of the Rules as the central issue. He therefore proposed deleting the text of the last sentence beginning with the words “on whether” and replacing it with the words “with regard to the question of preliminary orders”.

73. *Paragraph 32, as orally amended, was adopted.*

74. **Mr. Castello** (United States of America) proposed replacing the words “derived from legislation” at the end of the first sentence of paragraph 33 with the words “found outside these Rules”.

75. In paragraph 34, he proposed replacing the words “only referred to applicable law” with the words “did not provide a Rule”.

76. *Paragraphs 33 and 34, as orally amended, were adopted.*

77. *Paragraphs 35 to 42 were adopted.*

78. **Mr. Castello** (United States of America) proposed inserting the words “certain types of” before the word “recourse” in the second sentence of paragraph 43.

79. *Paragraph 43, as orally amended, was adopted.*

80. *Paragraph 44 was adopted with a minor drafting change.*

81. *Paragraphs 45 to 55 were adopted.*

82. **Mr. Castello** (United States of America) proposed replacing the word “parties” at the end of the first sentence of paragraph 56 by the phrase “losing parties who might seek review of fees to delay enforcement of an award”. The word “restore” before the word “confidence” in the third sentence should be replaced by the word “promote”.

83. *Paragraph 56, as orally amended, was adopted.*

84. *Paragraphs 57 to 59 were adopted.*

85. **Mr. Castello** (United States of America) proposed deleting, in paragraph 60, the redundant clause after the first colon in the first sentence, reading “With respect to the drafting of draft article 41, paragraph (4), the following proposal was made:”.

86. *Paragraph 60, as orally amended, was adopted.*

87. *Paragraph 61 was adopted.*

88. **Mr. Castello** (United States of America) proposed inserting in paragraph 62, following the words “After discussion,” the phrase “and particularly in view of the agreed addition to paragraph 6,”.

89. *Paragraph 62, as orally amended, was adopted.*

90. *Paragraphs 63 and 64 were adopted.*

91. **Mr. Mekjian** (Armenia), noting an omission in paragraph 65, said that the words “those relating to” should be reinserted after the words “all parts of the award other than” in the first sentence.

92. *Paragraph 65, as orally amended, was adopted.*

93. *Paragraphs 66 to 72 were adopted.*

A/CN.9/XLIII/CRP.2 and Add.1-3

94. **Mr. Sorieul** (Secretary of the Commission), drawing attention to the annex to the draft report, containing the text of the draft revised UNCITRAL Arbitration Rules (A/CN.9/XLIII/CRP.2 and Add.1-3), said that, in paragraph 2 of article 1, the date of adoption of the revised Rules remained to be indicated. As the texts of the Arabic and Spanish versions still required some editorial changes in order to be brought fully into line with the other language versions, he proposed the insertion of the date of 15 August 2010, by which time all the versions would be posted on the UNICTRAL website; that date would accordingly be the effective date of adoption.

95. **The Chairperson** took it that the Committee wished to adopt the annex as amended.

96. *The annex to the draft report, containing the text of the draft revised UNCITRAL Arbitration Rules, as orally amended, was adopted.*

97. *The Committee of the Whole adopted its report.*

98. **The Chairperson** said that the Committee of the Whole had concluded its work.

99. **Mr. Moollan** (Mauritius), Vice-Chairperson of the Commission, took the Chair.

100. *The Commission adopted the report of the Committee of the Whole.*

A/CN.9/XLIII/CRP.4

101. **The Chairperson** said he took it that the Commission wished to adopt the draft decision adopting the revised UNCITRAL Arbitration Rules (A/CN.9/XLIII/CRP.4).

102. *The draft decision was adopted, subject to editorial changes.*

Settlement of commercial disputes: revision of the UNICTRAL Arbitration Rules (A/CN.9/705)

103. **Ms. Montineri** (International Trade Law Division) said that the secretariat needed to know whether the recommendation to be prepared on the revised Rules should follow the model of the 1982 recommendation. The 1982 model was quite useable, including for the purposes of arbitral bodies; however, some of those bodies might wish to have guidance on the use of the new Rules. She suggested that the secretariat prepare a draft recommendation that would include such guidance.

104. **Mr. Lebedev** (Russian Federation), supported by **Mr. Möller** (Observer for Finland) said that the new Rules should be made better known and that a recommendation to that effect would be useful. The question remained whether the new Rules should be referred to as an update of the 1976 Rules or as the new 2010 Rules.

Future work of the Commission in the field of settlement of commercial disputes

105. **The Chairperson** drew the Commission’s attention to paragraph 299 of the UNCITRAL 2009 report (A/64/17), which referred to its earlier decision that the question of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority upon completion of the revision of the Arbitration Rules. He took it that there was no need to reaffirm that decision.

106. **Mr. Schneider** (Observer for Switzerland) suggested that the mandate of Working Group II should not be limited to that question but should include other issues arising specifically in investor-State arbitration.

107. **The Chairperson** said that it had been decided to give priority to that question following representations by States and non-governmental organizations. He proposed that the mandate might remain as a starting point for the work of the Working Group and be reviewed as the work proceeded.

108. **Mr. Schneider** (Observer for Switzerland) agreed, on the understanding that the Working Group would indeed be free to consider certain other issues, such as rules governing investor-State arbitration in general.

109. **Mr. Castello** (United States of America) said that there should continue to be a specific focus on transparency, which would not preclude consideration of other issues. The Working Group's mandate should remain unchanged, subject to review by the Commission in 2011 on the basis of the Group's work in 2010.

110. **Mr. Monardes** (Chile) said that the Commission might usefully spell out that the question of priority was just a starting point and that other issues could be addressed.

111. **Ms. Dostie** (Canada) said that there was no need to change the formulation adopted in 2009.

112. **Mr. Jacquet** (France) said that the transparency was indeed a priority concern and might well take up more than two sessions of the Working Group; the question of a possible redefinition of its mandate should remain open for the time being. More pressing questions concerned the approach to be adopted, the scope of the work and the basis on which it would proceed. He asked whether a questionnaire would be used.

113. **Ms. Montineri** (International Trade Law Division) said that a questionnaire had been circulated and that the 40 replies already received would be published in August 2010. It would be for the Working Group to define transparency and then to take stock of the question as reflected in international texts.

114. **The Chairperson** said he took it that the Commission wished the Working Group to maintain the priority focus on transparency and to go on to consider other issues relating to investor-State security as they arose.

115. *It was so decided.*

Monitoring implementation of the 1958 New York Convention

116. **Ms. Montineri** (International Trade Law Division) recalled that, in 2008, the secretariat had published a report on the implementation of the New York Convention by States (A/CN.9/656 and Add.1) based on replies to a questionnaire addressed to States parties, subsequently transformed into a dedicated database. The secretariat was currently preparing a further report on the subject, which was expected to be completed in 2012.

117. **Mr. Sorieul** (Secretary of the Commission) said that the outcome of that work would be the preparation by the UNCTAD secretariat of a guide to the Convention which would go beyond the compilation of data and require a number of expert meetings. It was likewise expected to be submitted for the consideration of the Commission in 2010 or 2011.

The meeting rose at 6 p.m.