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Summary record of the 941st meeting

Held at the Vienna International Centre, Vienna, on Friday, 8 July 2011, at 9.30 a.m.

Chairperson: Mr. Moollan.....(Mauritius)

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The meeting was called to order at 9.45 a.m.

Adoption of the report of the Commission

1. **The Chairperson** invited the Rapporteur, Mr. Phua (Singapore), to introduce the draft report of the Commission on the work of its forty-fourth session.

2. **Mr. Phua** (Singapore), Rapporteur, said that documents A/CN.9/XLIV/CRP.1 and addenda would together form the report of the Commission. As addenda 16, 17 and 21 were still in preparation, the Commission had before it addenda 1-15 and 18-20. He noted that in addendum 7, the chapter heading was incorrectly indicated as part VI.

3. **Mr. Sorieul** (Secretary of the Commission) said that, as usual, delegations should provide written notification of any typographical errors and other errors of form. The Secretariat would revise the report without modifying the substance, and the report would be formally edited prior to submission to the United Nations General Assembly.

A/CN.9/XLIV/CRP.1

4. *Document A/CN.9/XLIV/CRP.1 was adopted.*

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

5. **Ms. Nicholas** (Secretariat) said that she would present comments on behalf of delegations involved in the discussions on public procurement that had already returned to their capitals.

6. With regard to the first sentence in paragraph 12, in order to address a concern that the meaning of the phrase “located with the definitions (f) and (g)” was not clear, it was proposed that it be amended to read “It was further agreed that article 2 should contain new definitions of ‘pre-qualification’ and ‘pre-selection’, which would be located with the definitions (f) and (g).”

7. It was proposed that the words “were raised” in the last sentence of paragraph 8 be moved to the beginning of the sentence, so that it read “Concerns were raised about [remainder unchanged].”

8. It was proposed that paragraph 24 be amended to read “The Commission agreed that the guide text would discuss the risks of discrimination where specific production methods were mentioned by drawing attention to the prohibition against discriminatory treatment in article 10 (2).”

9. Regarding paragraph 40, it was proposed to add a new sentence at the end reading “After discussion, this proposal was not retained.”

10. **The Chairperson** took it that there were no objections to the proposed changes.

11. *Document A/CN.9/XLIV/CRP.1/Add.1, as orally revised, was adopted.*

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

12. **Ms. Nicholas** (Secretariat) said that it was proposed that in paragraph 19 “World Bank requirements” be amended to read “MDB (Multilateral Development Bank) requirements.”

13. It was proposed that paragraph 22 be amended to read: “The Commission discussed whether to delete the reference to “low” in the provisions to avoid confusion with other provisions of the Model Law that referred to a low-value threshold, but agreed to retain the current wording, noting that the provision would be explained in the Guide.”

14. **The Chairperson** took it that there were no objections to the proposed changes.

15. **Ms. Sabo** (Canada) proposed the addition, for clarification purposes, of the following sentence at the end of paragraph 29: “After consideration, this proposal was rejected as it was believed that the subject matter of a procurement is a question of fact which cannot easily fall under a generic definition and it was therefore felt better to leave it open and to include a discussion in the Guide.”

16. *It was so decided.*

17. **Ms. Nicholas** (Secretariat), referring to paragraph 43, said that the deletion of the words “in the long term” in the fourth sentence was proposed.

18. It was proposed that paragraph 46 be expanded to read “The need to clarify confusing terminology in articles 63-68 was raised.”

19. **The Chairperson** took it that there were no objections to those proposals.

20. *Document A/CN.9/XLIV/CRP.1/Add.2, as orally revised, was adopted.*

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

21. **Ms. Nicholas** (Secretariat), drawing attention to the second sentence in paragraph 15, which read “The Commission deferred its decision on the proposal to a later stage.”, said that the report would make it clear that the proposal in question had been accepted.

22. In the last sentence of paragraph 23, it was proposed to insert “[name of the independent body]” after “provide”.

23. **The Chairperson** said he took it that those proposals were acceptable.

24. *Document A/CN.9/XLIV/CRP.1/Add.3, as orally revised, was adopted.*

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

25. **Ms. Nicholas** (Secretariat) said, with regard to paragraph 13, that it was proposed that the following sentence be added at the end: “The alternative view was that the previous wording implied the use of the English language, which would not be appropriate, and also that the revised wording reflected modern practices such as the use of Internet-based communications.”

26. Regarding paragraph 14, it was proposed that the words “for international publication” be added to the second sentence, so that it would read: “It was also agreed that the Guide would describe the different ways in which the requirements for international publication could be fulfilled [remainder unchanged].”

27. It was proposed that the first sentence of paragraph 15 be amended to read as follows: “The Commission agreed that the Guide should (a) note that the provisions would require that the publication be made in a language that would make it in fact accessible to all potential suppliers or contractors in the context of the procurement concerned and (b) alert enacting States that, in the WTO, [remainder unchanged]”. The final sentence would be deleted.

28. In paragraph 17, the first part of the sentence should be amended to read “The Commission agreed to replace paragraph (2) with the following wording: ‘All suppliers [remainder unchanged]’”.

29. Regarding subparagraph 40 (2), it was proposed that “an appeal” be amended to read “an application or appeal”.

30. Regarding the first sentence of paragraph 42, the insertion of “, subject to clarification of terminology” after “along the following lines” was proposed.

31. Regarding paragraph 47, the insertion of the words “appeal and” before “or appellant” was proposed.

32. In paragraph 49, the noun “reference” should be in the plural — “references”.

33. In paragraph 50, the phrase “may apply to the procuring entity” should be replaced with “may apply to the [name of independent body]”.

34. Regarding paragraph 51, it was proposed that the following phrase be added at the end: “and that the word ‘appellant’ be replaced with the word ‘applicant’”.

35. Regarding paragraph 54, it was proposed that: the phrase “that is in compliance with the provisions of this Law” in subparagraph (d bis) be deleted; and subparagraph (h) be amended to read “Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting an application or an appeal as a result of an act or decision of, or procedure followed by, the procuring entity in the procurement proceedings which is not in compliance with the provisions of this Law, and for any loss or damages suffered [, which shall be limited to costs for the preparation of the submission or the costs relating to the application, or both]”.

36. The addition of the following sentence at the end of paragraph 56 was proposed: “It also agreed to add the words ‘duly notified of the proceedings’ after the words ‘a supplier or contractor’ at the beginning of the second sentence.”

37. Regarding the first sentence of paragraph 65, it was proposed that the phrase “the view was expressed that some of its provisions” be amended to read “a view expressed was that some of its provisions”. Regarding the second sentence, the replacement of “the point was made that” with “according to that view” was proposed.

38. **The Chairperson** took it that there were no objections to the proposed changes.

39. *Document A/CN.9/XLIV/CRP.1/Add.4, as orally revised, was adopted.*

A/CN.9/XLIV/CRP.1/Add.5

40. **Ms. Nicholas** (Secretariat) said it was proposed that in the first sentence of paragraph 1 “part of” be replaced with “accompaniment to”.

41. **Mr. Sorieul** (Secretary of the Commission), in response to a question from **Mr. Bellenger** (France) in relation to paragraph 2, said that the session of Working Group I scheduled for the second half of 2011 was to be cancelled and the next session would be held in New York in April 2012 or in Vienna at the end of February 2012.

42. **Ms. Nicholas** (Secretariat), describing the process for finalizing the draft Guide to Enactment through extensive consultations, said that the Secretariat would amend the draft pursuant to the instructions given by Working Group I at its twentieth session. The draft would then be circulated as widely as possible by e-mail. A series of expert group consultations would be held in the second half of 2011 so that the text submitted to Working Group I early in 2012 was as near-final as possible. If the Working Group I session took place in April, there would be only a short time in which to finalize the text for submission to the forty-fifth session of the Commission.

43. **Mr. Bellenger** (France) said that the Working Group I session should not be held too close to the forty-fifth session of the Commission. The February 2012 option was therefore preferable.

44. **The Chairperson** suggested that further discussion on the matter be deferred until the Commission dealt with the section of the draft report that dealt with the dates of meetings.

45. **Ms. Nicholas** (Secretariat) said it was proposed that in the first sentence of paragraph 9 the second “in particular” be replaced with “also”, so that the sentence read “The need for States to take a more active role in promoting the use of the 2011 Model Law and its effective implementation and uniform interpretation, in particular through States’ donor agencies, was stressed, also given resource constraints in the Secretariat for such work.”

46. Regarding paragraph 11 it was proposed that a sentence reading as follows be added: “It was noted that this topic could include many aspects, of which public procurement was only one.”

47. **The Chairperson** took it that there were no objections to the proposed changes.

48. **Mr. Gautney** (United States of America) proposed the addition to the first sentence of paragraph 14 of the words “at its last working group session”, so that the sentence would read “At its current session, the Commission noted that Working Group V had considered at its last working group session [remainder unchanged]”.

49. **The Chairperson** took it that there were no objections to that change.

50. *Document A/CN.9/XLIV/CRP.1/Add.5, as orally revised, was adopted.*

A/CN.9/XLIV/CRP.1/Add.6

51. **The Chairperson** proposed the replacement of “understanding” with “commitment” in the last sentence of paragraph 3.

52. *It was so decided.*

53. **Mr. Gautney** (United States of America) proposed that, in order to record the fact that some delegations wished to make a distinction between a right accorded by the transparency rules and a right under the treaty, a sentence or the following lines be added at the end of paragraph 5: “It was noted that “amicus curiae” participation of a non-disputing State party to the investment treaty should be distinguished from situations in which a non-disputing State party participated in the arbitration pursuant to a right provided in the treaty.”

54. **The Chairperson** proposed that the Secretariat finalize the wording.

55. **Ms. Sabo** (Canada) said that, while it was normally preferable to finalize wording in the Commission, the proposed sentence could, in her view, be referred to the Secretariat.

56. **Ms. Jamschon MacGarry** (Argentina) proposed that the second sentence of paragraph 5 be reworded along the following lines: “It was said that different approaches to the intervention of different types of “amici curiae” should be considered and that, in order to assess the suitability of the participation by non-disputing States parties to the treaty, the scope and modalities of such participation and the conditions

under which such participation was regulated should be further considered.

57. **The Chairperson** said that two substantive issues were involved. First, the Commission should not give Working Group I the impression that it was presuming that the transparency rules should give non-disputing parties the right to participate; there was no intention of pre-empting the outcome. Secondly, the report should reflect the fact that there had been discussion as to whether the right of a non-disputing State to participate arose from the transparency rules or from a right under the treaty.

58. **Mr. Jezewski** (Poland) suggested that, in order to reflect the concerns of the United States and Argentina, which he shared, the first part of the second sentence be deleted, so that the sentence would read “The manner in which the intervention of such a State should be dealt with should be left for further consideration by the Working Group.”

59. **The Chairperson** proposed, after a further intervention by **Ms. Jamschon MacGarry** (Argentina), a formulation on the following lines: “Whether there should be such a right of intervention, and, if so, the manner, scope and modalities of such intervention, should be left for further consideration by the Working Group.”

60. *It was so decided.*

61. **The Chairperson** proposed that, in paragraph 8, the words “might need” be replaced by the word “needed”; the Commission had reached an agreement to that effect.

62. *It was so decided.*

63. **Mr. Bellenger** (France) said, with reference to the last sentence of paragraph 15, that he did not recall the Commission’s agreeing that conciliation/mediation with respect to the settlement of treaty-based investor-State disputes should be considered as a topic for future work of Working Group I.

64. **Ms. Sabo** (Canada), concurring, proposed that the words “The Commission agreed” be replaced by the words “It was suggested”.

65. *It was so decided.*

66. *Document A/CN.9/XLIV/CRP.1/Add.6, as orally revised, was adopted.*

A/CN.9/XLIV/CRP.1/Add.7

67. **Mr. Bellenger** (France) said, in relation to the last sentence of paragraph 9, that not only consumer protection legislation was involved. The sentence should therefore be preceded by the following phrase: “Generally, pursuant to its mandate,”.

68. *It was so decided.*

69. *Document A/CN.9/XLIV/CRP.1/Add.7, as orally revised, was adopted.*

A/CN.9/XLIV/CRP.1/Add.8

70. **Mr. Gautney** (United States of America) proposed that the following phrase be added at the end of the second sentence of paragraph 3: “, which would provide States that had enacted the secured transactions law recommended in the Guide with practical advice as to the issues to be addressed in the context of the establishment and operation of a general security rights registry”.

71. *It was so decided.*

72. **Mr. Gautney** (United States of America) proposed the addition of the following sentence before the penultimate sentence in paragraph 4: “There was no general discussion of the merits of that proposed approach or of alternative approaches.” If that proposal was accepted, the words “In that connection” at the beginning of the penultimate sentence should be deleted.

73. **Ms. Sabo** (Canada), supported by **Mr. Grand d’Esnon** (France), questioned the need to refer to a general discussion that had not taken place.

74. **The Chairperson** took it that the Commission wished to leave the text unchanged.

75. *It was so decided.*

76. **Mr. Tata** (Observer for the World Bank) suggested that the second sentence of paragraph 7 be reworded to read “It was noted that, based on the precedent of the coordination between the World Bank Principles and Guidelines for Effective Insolvency and Creditor Rights Systems and the *UNCITRAL Legislative Guide on Insolvency Law*, a draft of those principles could be jointly prepared by the Secretariat in cooperation with the World Bank, through its legal vice-presidency, and outside experts within existing

resources and without utilizing Working Group resources.”

77. In response to a question from **the Chairperson** concerning the need for the word “jointly”, he said that the final product would need to be used by the World Bank and integrated into a pattern that already existed. If that was understood, the word “jointly” was unnecessary.

78. *Document A/CN.9/XLIV/CRP.1/Add.8, as orally revised, was adopted.*

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

79. **Mr. Gautney** (United States of America) proposed that in paragraph 5 “UNCITRAL” be inserted between the words “prevent” and “from” in the third sentence.

80. *It was so decided.*

81. **Ms. Sabo** (Canada) proposed that in the second sentence of paragraph 5 the words “Broad consensus was expressed on” be replaced by the words “The prevailing view supported”.

82. **The Chairperson** said that he saw no support for that proposal.

83. **Mr. Gautney** (United States of America), referring to paragraph 6, proposed that the following sentence be added at the end: “It was suggested that, time and resources permitting, a reconvened working group consider a recommendation pending in UN/CEFACT that raises issues under UNCITRAL instruments.”

84. *It was so decided.*

85. **Mr. Gautney** (United States of America), referring to paragraph 7, proposed that the following sentence be added at the end: “It was also noted that work regarding electronic transferable records may include certain aspects of the other topics discussed in documents A/CN.9/728 and A/CN.9/728/Add.1.”

86. **The Chairperson** took it that the Commission wished to accept that proposal.

87. *It was so decided.*

88. **Mr. Gautney** (United States of America) proposed that paragraph 11 be reworded to read “The Commission also agreed that the extension of the mandate of Working Group IV (Electronic Commerce)

to other topics discussed in documents A/CN.9/728 and A/CN.9/728/Add.1 as discrete subjects (as opposed to their incidental relation to electronic transferable records) would be further considered at a future session.”

89. *It was so decided.*

90. *Document A/CN.9/XLIV/CRP.1/Add.9, as orally revised, was adopted.*

A/CN.9/XLIV/CRP.1/Add.10

91. **Mr. Seweha Boles** (Egypt) asked what need there was for the words “in particular” in subparagraph 4 (n). Unless the reason for their inclusion was to distinguish microenterprises and SMEs from individuals, they were redundant and should be deleted.

92. *It was so decided.*

93. **Mr. Gautney** (United States of America) proposed that at the end of the second sentence of paragraph 7 the following phrase be added: “, keeping in mind the scope of UNCITRAL’s mandate and its traditional areas of work”.

94. *It was so decided.*

95. *Document A/CN.9/XLIV/CRP.1/Add.10, as orally revised, was adopted.*

A/CN.9/XLIV/CRP.1/Add.11 and 12

96. *Documents A/CN.9/XLIV/CRP.1/Add.11 and 12 were adopted.*

A/CN.9/XLIV/CRP.1/Add.13

97. **Mr. Gautney** (United States of America) proposed that, in paragraph 13, the phrase “cost incurred by the Secretariat” be replaced by the phrase “cost associated with time spent by Secretariat personnel on such activities”.

98. *It was so decided.*

99. *Document A/CN.9/XLIV/CRP.1/Add.13, as orally revised, was adopted.*

A/CN.9/XLIV/CRP.1/Add.14 and 15

100. *Documents A/CN.9/XLIV/CRP.1/Add.14 and 15 were adopted.*

A/CN.9/XLIV/CRP.1/Add.18

101. **Ms. Montineri** (Secretariat) said that one delegation had requested the addition of the following sentence at the end of paragraph 2: “Appreciation was also expressed to all institutions and experts involved in the preparation and implementation of the moot competition.”

102. *It was so decided.*

103. *Document A/CN.9/XLIV/CRP.1/Add.18, as orally revised, was adopted.*

A/CN.9/XLIV/CRP.1/Add.19

104. *Document A/CN.9/XLIV/CRP.1/Add.19 was adopted.*

A/CN.9/XLIV/CRP.1/Add.20

105. **Ms. Sabo** (Canada) said that the reference in paragraph 3 to “11 female interns and 12 interns coming from developing countries” was misleading.

106. **The Chairperson** suggested that the Secretariat make the wording of the sentence in question more felicitous.

107. *It was so decided.*

108. **Ms. Sabo** (Canada) proposed that the words “and options” be inserted after the word “issues” in the last sentence of paragraph 6.

109. *It was so decided.*

110. **Mr. Sorieul** (Secretariat) proposed the reinsertion in paragraph 6, after the first sentence, of the following text: “The Commission noted that, under General Assembly resolution 49/221, it was entitled to summary records. Furthermore, the Commission noted that it had previously addressed the issue of the necessity of summary records at its thirty-seventh session. On that occasion, the Commission had been presented with the option of edited verbatim transcripts or digital sound recordings and had determined that summary records were essential for its work.” — that text to be accompanied by a footnote reference to paragraphs 129 and 130 of the report of the Commission on its thirty-seventh session (General Assembly document A/39/17).

111. **Ms. Sabo** (Canada) said that paragraph 6 should, in order to reflect the tone of the debate, indicate the Commission’s willingness to consider other options.

112. **The Chairperson** proposed that the final sentence of paragraph 6 (“After discussion, ...”) be reformulated in such a way as to indicate that the Commission was willing to consider other options.

113. *It was so decided.*

114. *Document A/CN.9/XLIV/CRP.1/Add.20, as orally revised, was adopted.*

The meeting rose at 11.40 a.m.