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**United Nations Commission  
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## Settlement of commercial disputes

### Interim measures of protection

#### Note by the Secretariat

1. At its thirty-sixth session in March 2002, the Working Group resumed discussions on the power of a court or arbitral tribunal to order interim measures of protection (A/CN.9/508, paras. 51-94; for earlier discussions, see A/CN.9/468, paras. 60-87, A/CN.9/485, paras. 78-106, A/CN.9/487, paras. 64-87) and considered a draft text for a revision of article 17 of the UNCITRAL Model Law on International Commercial Arbitration (A/CN.9/WG.II/WP.119, para. 74) (hereinafter referred to as “the Secretariat proposal”).
2. At the start of its thirty-seventh session in October 2002, a decision was made that the Working Group would continue its deliberations on the basis of a proposal submitted by the United States of America (A/CN.9/WG.II/WP.121) (hereinafter referred to as “the United States proposal”) setting out a revision of draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration, also having regard to the Secretariat proposal.
3. This note has been prepared on the basis of discussions and decisions of the thirty-seventh session of the Working Group. To facilitate the resumption of discussions, the following text (hereinafter referred to as “the revised draft”), sets out a newly revised version of article 17 of the UNCITRAL Model Law on International Commercial Arbitration, taking account of discussions and decisions made at the thirty-seventh session of the Working Group.

**Revised draft of article 17 of the UNCITRAL Model Law on International Commercial Arbitration regarding the power of an arbitral tribunal to grant interim measures of protection**

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection.
- (2) An interim measure of protection 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 [, in order to ensure or facilitate the effectiveness of a subsequent award];
  - (b) Take action that would prevent, or refrain from taking action that would cause, current or imminent harm [, in order to ensure or facilitate the effectiveness of a subsequent award];
  - (c) Provide a preliminary means of securing 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 of protection shall [demonstrate] [show] [prove] [establish] that:
  - (a) Irreparable harm will result if the measure is not ordered, and such harm substantially outweighs the harm that will result to the party affected by the measure 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 determinations.
- (4) [Subject to paragraph (7) (b) (ii),] [except where the provision of a security is mandatory under paragraph (7) (b) (ii),] the arbitral tribunal may require the requesting party and any other party to provide appropriate security as a condition to granting an interim measure of protection.
- (5) The arbitral tribunal may modify or terminate an interim measure of protection at any time [in light of additional information or a change of circumstances].
- (6) The requesting party shall, from the time of the request onwards, inform the arbitral tribunal promptly of any material change in the circumstances on the basis of which the party sought or the arbitral tribunal granted the interim measure of protection.
- (7) (a) Unless otherwise agreed by the parties, the arbitral tribunal may [, in exceptional circumstances,] grant an interim measure of protection,

without notice to the party [against whom the measure is directed] [affected by the measure], when:

- (i) There is an urgent need for the measure;
  - (ii) The circumstances set out in paragraph (3) are met; and
  - (iii) The requesting party shows that it is necessary to proceed in that manner in order to ensure that the purpose of the measure is not frustrated before it is granted.
- (b) The requesting party shall:
- (i) Be liable for any costs and damages caused by the measure to the party [against whom it is directed] [affected by the measure] [to the extent appropriate, taking into account all of the circumstances of the case, in light of the final disposition of the claims on the merits]; and
  - (ii) Provide security in such form as the arbitral tribunal considers appropriate [, for any costs and damages referred to under subparagraph (i),] [as a condition to granting a measure under this paragraph];

[(c) [For the avoidance of doubt,] the arbitral tribunal shall have jurisdiction, inter alia, to determine all issues arising out of or relating to [subparagraph (b)] above;]

[(d) The party [against whom the interim measure of protection is directed] [affected by the measure granted] under this paragraph shall be given notice of the measure and an opportunity to be heard by the arbitral tribunal [as soon as it is no longer necessary to proceed on an ex parte basis in order to ensure that the measure is effective] [within forty-eight hours of the notice, or on such other date and time as is appropriate in the circumstances];]

[(e) Any interim measure of protection ordered under this paragraph shall be effective for no more than twenty days [from the date on which the arbitral tribunal orders the measure] [from the date on which the measure takes effect against the other party], which period cannot be extended. This subparagraph shall not affect the authority of the arbitral tribunal to grant, confirm, extend, or modify an interim measure of protection under paragraph (1) after the party [against whom the measure is directed] [affected by the measure] has been given notice and an opportunity to be heard;]

[(f) A party requesting an interim measure of protection under this paragraph shall have an obligation to inform the arbitral tribunal of all circumstances that the arbitral tribunal is likely to find relevant and material to its determination whether the requirements of this paragraph have been met;]

## Notes

### Paragraph (1)

4. At its thirty-seventh session, the Working Group observed that paragraph (1) of the United States proposal was in line with the text previously discussed by the Working Group. The Working Group found the substance of the redrafted paragraph generally acceptable but suggested that the words “order another party to take interim measures of protection” might unduly limit the scope of the provision and suggested that these words be replaced by “grant interim measures of protection” (A/CN.9/523 para. 34). The revised draft takes account of this suggestion.

### Paragraph (2)

#### *Placement of paragraph (2) and general remark*

5. The text currently contained in paragraph (2) of the revised draft (formerly paragraph (4) of the Secretariat proposal) was discussed at the thirty-sixth session of the Working Group and it was agreed that it be placed immediately after paragraph (1) (A/CN.9/508, para. 64). The substance of this paragraph was, in part, inspired by the draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters, interim text 2001 of the Hague Conference on Private International Law (reproduced in part in A/CN.9/WG.II/WP.119, para. 71).

#### *Chapeau—Notion of “interim measure of protection”*

6. At its thirty-seventh session, the Working Group heard that paragraph (2) of the United States proposal was intended to reflect the discussion at the thirty-sixth session of the Working Group (A/CN.9/508, paras. 64-76). The reference to an “interim award” was said to be contrary to the view that had prevailed at that session not to qualify an award as “partial” or “interim” (see A/CN.9/508, para. 66 and A/CN.9/523, para. 36). Doubts were also expressed with respect to the notion of an interim measure being “reflected” in an award. In line with the decision taken at the thirty-seventh session of the Working Group, paragraph (2) of the revised draft includes the following words: “An interim measure of protection is any temporary measure, whether in the form of an award or in another form” (A/CN.9/523, para. 36).

#### *Subparagraphs (a) and (b)—“in order to ensure or facilitate the effectiveness of a subsequent award”*

7. The words “in order to ensure or facilitate the effectiveness of a subsequent award” in both subparagraphs (a) and (b) of the revised draft were introduced into the text by the United States proposal. The wording appears to incorporate language used in a variant considered by the Working Group at its thirty-sixth session as a separate paragraph to describe an interim measure (see para. 4 (b) of Variant 2, A/CN.9/WG.II/WP.119, para. 74 and reproduced in A/CN.9/508, para. 51). However, these words, as incorporated within subparagraphs (a) and (b) of the revised draft were not fully discussed and the Working Group may wish to consider whether this wording unduly restricts the scope of these provisions.

*Subparagraphs (a), (b) and (c)—“a subsequent award”*

8. In order to avoid the difficulty of defining the term “eventual award”, as contained in the text of the United States proposal under paragraphs 2 (a), (b) and (c), more neutral language has been used (“subsequent award”) in paragraphs (2) (a), (b) and (c) of the revised draft to indicate any award that might be ordered at a subsequent point in time.

*Subparagraph (b)—Scope of the provision*

9. At its thirty-sixth session, the Working Group generally felt that the ambit of subparagraph (b) of the revised draft (formerly para. (4) (c) of Variant 1, A/CN.9/WG.II/WP.119, para. 74) should be broadened to cover also cases where the purpose of the interim measure was not to restrain but to order affirmative conduct (A/CN.9/508, para. 75). Along the same lines, it was felt that the scope of the provision should not cover only measures ordered against the defendant but also measures addressed to other parties to the arbitration. The Working Group may wish to consider whether the text in the revised draft appropriately addresses these suggestions.

*Subparagraph (c)*

10. At its thirty-seventh session, the Working Group agreed to replace the entire text of subparagraph (c) of the United States proposal being, “provide security for the enforcement of an eventual award, including an award of costs”, by wording along the lines, “provide a preliminary means of securing assets out of which an award may be satisfied” (A/CN.9/523, para. 37). That decision restored the language used in the Secretariat proposal (formerly para. (4) (b) of Variant 1 in A/CN.9/WG.II/WP.119, para. 74 and reproduced in A/CN.9/508, para. 51).

*Subparagraph (d)*

11. At its thirty-sixth session, the Working Group agreed that, to facilitate the issuance of interim measures aimed at preventing destruction of evidence, paragraph (2) should also refer to “a measure intended to provide a preliminary means of preserving evidence” (A/CN.9/508, para. 76). Subparagraph (d) of the revised draft, which refers to “preserve evidence that may be relevant and material to the resolution of the dispute” was not discussed at the thirty-seventh session of the Working Group. The Working Group may wish to consider if that wording is appropriate.

*Non-exhaustive nature of list of provisional measures*

12. At the close of the discussion at the thirty-seventh session of the Working Group, it was recalled that, at its thirty-sixth session, the Working Group had agreed that it should be made abundantly clear that the list of provisional measures provided in the various subparagraphs was intended to be non-exhaustive (A/CN.9/508, para. 71). It was pointed out that, as redrafted, the list was exhaustive. It was explained in response that, as redrafted, paragraph (2) no longer provided a list of the individual interim measures that could be granted by a tribunal. Instead, the revised provision mentioned “any temporary measure”, thus offering an open-ended formulation. In addition, the provision listed the various purposes for which a

provisional measure could be granted. To the extent that all such purposes were covered by the revised list, it was no longer necessary to make the list non-exhaustive. While that explanation was generally accepted, the Working Group decided to consult further before making a final decision as to whether all conceivable grounds for which an interim measure of protection might need to be granted were covered by the current formulation. It was agreed that the discussion, in that regard, would be reopened at a future session (A/CN.9/523, para. 38).

### **Paragraph (3)**

#### *Chapeau*

13. The chapeau of paragraph (3) of the revised draft has been simplified to avoid unnecessarily repeating the content of paragraph (1) and now reflects the original text as contained in paragraph (2) of the Secretariat proposal. Paragraph (3) has also been revised to include a number of other verbs other than the word “demonstrate” because concern was expressed that this term might connote a high standard of proof (A/CN.9/523, para. 40; for earlier discussion, see A/CN.9/508, para. 55).

#### *Deletion of the reference to the “urgent need for the measure”*

14. At its thirty-seventh session, the Working Group agreed that the urgency of the need for the measure should not be a general feature of interim measures of protection but rather it should be made a specific requirement for granting an interim measure *ex parte* where urgency made notice to the other party impracticable (A/CN.9/523, paras. 29 and 41). The reference to the urgency of a measure has been relocated into paragraph (7) (a) (i) of the revised draft (formerly paragraph 4 of the United States proposal) which deals with *ex parte* interim measures.

#### *Subparagraph (a)*

15. Paragraph 3 (a) of the revised draft (formerly paragraph 3 (b) of the United States proposal) has been revised to take account of the suggestion that the words “the party opposing the measure” be replaced by “the party affected by the measure” and that the words “and that harm” should be replaced by the words “and such harm” (A/CN.9/523, para. 42). A view was expressed that the words “irreparable harm” might lend themselves to confusion with the words “current or imminent harm” in paragraph (2) (b) thus creating the risk that the criteria set forth in paragraph (3) might be read as applying only to those measures granted for the purposes of paragraph (2) (b). The Working Group took note of that view (A/CN.9/523, para. 42). It should be recalled that, at the thirty-sixth session of the Working Group, it was widely felt that the provision should be based on a “balance of convenience” under which the assessment of the degree of harm suffered by the applicant if the interim measure was not granted should be balanced against an evaluation of the harm suffered by the party opposing the measure if that measure was granted. In addition, it was felt that the quantitative approach reflected in the words “a significant degree of harm” might create uncertainties as to how a degree of harm should be considered to be sufficiently “significant” to justify certain provisional measures. It was suggested that a reference to the more qualitative notion of “irreparable harm” should be used (A/CN.9/508, para. 56). The text in the revised draft mirrors this earlier decision of the Working Group. It is submitted that

the broad definition of interim measures under paragraph (2) does not conflict with the need for the party requesting the interim measure to show evidence of irreparable harm.

*Subparagraph (b)*

16. Consistent with a suggestion made at the thirty-seventh session of the Working Group, paragraph (3) (b) of the revised draft (formerly paragraph (3) (c) of the United States proposal) has been revised to replace the words “there is a substantial possibility that the requesting party will succeed on the merits of the dispute” with “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 determinations” (A/CN.9/523, para. 64; for earlier discussion, see para. 43 and A/CN.9/508, para. 57).

**Paragraph (4)**

*Placement of paragraph (4)*

17. Paragraph (4) of the revised draft (formerly paragraph (5) of the United States proposal) has been relocated in the text to reflect the fact that it is intended to apply to interim measures in general and not only to those measures that might be granted ex parte under paragraph (7) of the revised draft (A/CN.9/523, para. 45). The Working Group also agreed that paragraphs (6) and (7) of the United States proposal (paragraphs (5) and (6) of the revised draft) be relocated to appear before the paragraph dealing with the ex parte interim measures (A/CN.9/523, para. 45).

*Interplay between paragraph (4) and paragraph (7) (b) (ii)*

18. At the thirty-seventh session of the Working Group, concern was expressed that, as previously drafted, this text might create a possibility to avoid supplying mandatory security in respect of ex parte interim measures of protection (A/CN.9/523, para. 46). It was agreed that this text was based on the idea that, in respect of inter partes measures, the requirement for security should be within the discretion of the arbitral tribunal (A/CN.9/523, para. 46). To meet this concern, two alternative texts, namely, “Subject to paragraph (7) (b) (ii)” or “Except where a provision of security is required under paragraph (7) (b) (ii)” have been included in the revised draft in square brackets. These alternatives seek to clarify the decision of the Working Group that paragraph (4) be subject to paragraph (7) (b) (ii) and to distinguish between the situation where the granting of security results from the exercise of a discretion of the arbitral tribunal and the situation where the arbitral tribunal is obliged to require security from the party requesting the ex parte interim measure of protection.

*“and any other party”*

19. At its thirty-seventh session, the Working Group also agreed to include the words “and any other party” after the words “the requesting party” to provide the arbitral tribunal with a discretion that would accommodate certain situations in a multiparty arbitration, for example, the situation where there were numerous claimants, each of whom would benefit from the interim measure, but the request

was made by only one claimant having no assets. In that situation, the tribunal would have the discretion to request security from the other claimants. In addition, the reference to “any party” could accommodate the situation where a party provided counter-security (A/CN.9/523, para. 48).

**Paragraph (5)**

*“in light of additional information or a change of circumstances”*

20. At the thirty-seventh session of the Working Group, it was said that the discretion to modify or terminate an interim measure should not be limited. It was observed that, given the extraordinary nature of such measures, if a tribunal had the power to grant such measures then it should also have the power to modify or terminate them. The Working Group may wish to consider whether the text currently included in square brackets being “in light of additional information or a change of circumstances”, originally used in the Secretariat proposal (see A/CN.9/508, paras. 88-89) should be included to avoid establishing an arbitrary discretion.

*Application to ex parte measures*

21. It was further said that, given that the intention in paragraph (5) appeared to also cover ex parte measures, the circumstances in which the arbitral tribunal might wish to modify or terminate an interim measure could occur during the ex parte period and that therefore the requirement to inform the party affected by the measure as required under paragraph (7) (e) could frustrate the measure. It was suggested that further consideration might be necessary to examine whether a distinction should be made depending upon whether the interim measure was inter partes or ex parte, in which case a separate provision might need to be prepared to deal with ex parte measures (A/CN.9/523, para. 52).

*Sanction*

22. The Working Group may wish to consider whether paragraph (5) should be revised to provide a clear sanction if the duty under paragraph (6) is not complied with (A/CN.9/523, para. 49; see also para. 24 below).

**Paragraph (6)**

*“or any other party”*

23. A suggestion was made at the thirty-seventh session of the Working Group that, if the term “or any other party” was included in paragraph (4), then this phrase should also be added to the text now contained in paragraph (6) (A/CN.9/523, para. 49). The view was expressed that this could however invite additional argument between the parties. The Working Group may wish to give further consideration to this issue.

*Sanction*

24. A suggestion was made that whilst there was a duty to inform the arbitral tribunal of any material changes in the circumstances affecting the granting of the interim measure, there was no sanction if this duty was breached. In response, it was agreed that this matter could be adequately dealt with under paragraph (5)

(A/CN.9/523, para. 49). On that basis, no decision was made, at the thirty-seventh session of the Working Group, to change the text of paragraph (6). If the Working Group agrees that paragraph (5) should provide a sanction in the event that paragraph (6) is breached, the Working Group may also wish to consider whether the order of these paragraphs should be reversed.

25. The Working Group may wish to consider whether the language used in paragraph (6), which refers to “any material change”, as compared to the language used in paragraph (5), which refers to “a change of circumstances”, is appropriate.

### **Paragraph (7)**

#### *General remark*

26. The issue of the power of an arbitral tribunal to order ex parte interim measures of protection was the subject of extensive discussion at the thirty-seventh session of the Working Group (A/CN.9/523, paras. 16-27). The view stated at the thirty-sixth session of the Working Group, that the power to order ex parte interim measures of protection should be reserved for State courts, was reiterated at the thirty-seventh session of the Working Group (A/CN.9/523, para. 17). Whilst a number of delegations continued to oppose the inclusion of the power of arbitral tribunals to grant ex parte interim measures of protection, the Working Group nevertheless agreed to continue its examination of the United States proposal (A/CN.9/523, para. 28).

#### *Subparagraph (a)*

27. The text contained in paragraph (7) (a) of the revised draft (formerly paragraph (5) of the Secretariat proposal and paragraph (4) (a) of the United States proposal) received considerable attention at the thirty-seventh session of the Working Group (A/CN.9/523, paras. 28-33). At that session, the Working Group took note, inter alia, of the suggestion that further consideration be given to the possibility of lifting the ex parte interim measure of protection where a responding party provided sufficient security (A/CN.9/523, para. 33). The revised draft does not address this point.

28. The Working Group may wish to consider whether, in the interests of consistency, the language used in paragraph 3 (a) namely “the party affected by the measure” should also be reflected in paragraphs 7 (a), (b) (i), (d) and (e), to replace the phrase “the party against whom the measure is directed”. Both alternatives are included in square brackets in the revised draft.

29. A widely shared view of the Working Group at its thirty-seventh session was that, if ex parte measures were included, then the provision should indicate that such measures only be granted in exceptional circumstances (A/CN.9/523, para. 17). The words “in exceptional circumstances” have been included after the words “the arbitral tribunal may”. The Working Group agreed that paragraph (4) (a) of the United States proposal should be revised to take account of the views and concerns expressed by the Working Group and, in particular, to recognize the parties’ freedom of contract by allowing them to contract out of the provision giving the tribunal the power to grant an ex parte interim measure of protection (A/CN.9/523, para. 31). To give effect to this decision, paragraph (7) (a) of the revised draft includes the phrase

“by the parties” after the opening phrase, “Unless otherwise agreed” as suggested at the thirty-seventh session of the Working Group (A/CN.9/523, para. 54).

30. At the thirty-seventh session of the Working Group, a revised draft of paragraph (4) (a) of the United States proposal was prepared (A/CN.9/523, paras. 32 and 53-69) (hereinafter referred to as “the paragraph (4) (a) redraft”) and the following decisions and suggestions made at that session have been included in the revised draft:

- Preference was expressed for the second bracketed alternative in the paragraph (4) (a) (i) redraft (paragraph (7) (a) (iii) of the revised draft), with the term “defeated” being replaced by the term “frustrated” (A/CN.9/523, paras. 57 and 61);
- Paragraph (7) (a) (ii) of the revised draft (formerly subparagraph (iv) of the paragraph (4) (a) redraft) was revised in accordance with the suggestions made at the thirty-seventh session of the Working Group (A/CN.9/523, para. 64);
- The words “or before the party against whom the measure is directed has had an opportunity to respond” were deleted on the assumption that the text sufficiently covered the situation where notice was given but the responding party either could not or had not responded to the notice (A/CN.9/523, para. 60);
- It was agreed that the conditions that applied to inter partes measures as set out in paragraph (3) of the United States proposal should also apply to ex parte measures but that the requirement in paragraph 3 (c) of a “substantial possibility” of success on the merits should be softened by using more neutral language (A/CN.9/523, para. 31); a reference to meeting the requirements of paragraph (3) has been added to the paragraph (7) (a) of the revised draft (A/CN.9/523, para. 62);
- Subparagraph (a) now lists the conditions to be satisfied by the party requesting the ex parte interim measure and subparagraph (b) refers to obligations to be complied with by the party requesting the ex parte interim measure; the Working Group may wish to consider if this new structure is appropriate;
- Other suggestions made included that there be a mandatory requirement that security be provided by the party requesting the measure to compensate the respondent if the measure is later found to have been unjustified; that the person seeking the ex parte measure be able to demonstrate the non-existence of any other legal remedy and that this is a remedy of last resort; and that reasonableness and proportionality apply in the case of ex parte measures (A/CN.9/523, para. 30). The Working Group may wish to consider further these suggestions.

*Subparagraph (b)*

31. The text in paragraph (7) (b) (i) of the revised draft (formerly subparagraph (v) of the paragraph (4) (a) redraft) has been redrafted to delete the reference to “strictly” and to include, in square brackets, the words “to the extent appropriate, taking into account all of the circumstances of the case, in light of the final disposition of the claim on the merits” (A/CN.9/523, paras. 31 and 66-67).

32. The text in paragraph (7) (b) (ii) of the revised draft (formerly paragraph (4) (a) (vi) redraft) was redrafted to take account of the preference expressed at the thirty-seventh session of the Working Group for the words “security in such form as the arbitral tribunal considers appropriate”. Also preference was expressed for the use of language along the following lines “for any damages and any costs of arbitration referred to in subparagraph (i)” (A/CN.9/523, paras. 68-69). For the sake of consistency with the wording of paragraph 4 of the revised draft, paragraph 7 (b) (ii) refers to providing security “as a condition to granting a measure under this paragraph”. It was a generally accepted view of the Working Group at its thirty-seventh session that the security to be provided in respect of ex parte interim measures be mandatory (A/CN.9/523, para. 46). The Working Group may wish to consider whether this subparagraph adequately reflects this view.

*Subparagraph (c)*

33. The Working Group agreed to place the cross-reference to subparagraph (b) of the revised draft (formerly a cross reference to paragraph (4) (a) (v) and (vi) redraft) between square brackets following the concern that a cross reference to subparagraph (b) (ii) (formerly subparagraph (vi) of the paragraph 4 (a) redraft) was necessary (A/CN.9/523, para. 72). The Working Group may wish to continue its discussion on this matter at its thirty-eighth session.

34. The words “For the avoidance of doubt” have been included as the opening words of subparagraph (c) of the revised draft for continuation of discussion at a future session (A/CN.9/523, para. 70). At the thirty-seventh session of the Working Group, some support was expressed for this suggestion but it was pointed out that such wording was generally inappropriate in a legislative text and, in many countries, the effect of the subparagraph would not be to dispel a doubt but to create jurisdiction for the arbitral tribunal beyond the confines of the jurisdiction conferred upon the arbitral tribunal by the parties in the arbitration agreement (A/CN.9/523, para. 70). The view was expressed that, in formulating a provision extending the jurisdiction of the arbitral tribunal in connection with interim measures of protection ordered on an ex parte basis, the Working Group should avoid suggesting that such a provision should be interpreted *a contrario* in the context of those interim measures that were ordered inter partes (A/CN.9/523, para. 71).

*Subparagraph (d)*

35. Paragraph (7) (d) of the revised draft (formerly paragraph 4 (c) of the United States proposal) has been redrafted taking account of comments and suggestions set out in paragraphs 74-75 of A/CN.9/523. This redrafting includes reversing the order of subparagraphs (b) and (c) of paragraph (4) of the United States proposal as requested by the Working Group (A/CN.9/523, para. 73). It should be noted that paragraph 7 (d) refers to “an opportunity” for the responding party to be heard either “as soon as it is no longer necessary to proceed on an ex parte basis in order to ensure that the measure is effective” or “within forty-eight hours of the notice, or on such other date and time as is appropriate in the circumstances”. The first option provides some flexibility. However, if the Working Group prefers the second option, it should be noted that it will then be necessary to revert back to the question when notice should be given. As currently drafted, paragraph (7) (d) applies only to ex parte measures. However, at the thirty-seventh session of the Working Group, it was

suggested that future consideration should be given to determining whether this paragraph should apply only in the context of the interim measures ordered on an ex parte basis or more generally to all interim measures (A/CN.9/523, para. 75).

*Subparagraph (e)*

36. The text of paragraph (7) (e) of the revised draft (formerly paragraph (4) (b) of the United States proposal) has been redrafted taking account of the discussion of the Working Group at its thirty-seventh session (A/CN.9/523, para. 73). Paragraph (7) (e) provides that an interim measure of protection shall be effective for no more than twenty days and provides two options for determining the commencement of this twenty-day period. At the thirty-seventh session of the Working Group, concerns were expressed about the inclusion of a blanket period of effectiveness of an interim measure, such as twenty days (A/CN.9/523, paras. 20, 25 and 73). Concern was expressed that, as drafted, the paragraph did not meet its purpose of providing a rebalancing of the arbitral procedure following the granting of an ex parte measure by giving the responding party an opportunity to be heard and having that measure reviewed as soon as possible. It was stated that the objective of restoring the balance of the arbitral procedure was dealt with under paragraph (4) (c) of the United States proposal (paragraph (7) (d) of the revised draft) which gave the responding party an opportunity to be heard (A/CN.9/523, para. 73). The Working Group may wish to consider whether the text as currently drafted meets these concerns. The Working Group should note that the words “This subparagraph shall not affect the authority of the arbitral tribunal to grant, confirm, extend or modify an interim measure of protection under paragraph (1) after the party against whom the measure is directed has been given notice and an opportunity to be heard” differ from the text that appeared in paragraph (7) at the Secretariat proposal, which provided “A measure granted under paragraph (5) may be extended or modified after the party to whom it is directed has been given notice and an opportunity to respond”. It should be noted that, whilst the Secretariat proposal was directed at extending or modifying the ex parte interim measure after the responding party had been heard, the current text refers to interim measures in general and includes granting or confirming either the ex parte interim measure or a new interim measure altogether.

*Subparagraph (f)*

37. In respect of paragraph (7) (f) of the revised draft (formerly paragraph (4) (d) of the United States proposal), it was suggested that a further redraft of the provision should establish a clear link between the obligation to disclose a change in circumstances and the liability regime applicable to the party requesting the interim measure (A/CN.9/523, paras. 49 and 76). The Working Group may wish to consider further this suggestion.

38. The Working Group should note that paragraph (7) (f) provides a similar obligation to that imposed under paragraph (6), although paragraph (7) (f) appears to impose a slightly broader obligation to inform. At the thirty-seventh session of the Working Group, it was suggested that, if maintained, the text contained in paragraph (7) (f) should provide a time limit within which the party requesting the interim measure should disclose a change in circumstances to the arbitral tribunal. As noted above (para. 24), the Working Group may consider whether an express

sanction should be included for the breach of paragraph (6). If the Working Group does decide to include such a sanction, it will be also necessary to decide if the duty to disclose under paragraph (6) should apply to both inter partes and ex parte measures or, if paragraph (7) (f) should be maintained, a separate sanction should be provided where it is breached. It is submitted that the result expected from paragraph (7) (f) (namely to impose a strict obligation to inform upon the party requesting an ex parte measure) is already achieved by the application of paragraph (6) and that duplication of this obligation would affect the readability and internal logic of the text.

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