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Work Programme

Possible future work on climate change mitigation, adaptation and resilience

Note by the Secretariat

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B. Private law and the incorporation of climate considerations into business decisions[1]

1. Whether or not, and the extent to which, climate considerations are taken into account into business decisions is a key factor in addressing climate change. The private sector controls considerable financial, material, and engineering resources, and to achieve the goals of the Paris Agreement it is of crucial importance that these resources are mobilized and deployed in ways that support the transition towards a lower carbon economy as well as the enhancement of adaptive capacities.[2]

2. Over the years, the understanding of the business-climate nexus has evolved. Initially perceived as a purely environmental problem, climate change is now regarded by most economic analysts as an issue that "presents foreseeable financial and systemic risks (and opportunities) over mainstream investment horizons".[3]

3. While the decision to incorporate climate considerations into business operations and the importance to accord to these considerations were issues traditionally left at the discretion of companies, the dominant view today among States and legal scholars seems to be that this incorporation should be more systematic and, therefore, regulated and made mandatory. The current legal practice indicates that there is a range of legal steps involving private law tools, concepts, and structures that can be implemented to achieve that result. Such steps may consist in: obliging corporations to disclose climate-related financial information; interpreting fiduciary duties of corporate directors and officers as requiring to consider climate change; or holding the private actors that fail to adequately address climate change liable for breach of tort law duty of care or breach of a statutory duty of vigilance. The following section presents and discusses these three private law-based approaches which all aim at placing climate change at the heart of business decisions.

1. Disclosure of climate-related financial information

4. The disclosure of climate-related financial information by corporations aims at enabling shareholders to have a clear understanding of the financial implications of climate change for the companies in which they invest.[4] By having access to this information, shareholders have the possibility to use their influence to encourage companies to incorporate climate considerations into their business decisions and to adopt approaches that are more appropriate to managing the risks and opportunities presented by climate change. With the growing awareness of the financial risks posed by climate change, corporations have been facing increasing pressure from their shareholders since the mid-2000s to disclose their exposure to climate-related risks.[5]

5. While the disclosure of climate-related financial information was initially done on a purely voluntary basis and without any reference framework or harmonized standards,[6] initiatives were gradually put in place by the business sector and public authorities to encourage, facilitate, and regulate this practice. A turning point in this

[1] This section of the report was prepared with the valuable help of Ms. Camille D'Astous, LL.M. Candidate at the Law Faculty at Laval University who acted as research assistant.

[2] Craig A. Hart, *Climate change and the private sector. Scaling up private sector response to climate change*, Routledge, 2013, p. 296.

[3] Sarah Barker, Cynthia Williams, Alex Cooper, *Fiduciary duties and climate change in the United States*, Commonwealth Climate and Law Initiative, 2021, p. 1, https://ccli.ubc.ca/wp-content/uploads/2021/12/Fiduciary-duties-and-climate-change-in-the-United-States.pdf.

[4] Ans Kolk, David Levy, Jonatan Pinkse, "Corporate responses in an emerging climate regime: the institutionalization and commensuration of carbon disclosure", *European Accounting Review*, vol. 17, issue 4, 2008, pp. 719–745.

[5] Philipp Pattberg, "The emergence of carbon disclosure: exploring the role of the governance entrepreneurs", *Environment and Planning C: Politics and Space*, vol. 35, issue 8, 2017, p. 1444.

[6] Jeffrey A. Smith, Matthew Morreale, Michael E. Mariani, "Climate change disclosure: moving towards a brave new world", *Capital Markets Law Journal*, vol. 3, issue 4, 2008, p. 470.

process was the creation, in 2015, of the Task Force on Climate-Related Financial Disclosure (TCFD) by the Financial Stability Board established by the G20. In 2017, the Task Force published a report containing a set of recommendations on how to disclose climate-related financial information applicable to organizations across sectors and jurisdictions. These recommendations are structured around four core elements: the organization's governance around climate-related risks; the actual and potential impacts of climate-related risks and opportunities on the organization's business, strategy, and financial planning; the processes used by the organization to identify, assess, and manage climate-related risks; and the metrics and targets used to assess and manage relevant climate-related risks and opportunities.[7] The report also recommended that "preparers of climate-related financial disclosures provide such disclosures in their mainstream (i.e., public) annual financial filings".[8]

6. Even in the absence of specific domestic rules imposing mandatory climate-related disclosure requirements, it should be noted that corporations may still expose themselves to legal actions by not disclosing appropriate information on how climate change affects their activities and assets. In many jurisdictions (including in most of the G20 jurisdictions), companies with public debt or equity have legal obligations to disclose material information in their financial filings, and it seems increasingly likely that courts would be willing to consider climate risks as material information and treat situations of non-disclosure as potential securities fraud. In recent years, issues relating to climate disclosure have been at the heart of several court cases or complaints to regulatory bodies initiated by State attorneys, company shareholders or interested non-governmental organizations alleging failure to disclose relevant climate change information and misrepresentation of the effects of climate change on certain company assets.[9]

7. Those examples illustrate that climate litigation can be a useful tool to encourage companies to disclose climate-related financial information even in the absence of specific regulations requiring it. In the jurisdictions where such regulations do not exist, a key and often discussed question is whether companies failing to disclose climate-related information would be considered to be in violation of securities and corporate laws.[10]

2. Fiduciary duties of directors and officers regarding climate change

8. Whether in common law or in civil law jurisdictions, corporate directors and officers usually owe fiduciary duties to the corporation and its stakeholders for the breach of which they may be held personally liable. At the moment, corporate duties mandating greater attention to climate change are, by and large, non-existent in domestic legislations.[11] In some jurisdictions, statutory provisions do however require directors and officers to consider the environment when acting in the company's best interests.

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[7] Task Force on climate-related financial disclosures, *Recommendations of the Task Force on Climate-related Financial Disclosures*, 2017, v, https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf.

[8] Ibid., iv.

[9] *Pedro Ramirez Jr. v. Exxon Mobil Corporation et al*., No. 3:16-CV-3111-K (N.D. Tex. 2016) (United States); *Guy Abrahams v. Commonwealth Bank of Australia*, VID879/2017 (Australia); Cynthia A. Williams, Disclosure of information concerning climate change: liability risks and opportunities, Commissioned Reports, Studies and Public Documents, Osgoode Hall Law School of York University, Paper 206, 2018, p. 34, https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1207&context=reports; Stephen Erlichman, Sophie Langlois, "ESG disclosure in Canada: legal requirements, voluntary disclosure and potential liability", Mondaq, 25 February 2021, www.mondaq.com/canada/climate-change/1039490/esg-disclosure-in-canada--legal-requirements-voluntary-disclosure-and-potential-liability.

[10] Anik Bhaduri, "Taking the heat: (non)disclosure of climate change risks in India", *Business Law Review*, vol. 41, issue 3, 2021, pp. 152–158.

[11] Rolf H. Weber, Andreas Hösli, "Corporate climate responsibility – The rise of a new governance issue", *Sui generis,* 2021, p. 90.

9. Whether or not such provisions exist in domestic laws, a survey of the recent legal literature reveals an emerging body of opinion holding that corporate directors and officers have a fiduciary duty to identify and address climate-related risks.[12] While these findings all point in the same direction, there also seems to be a consensus in the legal literature on the fact that the existence of a duty to consider climate-related financial risks for corporate directors should be made explicit in the law, either by amending existing statutes or judicial interpretation.[13] To further promote the incorporation of climate considerations into business decisions, more clarity should also be provided on the exact legal implications of this duty. Corporate directors and officers may indeed be declared legally obliged to consider climate-related financial risks, but uncertainties could remain as to what "considering" these risks really entails in practice and about the corporate governance practices that should be put in place to discharge the duty.

10. To govern climate risks in a way that is in compliance with the fiduciary duties, it is often argued that directors and officers have to deploy procedural efforts, such as making relevant inquiries and seeking advice about the materiality of the risks posed by climate change, assessing the exposure of the company to these risks, and monitoring the company's compliance with climate law and regulations.[14] However, it is unclear whether fiducial duties would go as far as requiring directors and officers to release a public climate change strategy containing mitigation and/or adaptation goals, and to achieve those goals. As evidenced by the numerous international corporate social responsibility standards that have been developed over the years,[15] there is an increasing social expectation that companies – especially those responsible for large emissions of GHG – act as "good" and "responsible"[16] corporate citizens. There is also a global trend in domestic legislations to transforming voluntary endeavours into mandatory ones.[17]

3. Climate lawsuits against corporations for alleged breach of tort law duty of care or breach of statutory duty of vigilance

11. As evidenced by the landmark judgement rendered by the Hague District Court in May 2021 in the case *Milieudefensie et al. v. Royal Dutch Shell plc*, tort law is also a private law tool that may be mobilized to foster the incorporation of climate considerations into business decisions. This class action lawsuit against Royal Dutch Shell (RDS) was brought by various non-governmental environmental organizations which claimed that RDS had an obligation to reduce its GHG emissions ensuing from the tort law duty of care laid down in Book 6 section 162 of the Dutch Civil Code, according to which acting in conflict with what is generally accepted according to unwritten law is unlawful.[18] To fulfil its duty of care, the plaintiffs contended that

[12] Sarah Barker, *Directors' liability and climate risk: Australia – Country Paper*, Commonwealth Climate and Law Initiative, 2018, p. 17, www.smithschool.ox.ac.uk/research/sustainable-finance/publications/CCLI-Australia-Paper-Final.pdf; Janis Sarra, *Duty to protect: corporate directors and climate-related financial risk*, C.D. Howe Institute, 2021, p. 9, www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/e-brief_310.pdf; Barker, Williams, Cooper, op. cit., p. 4; Chapman Tripp, "Climate change obligations for directors and scheme managers: legal opinion", Aotearoa Circle, 2019, para. 67.1; Yoshihiro Yamada, Janis Sarra, Masafumi Nakahigashi, "Directors' duties regarding climate change in Japan", Commonwealth Climate and Law Initiative, 2021, p. 1, https://law-ccli-2019.sites.olt.ubc.ca/files/2021/02/Directors-Duties-Regarding-Climate-Change-in-Japan.pdf.

[13] Sarra, op. cit., p. 9.

[14] Barker, Williams, Cooper, op. cit., pp. 21 and 46.

[15] E.g. OECD Guidelines for multinational enterprises (2011), UN Guiding Principles on Business and Human Rights (2011), UN Principles for Responsible Investments (2006), United Nations Global Compact (2000).

[16] *BCE Inc. v. 1976 Debenturelholders* [2008] 3 SCR 560, paras. 66 and 82 (Canada).

[17] Evguenia Paramonova, "Steering toward 'true north': Canadian corporate law, corporate social responsibility, and creating shared value", *McGill Journal of Sustainable Development Law and Practice*, vol. 12, issue 1, 2016, p. 35.

[18] *Milieudefensie et al. v. Royal Dutch Shell plc.*, District Court of the Hague, C/09/571932/HA ZA 19-379, 2021, para. 4.4.1, (Netherlands).

RDS had an obligation to reduce the GHG emissions attributable to the Shell group by at least 45 per cent relative to 2019 levels at the end of 2030. Consequently, the plaintiffs required the court to order RDS to achieve this GHG emission reduction goal.

12. To interpret the duty of care and determining the concrete legal implications attached to this duty in the circumstances of the case, the court considered a range of different factors, such as the Shell group's CO_2 emissions and their consequences for the Netherlands and their citizens, the relevant regulatory frameworks (like the European Union ETS and the human rights standards, notably the right to life and the right to respect for private and family life), the United Nations Guiding Principles as well as the science and what is needed to prevent dangerous climate change.[19] The court also considered the onerousness of imposing the reduction obligation that was requested by the plaintiffs on RDS. In discussing this point, the court acknowledged that the reduction obligation would require changes in the climate policy of RDS which could "curb the potential growth of the Shell group" but considered that "the interest served with the reduction obligation outweigh[ed] the Shell group's commercial interests".[20]

13. While an appeal against the decision of the Hague District Court is still pending, the Study indicates that the case has attracted great interest also in other jurisdictions and that the Shell case could "signal a movement towards an increased willingness of the courts to find that companies may become liable to third parties for the wider effects of climate change caused by their emissions".[21] This interest is strengthened by the fact that courts in other countries have also found parent companies to be liable for the actions of their subsidiaries.[22] Moreover, claims against corporations for failure to adequately address climate change can also in some countries be based on an alleged violation of a "statutory duty of vigilance", which obliges them to deploy reasonable efforts to prevent serious damage to human rights, the health and safety of humans and the environment throughout their supply chain.[23] In 2019, a group of plaintiffs comprised of non-governmental environmental organizations and local governments filed a lawsuit against a large French energy group for breach of its duty of vigilance by failing to provide sufficient information about the identification of the risks inherent to climate change in its vigilance plan, as well as to include adequate measures to reduce and prevent the damage caused by climate change.[24]

14. In the years to come, more jurisdictions could implement similar domestic measures to enforce international human rights and environmental standards through business organizations. In 2014, the United Nations Human Rights Council launched an intergovernmental negotiation process for the elaboration of legally binding instruments to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. While this process is still ongoing, the latest version of the negotiation text states that "States Parties shall take

[19] Ibid., para. 4.4.2.

[20] Ibid., para. 4.4.53.

[21] Cinthia A. Williams, Ellie Mulholland, "What the Shell judgement means for US directors", *Harvard Law School Forum on Corporate Governance*, 22 July 2021, https://corpgov.law.harvard.edu/2021/07/22/what-the-shell-judgment-means-for-us-directors.

[22] *Vedante Resources Plc and anothers v. Lungowe and others* [2019] UKSC 20 (United Kingdom); *Okpabi and others v. Royal Dutch Shell Plc and another* [2021] UKSC 3 (United Kingdom).

[23] In France, for instance, Parliament adopted in 2017 a law that imposes a duty of vigilance on large French companies (Law No. 2017-399 concerning the duty of parent companies and contracting companies). Any company whose head office is located in France and that employs at least 5,000 employees (including the company and its direct and indirect subsidiaries, or 10,000 employees in its service and in its direct or indirect subsidiaries) is required to establish, publish and implement an effective vigilance plan. This plan must identify the risks of serious harm to human rights, the health and safety of humans and the environment that may result from the activities of the company and include reasonable measures to prevent those risks.

[24] Notre Affaire à tous, et al., *Summons before le Tribunal Judiciaire de Nanterre*, 2019, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200128_NA_complaint-2.pdf.

appropriate legal and policy measures to ensure that business enterprises, including transnational corporations […] within their territory, jurisdiction, or otherwise under their control, respect internationally recognized human rights and prevent and mitigate human rights abuses throughout their business activities and relationships"[25]. Thus, as human rights abuse is defined in the negotiation text as including actions or omissions that impede the enjoyment of "the right to a safe, clean healthy and sustainable environment", such a provision – if it ever becomes treaty law – could have an important impact on domestic legislations and on how corporations operating at a global scale take climate change into consideration.

15. While many uncertainties remain about the precise results that may be achieved when tort law or duty of vigilance laws are used against corporations in the context of climate change, the overall conclusion is that these areas of law increasingly appear as offering valid legal grounds for holding corporations liable for the consequences of not adequately incorporating climate considerations in business decisions. As this liability risk increases, it has been held that boards should "think expansively about potential tortious liability risks relating to climate change and ensure that they have systems in place to avoid being sued".[26] This may require that corporations adopt and implement climate strategies that are aligned with the goals of the Paris Agreement and the science, and that cover their entire supply chain.

C. UNCITRAL instruments and climate action

16. Although UNCITRAL texts do not explicitly refer to climate change or climate-related issues, some of these texts do nevertheless have a relevance from a climate change perspective. In some cases, this relevance is due to the fact that these texts may be used to regulate the trading of "things" that have a link with climate change. For instance, the United Nations Convention on Contracts for the International Sale of Goods, or the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, could be (or perhaps are already being) used to regulate the trading of what could be called climate-friendly products (such as electric cars or solar panels), or the trading of CO_2. However, in other cases, the nexus with climate change stems from the fact that UNICTRAL texts, when interpreted and applied in certain ways, can become effective legal tools in the fight against climate change. The following section will focus on this latter case by providing examples of UNCITRAL texts that could be used to encourage or facilitate climate action.

1. International commercial arbitration

17. As evidenced by several recent cases, the domestic measures that States adopt to fight climate change can be challenged before arbitral tribunals by foreign investors for alleged violations of the rights protected by the international investment agreements those States have concluded. For instance, in the Netherlands, two energy corporations have filed claims against the government on the basis of the Energy Charter Treaty to obtain compensation for the loss of value of their investments resulting from the government's regulations on coal.[27] Likewise, under the North American Free Trade Agreement, a company registered in the United States brought a claim against Canada following the decision of the government of Quebec to revoke all rights to mine for oil and gas under the St. Lawrence River to obtain compensation for the money already invested and for anticipated future profits.[28] As States face

[25] *Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*, Open-ended intergovernmental working group Chairmanship, 17 August 2021, www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf.

[26] Williams and Mulholland, op. cit.

[27] *RWE v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4; *Uniper v. Netherlands*, ICSID Case No. ARB/21/22.

[28] *Lone Pine v. Canada*, ICSID Case No. UNCT/15/2.

more pressure to implement ambitious measures against climate change in their territory, these kinds of climate-related Investor-State disputes which are submitted to arbitration tend to become more frequent.[29]

18. With the increased use of Investor-State arbitration to resolve climate-related disputes, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration is an instrument whose implementation could support climate action in different ways. A key aspect of these rules that is of particular interest in the context of climate change is the obligation to make available to the public the documents relating to arbitral proceedings that are set out in article 3.1. This obligation could help putting climate-related Investor-State disputes in the public spotlight and, placed under public scrutiny, arbitrators could be more receptive to arguments relating to the importance of protecting the regulatory space that States need to adopt ambitious climate measures. In addition, the publication of awards confirming the compatibility of domestic climate measures with international investment agreements could provide examples of successful legal arguments for defending States involved in similar Investor-State disputes and give arbitrators acting on other cases more legitimacy to reach similar conclusions.

19. The possibility for third parties and non-disputing treaty parties to make submissions under certain circumstances (articles 4 and 5) is also an aspect of the Rules that is worthy of mention. According to legal scholars, the fact that most arbitrators are trained in commercial law and have relatively narrow expertise about climate change and climate law is something that could naturally lead them to be less receptive to legal arguments based on those grounds.[30] The submission of amicus curiae briefs by non-governmental environmental organizations, climate scientists and legal experts in the field of climate law could be a way to mitigate these risks and to facilitate the consideration of external (i.e. non-commercial) interests by arbitrators.[31] In the way forward, a possible avenue would be to complement the UNCITRAL Arbitration Rules with guidelines specifying that relevant expertise in climate/environmental law should be an element to take into consideration for the appointment of arbitrators in cases involving climate-justified measures.

2. Public procurement

20. Public procurement can play a significant role in addressing climate change. When purchasing goods and services governments have indeed the opportunity to guide public expenditures towards efficient low-carbon choices, or choices that increase the adaptation and resilience capacities of human communities. While analysts consider that the integrity and economic efficiency of public procurement remain critical, they are also of the view that it is now crucial that climate considerations are taken into account to award public contracts.[32]

21. Several provisions of the UNCITRAL Model Law on Public Procurement could be used as a tool in the fight against climate change. This is notably the case of article 9.2, which identifies the criteria against which procuring entities can ascertain that suppliers and contractors are eligible to bid for a specific public procurement

[29] Catherine Higham, Joana Setzer, “Investor-State dispute settlement as a new avenue for climate litigation”, Grantham Research Institute on Climate Change and the Environment website, 2 June 2021, www.lse.ac.uk/granthaminstitute/news/investor-state-dispute-settlement-as-a-new-avenue-for-climate-change-litigation.

[30] Mala Sharma, “Earth to exist and money to live – Integrating climate change goals and investor state arbitration for a sustainable future”, *The Journal of World Investment and Trade*, special issue: International investment law and climate change, 2022, forthcoming.

[31] Esmé Shirlow, “Dawn of a new era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-based Investor-State Arbitration”, *Foreign Investment Law Journal*, vol. 31, No. 3, 2016, p. 644.

[32] Richard Baron, *The role of public procurement in low-carbon innovation*, OECD, 2016, p. 4, www.oecd.org/sd-roundtable/papersandpublications/The%20Role%20of%20Public%20Procurement%20in%20Low-carbon%20Innovation.pdf.

contract. To be eligible to bid, the Model Law provides that suppliers and contractors may have to demonstrate that they have the necessary environmental qualifications, the professional and technical competence, and the equipment to perform the procurement contract.[33] They may also need to "meet ethical and other standards applicable"[34] in the State in which the contract is to be performed. Thus, a procuring entity would presumably be allowed to verify that suppliers and contractors have, for instance, access to low-carbon technologies, or that they comply with the domestic climate regulations. Article 10 is also a provision that enables procuring entities to take climate change into consideration. This article provides that a procuring entity "shall set out in the solicitation documents the detailed description of the subject matter of the procurement that it will use in the examination of submissions",[35] and that this description may include specifications and requirements[36] and "shall set out the relevant technical, quality and performance characteristics of that subject matter".[37] As can be seen, these provisions give ample authority to a procuring entity to embed climate-related conditions in the description of the subject matter of the procurement.

22. In recent years, the issue of how to turn public procurement into an efficient tool in the fight against climate change has elicited considerable interest among governments and public policy experts. Many observers are of the view that climate-related issues should now be systematically considered in public procurement, and some countries have already taken – or are taking – steps to move towards public procurement practices that include climate-related criteria.[38] Under the current UNCITRAL Model Law on Public Procurement, procuring entities have a level of discretion that enables them to include climate considerations when they apply the rules. However, the elaboration of specific indications on the best practices that exist on that matter could facilitate a more systematic incorporation of climate considerations into public procurement.

3. Public-private partnerships

23. Public infrastructure (transport, energy, waste management, buildings) are a crucial lever in the fight against climate change, both in terms of mitigation and adaptation. On the mitigation side, building and operating infrastructure are activities that can generate large amounts of GHG. In addition, because of the extended lifetime of infrastructure, decisions in that area that are not aligned with climate goals can contribute to lock societies into carbon-intensive emissions pathway for decades. As for adaptation, public infrastructure can have a decisive impact on the exposure and vulnerability of human communities to the physical impacts of climate change, such as heatwaves, hurricanes, sea-level rise, and flooding. As highlighted in a recent report, "infrastructure is at the heart of climate compatible development" and actions to ensure that the right infrastructure is done well "can enable unprecedented progress towards the Paris Agreement and the [Sustainable Development Goals]".[39]

24. Because infrastructure projects are primarily carried out through public-private partnerships (PPP), it appears essential that the legal frameworks governing PPP contain provisions expressly aiming at supporting the implementation of low-carbon

[33] UNCITRAL Model Law on Public Procurement Art. 9.2 (a).

[34] Ibid., art. 9.2 (b). As indicated in the Guidance on procurement regulations to be promulgated in accordance with article 4 of the UNCITRAL Model Law on Public Procurement, compliance with such standards may involve environmental considerations.

[35] Ibid., art. 10.1(b).

[36] Ibid., art. 10.3.

[37] Ibid., art. 10.4.

[38] Beatriz Martinez Romera, Roberto Caranta, "EU public procurement law: purchasing beyond price in the age of climate change", *European Procurement and Public Private Partnership Law Review*, vol. 12, No. 3, 2017, pp. 281–292.

[39] United Nations Office for Project Services, United Nations Programme for the Environment, University of Oxford, *Infrastructure for climate action*, 2021, p. 9, https://content.unops.org/publications/Infrastructure-for-climate-action_EN.pdf?mtime=20211008124956&focal=none.

and climate resilient infrastructure. When such provisions do not exist, these legal frameworks should be interpreted and applied in ways that could be the most beneficial for the achievement of climate goals. In the case of the UNCITRAL Model Legislative Provisions on Public-Private Partnerships, even if none of the provisions refer to climate change,[40] several of them can nevertheless be interpreted and applied so as to promote low-carbon and climate resilient infrastructure.

25. For instance, Model provision 5 provides that a contracting authority envisaging to develop infrastructure through a PPP shall carry out or procure a feasibility study. The provision further specifies that this feasibility study shall identify "how the project meets relevant national or local priorities for the development of public infrastructure".[41] In assessing this element, a contracting authority could be required to take into consideration the nationally determined contribution of the State to verify the extent to which the infrastructure considered is aligned with the domestic climate agenda.

26. Paragraph 3 of Model provision 5, which specifies that the request for approval of a PPP project shall assess the project's social, economic, and environmental impact, is also of direct relevance in the context of climate change. The authority responsible for approving a proposed PPP could indeed consider that assessing the environmental impact of the project requires assessing its impact in terms of GHG emissions. While such an assessment may pose practical challenges, it should be noted that various methodological tools have been developed in the context of environmental impact assessment procedures. In many countries, considering climate-related issues when the environmental impacts of a proposed project are assessed is now mandatory and how this should be done is often detailed in regulations. The elaboration of an UNCITRAL document providing precise methodological guidelines about how the assessment of the climate impact of a PPP project should be carried out could be contemplated. In addition to mitigation, the reference to social impact in paragraph 3 provides a legal basis on which an authority responsible for approving a proposed PPP could rely to require that the potential adverse effects that the project could have on human health, in case of extreme weather events, are analysed. For instance, for infrastructure projects such as roads, bridges, or tunnels, it could be asked that the extent to which these projects could contribute to the urban "heat-island" effect is documented.

27. The model provisions that govern the contract award procedure also offer various points of entry for climate considerations. This is notably the case of Model provision 10, which provides that interested bidders must have the necessary environmental qualifications, and professional and technical competence,[42] and must meet ethical and other standards applicable in the State.[43] Model provision 19, according to which the evaluation of the technical elements of the proposals shall be based on their technical soundness and compliance with environmental standards,[44] is also a provision that enables the consideration of climate issues.

D. Conclusions of the Study

28. The Study stresses that the discussion on legal measures to steer a transition toward a low-carbon and climate resilient society has usually focused on solutions that involve areas of law such as international law, constitutional law, administrative law, human rights law as well as energy and environmental law. The Study finds, however, that private law, too, can play a significant role in the fight against climate

[40] The Model Provision 1 does however refer to "long-term sustainability" in both Option I and Option II.

[41] UNCITRAL Model Legislative Provisions on Public-Private Partnerships, Model provision 5, para. 2(a).

[42] Ibid., Model Provision 10 (a).

[43] Ibid., Model Provision 10 (c).

[44] Ibid., Model Provision 19.1, para. (a) and (b).

change and in the achievement of the goals of the Paris Agreement. Contract law, tort law, property law, corporate law and trade law are all levers that can be used to tackle the climate crisis.

29. The Study finds, for instance, that private law could help create a more favourable environment for climate-friendly investment by providing more clarity, uniformity, and predictability in the area of carbon trading. At the moment, uncertainties remain in many jurisdictions about the legal status of carbon credits and their legal treatment under domestic law. Issues on which more clarity is often deemed desirable include questions such as whether carbon credits can be used as collateral security and whether they represent estate assets in the case of insolvency proceedings. In addition, the divergences that may exist in the legal treatment reserved to carbon credits across jurisdictions tend to generate uncertainties and create a complex regulatory framework for private actors. Contractual tools to manage the regulatory risks to which participants in mandatory and voluntary carbon markets are exposed in a more predictable way is also an issue on which further reflection is considered welcome.

30. The Study also finds that private law could also help create a more favourable environment for climate-friendly investment by addressing some of the legal issues that can currently be observed in the still emerging, but growing, international market of CO_2 utilization. Such issues concern the legal status under domestic law of the CO_2 that is captured and that is sold for commercial purposes, as well as the liability of private entities in case of CO_2 leakage. The Study strikes however a note of caution in that respect since the idea of encouraging the commercial use of CO_2 to accelerate the decarbonization of the world economy is not free of controversy.

31. Developments in private law, and more specifically in corporate law, could also serve to promote a more systematic incorporation of climate change considerations into business decisions. Many jurisdictions are already in the process of implementing domestic measures to oblige corporations to disclose their exposure to climate-related financial risks and fiduciary duties of corporate directors and officers are increasingly interpreted by legal scholars as requiring the consideration of climate change. In addition, there is a growing reflection about the necessity to impose a duty of vigilance on large corporations to encourage them to deploy the adequate efforts to mitigate the GHG emissions of their supply chain. However, to scale-up the pace of these evolutions, and to ensure a certain level of uniformity in future domestic legal developments, new texts such as model legislations or guides could be elaborated at the international level.

32. The Study concludes that, as a global standard setter, UNCITRAL could play a key role in the area of climate change mitigation, adaptation and resilience. While the adoption of legal texts on new topics could be contemplated, it should be noted that existing UNCITRAL texts – even though they do not explicitly refer to climate considerations – can already be interpreted and applied in ways that are beneficial for the climate. This is notably the case with the UNCITRAL texts relating to commercial arbitration, public procurement, and public-private partnerships. To facilitate and encourage the utilization of these texts as effective legal tools in the fight against climate change, guidelines could be adopted to specify how certain provisions contained in these texts could be applied to support the achievement of climate goals.

III. Remarks for consideration by the Commission

33. Climate change action has become a central concern of the United Nations system, and in his coordinating role the Special Envoy on Climate Action and Finance pays special attention to significantly shifting public and private finance markets and mobilizing private finance to the levels needed to achieve the 1.5°C goal of the Paris Agreement. This includes building the frameworks for financial reporting, risk management and corporate returns in order to bring the impacts of climate change to

the mainstream of private financial decision-making and to support the transition to a net zero carbon economy.

34. Most measures to achieve the goals of the Paris Agreement are of a policy, regulatory or technical nature, or require financial investment from the public and the private sector. The Study has nevertheless identified a few areas in which private law can facilitate climate change mitigation, adaptation and resilience and generally supports the idea that it would be desirable and feasible for the Commission to undertake work in those areas. While climate change action and finance are not as such directly related to the Commission's mandate, the Commission may nevertheless wish to consider that it could offer its own contribution to the broader climate goals embraced by the international community with respect to climate change mitigation, adaptation and resilience. Climate action is one of the 13 Sustainable Development Goals which all United Nations bodies are called upon to integrate as much as possible in their mandate. The Commission, which has consistently highlighted the relevance of its work programme for the promotion of the rule of law and the implementation of the Sustainable Development Goals,[45] may therefore wish to consider the proposed work on climate change mitigation, adaptation and resilience from that perspective and regard it as one additional contribution to the overall climate action agenda of the United Nations. The secretariat has transmitted the Study to interested United Nations bodies, namely the Office of the Special Envoy on Climate Action and Finance and the Secretariat of the Intergovernmental Panel on Climate Change (IPCC) and will transmit to the Commission any comments it receives from them.

35. In light of the above, the Commission may wish to consider the following:

(a) Whether it wishes to undertake work on private law aspects of climate change mitigation, adaptation and resilience identified in sections A ("Private law issues relating to clean investments") and B ("Private law and the incorporation of climate considerations into business decisions") of the overview of the Study;

(b) The scope of such work (for example, whether to address all areas identified in the Study, or only some of them, or whether the secretariat should be tasked with identifying possible additional areas relevant for the Commission's mandate);

(c) If so, how such work should be undertaken (for example, referring it to a Working Group or to the secretariat), resources permitting;

(d) Whether the secretariat should be requested to prepare guidance documents, for review by the Commission in due course, on the practical application and interpretation of existing UNCITRAL instruments (primarily those identified in section C ("UNCITRAL instruments and climate action"), but possibly others as well);

(e) Whether the secretariat should carry out, with the help of experts, a systematic review of private law issues arising in connection with climate action, in the form of a taxonomy or additional study to further enable the Commission to decide on the desirability of formulating concrete guidance on private law and climate action.

36. If the information provided above is not sufficient for the Commission to decide on whether to refer the work to a Working Group or if there is no available Working Group to undertake work, the Commission may wish to request the secretariat to conduct further research in the area, in consultation with outside experts and interested organizations from both within and outside the United Nations system. It may also consider requesting the secretariat to organize a colloquium or an expert group meeting on the various legal issues surrounding climate change mitigation, adaptation and resilience in conjunction with relevant and interested international

[45] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), paras. 370–374.

organizations, the results of which would facilitate its consideration at a future session.