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Role of UNCITRAL in promoting the rule of law at the national and international levels

Note by the Secretariat

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I. Introduction

1. The Commission may wish to recall that the item on rule of law has been on its agenda since its forty-first session, in 2008,¹ in response to the General Assembly's invitation to the Commission to comment, in its report to the General Assembly, on the Commission's current role in promoting the rule of law.² The Commission may further wish to recall that, at its forty-first to fifty-fourth sessions, in 2008 to 2022, respectively, the Commission transmitted comments on its role in promoting the rule of law at the national and international levels, in its annual reports to the General Assembly.³

2. At its fifty-first session, in 2018, the Commission considered the proposal to generate discussion within the Commission on agenda item "Role of UNCITRAL in promoting the rule of law at the national and international levels" and to improve the way the Commission handled that agenda item. The Commission considered the possibility of broadening the discussion of its role in promoting the rule of law at the national and international levels to a discussion of the way its work relates to the 2030 Agenda for Sustainable Development and 17 Sustainable Development Goals, both with regard to the instruments it has developed and with regard to assistance to States in their achievement of the Goals. It was suggested that, in order for the Commission to achieve a more meaningful consideration of that agenda item, the secretariat could prepare a paper outlining the way that the UNCITRAL instruments and texts relate to the Sustainable Development Goals and identifying concrete issues to be discussed by the Commission on that basis.

3. At its seventy-seventh session, the General Assembly again endorsed the conviction of the Commission that the implementation and effective use of modern private law standards in international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger and that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General.⁴

4. The Commission may wish to note that the General Assembly, in resolution 77/110 of 7 December 2022, reiterated its invitation to the Commission to comment on its current role in promoting the rule of law. In paragraph 23 of the same resolution, the General Assembly invited Member States to focus their comments during the upcoming Sixth Committee debate on the subtopic "Using technology to advance access to justice for all".

¹ For the decision of the Commission to include the item on its agenda, see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part two, paras. 111–113.

² General Assembly resolutions 62/70, para. 3; 63/128, para. 7; 64/116, para. 9; 65/32, para. 10; 66/102, para. 12; 67/97, para. 14; 68/116, para. 14; 69/123, para. 17; 70/118, para. 20; 71/148, para. 22; 72/119, para. 25; 73/207, para. 20; 74/191, para. 20; 75/141, para. 20; 76/117, para. 20, and 77/110, para. 20.

³ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 386; *ibid.*, *Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 413–419; *ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, paras. 313–336; *ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 299–321; *ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, paras. 195–227; *ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 267–291; *ibid.*, *Sixty-ninth Session, Supplement No. 17 (A/69/17)*, paras. 215–240; *ibid.*, *Seventieth Session, Supplement No. 17 (A/70/17)*, paras. 318–324; *ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, paras. 317–342; *ibid.*, *Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 435–441; *ibid.*, *Seventy-third Session, Supplement No. 17 (A/73/17)*, paras. 232–233; *ibid.*, *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, paras. 303–308; *ibid.*, *Seventy-fifth Session, Supplement No. 17 (A/75/17)*, para. 25; *ibid.*, *Seventy-sixth Session, Supplement No. 17 (A/76/17)*, paras. 370–374 and *ibid.*, *Seventy-seventh Session, Supplement No. 17 (A/77/17)*, paras. 308–315.

⁴ General Assembly resolution 77/99, para. 15.

5. At its fifty-fifth session, the Commission offered its comments on the subtopic “The impacts of the global coronavirus disease (COVID-19) pandemic on the rule of law at the national and international levels”. The comments provided a review of the discussion of the subtopic at prior sessions, described relevant exploratory work and outlined the relevance of texts to the subtopic in the areas of electronic commerce, MSMEs, insolvency, the international sale of goods, public-private partnerships and public procurement, mediation, arbitration and secured transactions.⁵

6. Chapter II of this note outlines the relevance of the texts that may be before the Commission for finalization and adoption at its fifty-sixth session, in 2023, to the promotion of the rule of law and the implementation of the Sustainable Development Goals. Chapter III suggests actions by the Commission under this agenda item at its fifty-sixth session.

II. Relevance of texts that are expected to be considered by the Commission at its fifty-sixth session, in 2023, to the promotion of the rule of law and the implementation of the Sustainable Development Goals

7. As the Commission was informed at past sessions,⁶ the UNCITRAL website contains a web page that explains the role of UNCITRAL in the implementation of the Sustainable Development Goals, including its rule-of-law-related target.⁷ The web page focuses on nine Goals most relevant to the work of UNCITRAL: Sustainable Development Goals 1, 5, 8, 9, and 16. The Introduction to the United Nations Commission on International Trade Law online course also outlines how the work of UNCITRAL contributes to the achievement of the sustainable development goals.⁸

8. As indicated in paragraphs 2, 3 and 4 above, the relationship between UNCITRAL instruments and the implementation of the Sustainable Development Goals, was highlighted by the Commission, by the General Assembly and by the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels.

9. At its fifty-sixth session, in 2023, the Commission is expected to have before it for finalization and adoption a number of texts that further demonstrate that interrelationship as explained below.

A. Draft guide on access to credit for micro, small and medium-sized enterprises

Relevance to Sustainable Development Goals 1, 5, 8 and 9.

10. At its fifty-sixth session, in 2023, the Commission will have before it for consideration and adoption a draft guide on access to credit for micro, small and medium-sized enterprises (MSMEs). The draft guide provides States with guidance as to how their domestic legal framework may be modified to facilitate access to credit for MSMEs. In addition to reforms of relevant areas of private or commercial law, the guide also discusses regulatory and policy measures, because legal reforms may not be sufficient to remove obstacles that MSMEs face in accessing credit. Consistent with the principle “think small first”, the draft guide mainly focuses on micro and small enterprises although it does not completely exclude medium-sized

⁵ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17 (A/77/17)*, paras. 308–315.

⁶ *Ibid.*, *Seventy-first Session, Supplement No. 17 (A/71/17)*, paras. 254 and 309; *Seventy-second Session, Supplement No. 17 (A/72/17)*, para. 193; *Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 193; and *Seventy-fourth Session, Supplement No. 17 (A/74/17)*, para. 267.

⁷ Available at <https://uncitral.un.org/en/about/sdg>.

⁸ Available at <https://uncitral.un.org/en/onlinecourses>.

enterprises and differentiates, as appropriate, the provisions and policy measures respectively applicable to each of these two categories.

11. MSMEs, in particular those owned by women, face many barriers in accessing credit. The draft guide examines legal, regulatory and policy interventions that help reduce barriers to MSMEs access to credit such as: enhanced conditions for business formation and registration, and MSME operation; improving secured transactions law to support the use of movable and immovable assets as collateral; issuance of personal guarantees and credit guarantee schemes. Other measures considered in the guide, which may reduce transaction costs incurred by financiers when lending to MSME, include developing information infrastructure to facilitate the assessment of creditworthiness of MSMEs; ensure effective enforcement of financiers' rights, and provide adequate mechanisms for resolving disputes. Finally, as they are expected to positively impact on MSME access to credit, the draft guide includes measures to support MSMEs in financial distress, rules and guidance on fair lending practices (including transparency), legal facilitation of business in an electronic environment and the promotion of financial literacy.

12. The draft guide is expected to contribute to the achievement of Sustainable Development Goal 1, 5, 8 and 9, in particular target 1.4 (By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance); target 5.a (Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws); target 8.3 (Promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro-, small- and medium-sized enterprises, including through access to financial services); and target 9.3 (Increase the access of small-scale industrial and other enterprises, in particular in developing countries, to financial services, including affordable credit, and their integration into value chains and markets).

B. Text on early dismissal and preliminary determination in the area of international arbitration

Relevance to Sustainable Development Goal 16.

13. The Commission will also have before it a draft note on early dismissal and preliminary determination for its consideration and adoption. The draft note is an explanatory text that illustrates the discretionary power of the arbitral tribunal under the UNCITRAL Arbitration Rules and other arbitration rules to dismiss a claim or defence or make a preliminary determination to that effect based on the "manifestly without merit" standard. It is expected to be included as an additional note in the UNCITRAL Notes on Organizing Arbitral Proceedings ("the Notes").

14. While the procedural tool of early dismissal and preliminary determination is common in certain jurisdictions, by explicitly illustrating such discretionary power, the text will make it easier for arbitral tribunals and arbitration practitioners to utilize such a procedural tool and may discourage frivolous claims, thus ensuring timeliness and cost-effectiveness of arbitral proceedings. By providing some clarity, the draft note contributes to the overall efficiency of arbitration proceedings and to a fair and efficient process for dispute settlement.

15. Once adopted, the note is expected to contribute to the implementation of Sustainable Development Goal 16 (Peace, Justice and Strong Institutions), in particular target 16.3 (Promote the rule of law at the national and international levels and ensure equal access to justice for all).

C. Draft provisions on mediation and draft guidelines on investment mediation

Relevance to Sustainable Development Goals 8, 16.

16. The draft provisions on mediation and the draft guidelines on mediation aim to provide a framework that will enable States and investors to use mediation when an investment dispute arises. The draft provisions on mediation are intended to be included in existing and future treaties in order to provide a clear legal basis to conduct mediation and to allow parties to easily engage in and start mediation proceedings. The draft guidelines are an explanatory text that briefly describe matters relevant to the organisation of an investment mediation proceeding, such as the overall process, the suitability of mediation to investment disputes and the role of institutions, mediators and parties.

17. The draft provisions and draft guidelines on mediation are designed to help States better understand the investment mediation process, its benefits and provide the tools necessary to utilise investment mediation in disputes, as mediation is currently underutilised as a method of resolving investment disputes. The use of mediation as a method of amicably settling disputes arising from international investment relations could lead to more efficient and less expensive resolution of disputes than adversarial dispute settlement, preserving the relationship between investors and States and potentially having a positive impact on whether the investment remains in the host State.

18. Both the provisions and the guidelines complement the UNCITRAL Mediation Framework, and once adopted, and are expected to contribute to the achievement of Sustainable Development Goal 8 (Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all), as well as Sustainable Development Goal 16 (Peace, Justice and Strong Institutions), and in particular target 16.3 (Promote the rule of law at the national and international levels and ensure equal access to justice for all).

D. Texts on draft codes of conduct for arbitrators and judges

Relevance to Sustainable Development Goals 5, 16.

19. The draft codes of conduct for arbitrators and judges in international investment dispute resolution (the draft Codes) provide mandatory ethical rules for arbitrators and judges involved in international investment disputes. The draft Codes aim to reinforce the duty of independence and impartiality of individuals called upon to adjudicate international investment disputes. The draft code for arbitrators would apply to arbitrators, both in ad hoc and institutional arbitration, and the draft code for judges would apply to individuals who become members of a standing mechanism to resolve investment disputes. The possible establishment of a standing mechanism is currently being discussed by Working Group III. The draft Codes also contain provisions applicable to candidates, former arbitrators and judges, as well as assistants of arbitrators.

20. The draft Codes address one of the key concerns regarding the current investor-State dispute settlement (ISDS) regime by addressing the independence and impartiality, diligence, integrity and competence, and confidentiality obligations of adjudicators. They also contain broad disclosure requirements and limit adjudicators from undertaking multiple roles. The code for arbitrators further regulates the practice of double-hatting (whereby an individual acts concurrently or within a certain period of time both as an arbitrator and as a legal representative or expert witness in another dispute resolution proceedings). It is expected that the adoption of the draft Codes would address the shortcoming both factual and perceived in the eyes of the general public relating to the decision-makers in ISDS cases.

21. When adopted, the Codes will promote integrity of the ISDS process and will reduce conflicts of interest in such proceeding. By codifying ethical notions and standards in existing instruments, the draft Codes will contribute to the implementation of Sustainable Development Goal 16 (Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels), in particular target 16.3 (Promote the rule of law at the national and international levels and ensure equal access to justice for all), target 16.5 (Substantially reduce corruption and bribery in all their forms), target 16.6 (Effective, transparent and accountable institutions) and target 16.7 (Ensure responsive, inclusive, participatory and representative decision-making at all levels). As the draft Codes also aim to ensure the diversity of the pool of adjudicators, they will also contribute to Sustainable Development Goal 5 (Achieve gender equality and empower all women and girls), in particular target 5.5 (Ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life).

III. Suggestions for consideration of the rule of law agenda item at the fifty-sixth session of the Commission, in 2023

A. UNCITRAL work relevant to upcoming Sixth Committee debates on “Using technology to advance access to justice for all”

22. The Commission may wish to take note of the General Assembly resolutions referred to in chapter II above. In formulating and transmitting its comments to the General Assembly in response to the invitation contained in paragraph 23 of General Assembly resolution 77/110, the Commission may wish to bear in mind that the upcoming debates of the Sixth Committee under the rule of law agenda item will focus on the subtopic “Using technology to advance access to justice for all”.

23. The Commission may wish to recall its consideration of issues relevant to that sub-topic at its sessions in 2014,⁹ 2016,¹⁰ 2017¹¹ and 2022.¹² At its forty-seventh session in 2014, in the comments by the Commission on its role in promoting the rule of law and facilitating access to justice it noted that technology tools such as the UNCITRAL website, CLOUT, digests, and the Transparency Registry, as well as training tools are relevant for increasing legal awareness and legal empowerment and provide a foundation for the promotion of uniform interpretation and application of international commercial law standards, thus increasing access to justice.¹³ At its forty-ninth session in 2016, in a summary of a panel discussion on practical measures to facilitate access to justice in the commercial law context, in particular by Micro-, Small and Medium-sized enterprises (MSMEs), technological solutions to access to justice issues were noted.¹⁴ At its fiftieth session in 2017, in a summary of the UNCITRAL Congress 2017, the Commission heard about a panel on new frontiers in dispute resolution and technological solutions that would enhance access to justice. At its fifty-fifth session in 2022, in noting the links between the work programme of the Commission and the Sustainable Development Goals and the rule of law, the Commission highlighted the project on the stocktaking of developments in dispute

⁹ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)* paras. 234–240.

¹⁰ *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17 (A/71/17)* paras. 332–342.

¹¹ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)* para. 408.

¹² *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17 (A/77/17)* para. 314.

¹³ *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17 (A/69/17)* para. 240(b).

¹⁴ *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17 (A/71/17)* paras. 337–338.

resolution in the digital economy (DRDE) and noted that the project could provide the international community with concrete information on how technology could be utilized to improve dispute resolution and access to justice with the aim of ensuring that use of technology further enables access to justice while maintaining fairness and due process.

24. The Commission may wish to highlight how the ongoing work of the DRDE stocktaking project contributes to the advancement of access to justice through technology and how its outcome, which is expected to contain proposals on possible future legislative work in the area of dispute resolution, may further increase access to justice. The UNCITRAL secretariat is currently compiling, analysing and sharing relevant information on the changing landscape of dispute resolution with increased digitalization. Both the positive and negative impacts of the use of technology in dispute resolution are being considered in the stocktaking justice.

25. On the positive side, there has been a significant increase in the use of technology for resolving disputes through alternative dispute resolution and the increase in the use of technology has been further accelerated by the COVID-19 pandemic. This has led to a broader acceptance of the use of different technologies in the provision of dispute resolution services, for instance through recourse to online hearings or electronic awards, conference management and document exchange platforms but also with the proliferation of dispute resolution platforms providing different online services which has expanded the reach of dispute resolution services to those who were not familiar with or had limited access to such services. Courts have also embraced technology to increase the efficiency of the dispute resolution process, making it less costly, less time-consuming and more accessible. It can also contribute to avoiding costly and climate unfriendly travel.

26. There are also potential negative impacts of the use of technology in dispute resolution. The integrity of the dispute resolution process needs to be maintained when using or incorporating new technology, especially the principles of due process and fairness. Differing levels of access to technology and technology infrastructure across and even within jurisdictions may affect due process and fairness and result in injustices. Some technologies may also be at risk of being misused.

27. The benefits of enhanced access to and delivery of justice through the use of technology in dispute resolution can only be fully realized when the negative impacts of the incorporation of technology are properly addressed. The current stocktaking project will continue to provide the international community with concrete information that can also inform the update of existing UNCITRAL texts or the development of new texts if necessary. When developed, such texts are expected to improve dispute resolution and access to justice. The outcome of the stocktaking project will enable UNCITRAL to continue to play an essential role in developing legal texts on dispute resolution in an increasingly digitalized world.¹⁵

28. The Commission may also wish to highlight the continued expansion of the e-learning course offerings on the work of UNCITRAL, developed in partnership with the International Training Centre of the International Labour organization (available at <https://uncitral.un.org/en/onlinecourses>). The online courses provide an introduction to the work of UNCITRAL, generally, outline how UNCITRAL texts contribute to the achievement of the Sustainable Development Goals, and include subject-specific overviews of the UNCITRAL texts in the areas of international commercial arbitration, public procurement and public-private partnerships, and international commercial mediation.

¹⁵ The stocktaking project complements the other work UNCITRAL is conducting with regards to the digital economy and international trade. For example, Working Group IV (Electronic Commerce) is currently engaged in topical work on AI in contracting and data transactions and the forthcoming Incheon Law and Business Forum will focus on cutting-edge dimensions of the digital economy and how to foster an enabling legal ecosystem.

B. Expected contribution of UNCITRAL's programme to the promotion of the rule of law and achievement of the Sustainable Development Goals

29. Considering the developments highlighted in this note, the Commission may wish to consider ways of closer aligning its work programme with the Sustainable Development Goals, taking into account that the Goals are time-bound (until 2030). The Commission may wish to consider whether criteria that it uses for assessing feasibility and desirability of undertaking work on a new topic, such as the promotion of international trade law, legal feasibility, economic need and relevance to specific needs of developing countries, already encompasses the expected relevance and impact of such work on the achievement of the Sustainable Development Goals.¹⁶

30. In addition, the Commission may wish to continue highlighting in its texts and decisions adopting or approving the texts, their relevance to and impact on sustainable development. In the light of the expected finalization and adoption of texts in the areas of investor-State dispute settlement reform, mediation and micro-, small and medium-sized enterprises (MSMEs) at its fifty-fifth session, the Commission may wish to highlight in its decisions on those texts their expected input to the implementation of the Sustainable Development Goals (see paras. XX–XX above). The Commission may also wish to consider and specify the expected contribution of its ongoing work on investor-State dispute settlement (ISDS) reform, civil asset tracing in insolvency proceedings, applicable law in insolvency proceedings, and negotiable multimodal transport documents to the achievement of the Sustainable Development Goals.

31. The Commission may wish to request States, the secretariat, organizations and institutions to continue their efforts towards increasing awareness of the role of UNCITRAL standards and activities for the promotion of the rule of law at the national and international levels and the implementation of the Sustainable Development Goals. Such opportunities might in particular arise in conjunction with the High-Level Political Forum on Sustainable Development “Accelerating the recovery from the coronavirus (COVID-19) and the full implementation of the 2030 Agenda for Sustainable Development at all levels” (New York, 10–19 July 2023), which will review Sustainable Development Goals 6 on clean water and sanitation, 7 on affordable and clean energy, 9 on industry, innovation and infrastructure, 11 on sustainable cities and communities, and 17 on partnership of the Goals and will further discuss the effective and inclusive recovery measures to address the impacts of the COVID-19 pandemic on the Sustainable Development Goals (SDGs) and explore actionable policy guidance for the full implementation of the 2030 Agenda and the SDGs at all levels. Another opportunity is provided by consultations, led by Rwanda and Sweden, leading to the Summit of the Future in September 2024, at which a Global Digital Compact is expected to be agreed outlining “shared principles for an open, free and secure digital future for all”; discussions so far between the secretariat and the Office of the Secretary-General’s Envoy on Technology indicate the possibility to use UNCITRAL texts and principles on electronic commerce, with the support of the recently finalized legal taxonomy, as a foundation for developing legal infrastructure to support the Global Digital Compact.

¹⁶ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, paras. 294 and 295.