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Possible future work on climate change mitigation, adaptation and resilience

Note by the Secretariat

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I. Introduction

1. At its fifty-fourth session, in 2021, the Commission heard a proposal to examine (a) how existing UNCITRAL texts could be aligned with climate change mitigation, adaptation and resilience goals, and (b) whether further work could be done by UNCITRAL to facilitate those goals in the implementation of those texts or through the development of new texts. It was added that public-private partnerships could be an area of focus for stocktaking existing texts, while legal uncertainty regarding the legal status of carbon credits traded in voluntary carbon markets could be a focus for future legislative work.[1]

2. Broad support was expressed for the Commission to consider the proposal further, based on more precise information on the work involved. It was added that member States might need to carry out further internal consultations across different government agencies before a decision on future work could be taken, and that such work would need to be undertaken within existing public international law frameworks, such as the Paris Agreement on climate change of 2015.[2]

3. After discussion, the Commission requested the secretariat to consult with interested States with a view to developing a more detailed proposal on the topic for presentation to the Commission for its consideration at its next session, in 2022.[3]

4. The consultations carried out by the secretariat in response to that request have revealed considerable interest by various Member States for examining further how existing UNCITRAL texts could be applied to support achieving climate change mitigation, adaptation and resilience goals, and whether UNCITRAL could further contribute to facilitating those goals in the implementation of those texts or through the development of new texts.

5. In the light of those positive responses, the secretariat commissioned a study on private law aspects of climate change ("the Study") by an outside expert, professor Géraud de Lassus St-Geniès, of Laval University in Québec (Canada). The findings and recommendations of the Study were summarized in a note by the Secretariat with a view to assisting the Commission consider the desirability and feasibility of undertaking work in this area (A/CN.9/1120 and A/CN.9/1120/Add.1).

6. The Commission considered the summary of the Study at its fifty-fifth session (New York, 27 June–15 July 2022). There was wide agreement within the Commission on the importance of the topic and on the usefulness of exploring how UNCITRAL could offer its own contribution to the international community's efforts to combat climate change and mitigate its effects by updating existing private law instruments and developing new enabling legal mechanisms, if necessary. It was observed that global efforts to combat climate change were an integral part of the agenda of the United Nations. Therefore, as a subsidiary body of the General Assembly, UNCITRAL was well placed to undertake work on those aspects of climate change falling within its mandate, and it would indeed be expected that UNCITRAL would provide its own contribution to support the efforts of other United Nations bodies and Secretariat units in that respect.[4]

7. It was stressed that some regions of the world were likely to be seriously affected by climate change and that developing countries in particular would suffer from its impact and the resulting challenges to their economic and development trajectory. UNCITRAL, it was said, could also play a role in the fight against climate change and that there would be benefits to greater legal certainty in that area. There was strong support for the suggestion that any work to be carried out should be consistent with existing international law and treaties on climate change, where relevant. It was

[1] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 244.
[2] Ibid., para. 245.
[3] Ibid., para. 246.
[4] Ibid., *Seventy-seventh Session, Supplement No. 17* (A/77/17), para. 212.

also emphasized that such work should have due regard for the principle of the common but differentiated responsibilities and respective capabilities of States. It was therefore noted that any such work should be guided by the principle of equity, in the light of different national circumstances, and be based upon respect for countries' sovereignty over their natural wealth and resources. Finally, it was said that no measures, including unilateral ones, should constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. [5]

8. The views differed, however, as to the scope and focus of such work. The importance of corporate responsibility was highlighted by examples of recent changes in legislation to strengthen obligations on the disclosure of climate-related information, an area in which important standards had been set by the International Sustainability Standards Board, and which should be reflected in any UNCITRAL work. At the same time, however, there were expressions of caution as to the feasibility of work in that area, calling for the Commission not to focus work on tools to facilitate litigation against corporations for climate change-related damages. Instead, it was suggested that focus be placed on private law issues relating to clean investments. In particular with respect to private law issues relating to carbon trading, the Commission's attention was drawn to various international initiatives and regulatory activities that called for close cooperation and a precise delineation of possible UNCITRAL work. The Commission was also informed that the UNIDROIT Governing Council, at its 101st session (Rome 8–10 June 2022) had recommended to the UNIDROIT General Assembly the inclusion of a project to analyse the private law aspects, and determine the legal nature, of voluntary carbon credits in the work programme for the period 2023–2025. The Commission heard expressions of concern about the possible overlap between the proposed UNIDROIT work and its own work in that area. The Commission agreed that any duplication should be avoided and expressed its confidence that all interested organizations would coordinate their respective activities. [6]

9. The Commission also heard several suggestions for improvements to and requests for clarification of the study commissioned by the secretariat (A/CN.9/1120 and A/CN.9/1120/Add.1), which the secretariat was asked to take note of and reflect in any revised version of the study that it might publish in the future. It was also stated that nothing in that study document should be interpreted as implying a change in the rights and obligations of a State party under any existing international agreement. [7]

10. In conclusion, the Commission agreed 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 also requested 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 organizations, the results of which would facilitate its consideration at a future session. [8]

11. This note contains an update to the Study considered by the Commission at its fifty-fifth session, which was prepared by the same outside expert [9] for further consideration by the Commission. The Annex to this note sets out the provisional programme of the colloquium "Climate Change and the Law of International Trade" to be held on 12–13 July in conjunction with the fifty-sixth session of the Commission in Vienna in a hybrid format.

[5] Ibid., para. 213.
[6] Ibid., para. 214.
[7] Ibid., para. 215.
[8] Ibid., para. 216.
[9] Professor Lassus St-Geniès acknowledges the valuable contribution of Mr. Camille Martini (LL.M.), doctoral candidate at the Faculty of Law at Laval University and at the Faculty of Law and Political Science at Aix-Marseille University (France).

II. Update of the Study on Private Law Aspects of Climate Change

12. The following sections, which supplement the analysis and discussion contained in documents A/CN.9/1120 and A/CN.9/1120/Add.1, examine additional issues that the Commission may wish to consider when determining the scope of the contribution that it may decide to make to climate change mitigation, adaptation and resilience. They set out observations on the nexus between climate change and private law/international trade law with a view to identifying potential areas where UNCITRAL could, should it wish to undertake work in this area, contribute to the achievement of the goals of the Paris Agreement.

A. The trading of internationally transferred mitigation outcomes under the Paris Agreement: legal issues and opportunities

13. An important breakthrough in the world of international carbon markets has been the adoption, at the United Nations Climate Change Conference in Glasgow (COP 26), in 2021 and the United Nations Climate Change Conference in Sharm el-Sheikh (COPP 27), in 2022, of the implementation's rules of the two market mechanisms set out in Article 6 of the Paris Agreement.[10] This step has opened a new era for carbon trading which has various implications from an international trade law perspective. The first of these mechanisms is referred to as "cooperative approaches" (Article 6.2). It allows Parties to trade on a direct bilateral basis "internationally transferred mitigation outcomes" (ITMOs), which may be used for compliance purposes under the Paris Agreement. ITMOs represent the new intangible unit that will be traded across jurisdictions from now on. Several countries have already concluded bilateral climate agreements, or are in the process of doing so, to detail how the trading of ITMOs will take place between them.[11] Under Article 6.2, private entities located in different jurisdictions are allowed to exchange ITMOs among them when authorized by their respective States. However, States engaged in cooperative approaches remain responsible to track and account for the transfers of ITMOs, including when ITMOs are traded by private entities. The second mechanism (Article 6.4) is a baseline-and-credit mechanism similar to the former Clean Development Mechanism of the Kyoto Protocol. Under Article 6.4, mitigation activities that result in emission reductions may generate offset credits, which are known as A6.4 emission reduction certificates (A6.4ERs). These credits are issued by a centralized institution, the Supervisory Body, established under the Paris Agreement. When transferred from one country to another, A6.4ERs are considered as ITMOs. It is expected that these two mechanisms will play an important role in the near future as most Parties to the Paris Agreement have expressed some interest in using them.[12] In addition, because ITMOs may be used for other mitigation purposes than the achievement of national determined contributions (NDCs),[13] corporations that have pledged to achieve carbon neutrality could seek to obtain ITMOs by entering into cooperative approaches with States to

[10] United Nations, *Treaty Series*, vol. 3156.

[11] See for instance: Federal Office of the Environment (Switzerland), "Bilateral climate agreements", www.bafu.admin.ch/bafu/en/home/topics/climate/info-specialists/climate--international-affairs/staatsvertraege-umsetzung-klimauebereinkommen-von-paris-artikel6.html; Swedish Energy Agency, "Bilateral climate agreements", www.energimyndigheten.se/en/cooperation/swedens-program-for-international-climate-initiatives/paris-agreement/bilateral-climate-agreements.

[12] 55 per cent of the Parties to the Paris Agreement have indicated in their nationally determined contributions their intention to use, or the possibility of using, cooperative approaches to fulfill their mitigation objective. The share for the Article 6.4 mechanism is 36 per cent. UNFCCC, *Nationally determined contributions under the Paris Agreement. Synthesis report by the Secretariat*, UN Doc. FCCC/PA/CMA/2022/4, 2022, p. 19.

[13] Decision 2.CMA.3, *Guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement*, UN Doc. FCCC/PA/CMA/2021/10/Add.1, 2022, Annex, para. 1(f) (hereinafter "Decision 2/CMA.3").

use them in the Voluntary Carbon Market (VCM). The paragraphs below discuss various legal issues related to ITMO trading.

1. Domestic legal frameworks

14. States interested in participating in ITMO trading may have to modify – or clarify some aspects of – their domestic legal framework to comply with the requirements set forth under the Paris Agreement and to create a predictable legal environment for the private sector. To illustrate this point, one may take the case of a company located in State A that achieves a mitigation outcome (e.g., a reduction of an amount of CO_2) and that wishes to sell it abroad to a company located in State B.

15. A first element to consider is that ITMOs must be "real, verified and additional",[14] and that all States participating in cooperative approaches are required to report information under the Paris Agreement to describe the "quality" of the mitigation outcomes that they trade and how their participation in cooperative approaches ensures environmental integrity.[15] This implies that State A may need to have in place a procedure to certify that the mitigation outcome claimed by the company is real, verified and additional. Regardless of what the Paris Agreement requires, the company in State B may in any case find it too risky to buy ITMOs whose environmental integrity could be questioned. Thus, countries interested in participating in cooperative approaches may have to set up new administrative rules. Although two States could decide to create a joint structure to perform this certification process, the emerging practice of bilateral climate agreements under Article 6.2 reveals that establishing domestic procedures is an approach that several States tend to favour.[16] Besides, as ITMO transfers require the authorization of both the exporting and importing States,[17] domestic procedures could also need to be defined to specify how this authorization is to be issued.

16. A second point to take into consideration is the way in which the existence of the mitigation outcome is materialized. An option for State A is to create an electronic registry.[18] Upon completion of the certification process, a number of credits corresponding to the amount of CO_2 reduced would be issued on the account of the company. State B could also have a domestic registry and credit the account of the purchaser with a number of credits corresponding to the ITMOs acquired at the time of the sell. Another possibility for State A would be to issue a physical document certifying that the company has achieved a mitigation outcome of a specified amount. State B could either have a registry in place or issue a similar document to certify that the company has acquired a mitigation outcome.

17. A third aspect on which legal certainty is crucial is the legal status applicable to the "things" (i.e., offset credits, emission allowances, certificates) that represent the mitigation outcome, and whether those "things" may be considered as movable intangible property under domestic law. Given that it is the States that are likely to issue the credits or the legal documents that substantiate the mitigation outcome, they could be considered as having an administrative status (such as licences and permits), which could then create uncertainties about their transferability. It should also be noted that a mitigation outcome could be the subject of a purely domestic commercial transaction before being sold aboard, as a company could find it easier to first sell the credits to a broker located in the same country. As some legal experts have noted, "[f]or practitioners, it will be vital to know the legal nature of the units and the

[14] Ibid., para. 1(a).
[15] Ibid., para. 22(b).
[16] See for instance the bilateral climate agreements concluded by Switzerland, supra note 11.
[17] Paris Agreement, art. 6.3.
[18] It should be noted that each Party to a cooperative approach must have, or have access, to a registry for the purpose of tracking the transfers of ITMOs. Decision 2/CMA.3, Annex, para. 29.

ownership rights of the seller in order to specify what is being traded and how delivery is to be accomplished".[19]

18. Participation in cooperative approaches is, therefore, likely to require various legal developments or clarifications at the domestic level. The ways in which these developments and clarifications occur, as well as their outcome, could influence the involvement of the private sector in the trading of ITMOs. In States where Emission Trading Schemes (ETS) have already been running for some time, the importance of these legal developments and clarifications may remain limited. By contrast, more work could be required for countries interested in selling or buying ITMOs that have no or only limited experience in the field of regulated carbon markets.

19. A further layer of complexity in relation to ITMO trading stems from the fact that an ITMO may not always correspond to one ton of CO_2 equivalent. Indeed, Parties to the Paris Agreement have agreed that ITMOs could also be measured in non-greenhouse gas (GHG) metrics.[20] This means that, in some cases, what will be sold will not be the right to claim a certain quantity of reduced tons of CO_2 equivalent, but rather the right to claim a certain number of hectares of land afforested, or a certain quantity of megawatt-hours (MWh) of electricity generated from a renewable energy resource. Yet, here too, it will be crucial for practitioners to know how the existence of these mitigation outcomes is materialized, how are they treated under domestic law and how international transfers are to be accomplished.

20. Establishing property rights over tradable intangible commodities representing something else than a reduction of one ton of CO_2 equivalent is not novelty from a legal standpoint. Some States, such as Australia, Canada and the United States, already have some experience with the trading of units that represent mitigation outcomes not measured in CO_2 equivalent with the renewable energy credits (or certificates) (RECs). RECs are tradable intangible commodities that "are issued when one megawatt-hour (MWh) of electricity is generated and delivered to the electricity grid from a renewable energy resource".[21] The owner of a REC is legally entitled to claim that one MWh of the electricity it used in its activities was generated from a renewable resource. Thus, by purchasing RECs, electricity consumers may substantiate their claim to have used renewable (i.e., zero-emission) electricity. However, a question to consider is the extent to which non-GHG mitigation outcomes should be treated under domestic law in the same way as mitigation outcome measured in CO_2 equivalent. For further clarity, States may wish to develop different legal frameworks for governing these two categories of mitigation outcomes.

21. In sum, while the elaboration of model laws and legislative guides could facilitate the emergence of a robust and credible international market for ITMOs, the legal developments and clarifications, as well as the institutional structures, that may be needed domestically to participate in ITMO trading may vary from State to State, depending on the types of ITMOs that they intend to trade. Should the Commission deem desirable to undertake work in this area, it should be noted that the UNFCCC Secretariat was already requested by the Conference of the Parties to the Paris Agreement to design and implement a capacity-building programme to assist Parties, particularly developing country countries, intending to participate in cooperative approaches.[22]

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[19] Pollination, *Legal gap analysis for transactions in preparation for Article 6*, Pollination Group, 2021, p. 6.

[20] Decision 2.CMA.3, Annex, para. 1(c).

[21] United States Environmental Protection Agency, "Renewable Energy Certificates (RECs)", www.epa.gov/green-power-markets/renewable-energy-certificates-recs. Each REC has a unique identification number and cannot be owned simultaneously by more than one owner. See also: Todd Jones, Robin Quarrier, Maya Kelty, *The legal basis for renewable energy certificates*, Center for Resource Solutions, 2015.

[22] Decision 2/CMA.3, para. 12. The Capacity Building Work Programme to support implementation of Article 6 was launched at COP 27, in November 2022.

2. Legal consistency and standardized practices

22. Article 6.2 represents a decentralized approach to carbon trading. Under this article, Parties to the Paris Agreement have a wide margin of discretion to decide what to trade, how to trade it and with whom. Because of the diversity of the mitigation components of the NDCs, enabling Parties to choose the format of their cooperative approaches is important to ensure that they may all benefit from the advantages of carbon trading under the Paris Agreement. However, this flexibility also entails the risk of permitting the emergence of an heterogenous and fragmented legal environment, which could complexify the trading of ITMOs. While the practice under Article 6.2 is still in its infancy, it may already be possible to identify several factors which could lead to such a situation.

23. The first factor is the level of consistency between the different Article 6.2 bilateral climate agreements that States participating in cooperative approaches will conclude.[23] The issue is of particular importance in the case of States that will participate in several cooperative approaches with different States. If a State A has already established a domestic procedure for certifying mitigation outcomes and authorizing their export as the result of its participation in a cooperative approach with a State B, a key issue is whether State A will need to establish new domestic procedures if it enters into a bilateral climate agreement with a State C and whether companies in State A will have to follow different rules to trade ITMOs with State B and C. A similar question arises in relation to what can be considered as an ITMO, as the trading of non-GHG ITMOs could be allowed between States A and B and forbidden between States A and C.[24]

24. A second element that is likely to influence the legal landscape of ITMO trading is the emergence of standardized commercial practices among private actors. At the moment, it is considered that stakeholders that are concluding ITMO transactions are "navigating unchartered territory, which creates many uncertainties".[25] Some of these uncertainties concern the ways to mitigate the legal risks that are specific to ITMO trading. For instance, private entities aiming at selling or buying ITMOs are confronted with the risk that a State may not authorize the export or import of the ITMOs, or may not apply corresponding adjustment to prevent the double-counting of the ITMOs transferred. According to the rules negotiated under the Paris Agreement, to avoid double counting of ITMOs, the first transferring Party and the Party that uses ITMOs towards its NDCs are each required to apply a corresponding adjustment. For the selling Party, it means that the quantity of ITMOs sold abroad needs to be added to its annual national GHG inventory. Conversely, the acquiring Party must subtract the quantity of ITMOs purchased from its inventory.[26] Yet, for now, it is unclear how the status and value of the ITMOs would be affected if a State were not to carry out a corresponding adjustment.[27] To guarantee legal predictability and reduce transaction costs, standardized practices and contractual tools to mitigate these risks could be developed. In addition, because of the specific features that ITMOs have – unlike other commodities, their mere existence may be questioned even after they have been transferred – a further question to consider is whether new

[23] For an overview of the agreements already concluded, see: Seth Kerschner, Ingrid York, William Grazebrook, "Emerging fundamentals in climate mitigation through ITMO transactions under Paris Agreement Article 6.2", White & Case, 8 March 2023, www.whitecase.com/insight-alert/emerging-fundamentals-climate-mitigation-through-itmo-transactions-under-paris#.

[24] Some observers consider that, "while flexibility and self-determination is an inherent part" of Article 6.2, "maintaining some degree of standards and consistency for what should be eligible to constitute an ITMO will be important". Pollination, *Legal gap analysis for transactions in preparation for Article 6*, supra note 19, p. 13.

[25] Lieke't Gilde, Gemo Andreo Victoria, Sandra Greiner, *Article 6 transaction structures*, World Bank, 2022, p. 19.

[26] Decision 2/CMA.3, Annex, para. 7–8. In the case of non-GHG ITMOs, see para. 9.

[27] Seth Kerschner, Ingrid York, William Grazebrook, "Emerging fundamentals in climate mitigation through ITMO transactions under Paris Agreement Article 6.2", supra note 23.

transnational rules and procedures should be developed to adjudicate commercial disputes that could arise in this field.

25. A third aspect which deserves consideration is whether the carbon credits issued on the VCM by private entities (i.e., carbon standards organizations) will have the same legal status in domestic law as ITMOs. The question is of importance as, under Article 6.2, private companies are allowed to engage directly in cooperative approaches with States to purchase ITMOs and use them to demonstrate progress towards their carbon neutrality targets. The emergence of State-issued carbon credits on the VCM will add complexity to this market as private companies could possess simultaneously State-issued carbon credits and carbon credits issued by carbon standards organizations.

B. Legal certainty of carbon credits resulting from carbon sequestration projects

26. A major challenge in the field of carbon markets is ensuring that each carbon credit that is traded corresponds to a mitigation outcome that is real and additional.[28] This challenge is particularly acute with carbon sequestration projects, such as afforestation/reforestation projects or activities involving carbon capture and storage. In these cases, carbon credits do not correspond to GHG that were not emitted, but rather to GHG that were absorbed from the atmosphere and stored somewhere (e.g., in the soil, in underground geological formations, in trees, in products). Thus, carbon credits resulting from carbon sequestration projects only offset emissions as long as the carbon they represent remains stored in reservoirs. Yet, for a variety of natural and human-induced causes (e.g., wildfires, diseases, land exploitation, industrial accident) stored carbon can return to the atmosphere (a situation referred to as reversal).

27. From a legal perspective, this risk of non-permanence of carbon sequestration raises different legal issues. One is the need to include provisions in the legal frameworks governing carbon sequestration projects to address situations of reversals. Various options exist, such as the issuance of temporary credits, which expire after a predefined period and must be replaced with other credits, or the creation of "buffer reserves" in which offset credits from individual projects are set aside and may serve as an insurance mechanism.[29] However, while developing rules to address situations of reversals is key, it is equally important to seek to prevent reversals from occurring. In the case of lands on which afforestation or reforestation projects are carried out, this can be done by granting a specific legal status to these lands to ensure that the trees will not be cut down. Such a status could, for instance, forbid the sale of the land for other purposes than the afforestation or reforestation project for a defined period. Restricting the rights of use of the land on which the carbon is sequestered may however raise delicate questions in cases of mitigation projects located on indigenous people's lands (a free, prior and informed consent would be required), or when the same land is claimed to be owned by different persons. It should be noted that, under the Paris Agreement, Parties that participate in cooperative approaches will be required to describe how their participation minimizes the risk of non-permanence of mitigation outcomes and ensures, when reversals of emissions removals occur, that these are addressed in full.[30] Jurisdictions interested

[28] In this context, the expression "additional" means that the mitigation outcome must be the result of a specific measure or project intended to generate this outcome, and that it would have not occurred anyway if the measure or project had not been implemented.

[29] Derik Broekhoff *et al.*, *Securing climate benefit: a guide to using carbon offsets*, Stockholm Environment Institute & Greenhouse Gas Management Institute, 2019, p. 26.

[30] Decision 2/CMA.3, Annex, para. 22(b)(iii).

in participating in cooperative approaches to sell ITMOs generated by carbon sequestration projects could therefore have to adjust their legislation.[31]

28. Ensuring legal certainty of the carbon credits resulting from carbon sequestration projects also requires clear rules about ownership of these credits. In jurisdictions in which ownership of the subsurface belongs to the government, the absence of a clear regime could raise questions as to whether the credits are owned by the government or the proponent of the sequestration project. Similar difficulties could appear in jurisdictions where the government is the owner of all natural resources, given that with afforestation or reforestation projects the carbon is stored in trees.[32] A last aspect to consider in relation to afforestation or reforestation projects is the importance to establish robust and conservative methodologies to account for the GHG sequestered. Some studies have shown that, in certain regions of the world, abandoned agricultural lands on which trees were planted had sequestered the same amount of carbon than agricultural lands left to natural succession over 50 years.[33] Credible legal framework in this field should also set out monitoring requirements to ensure that a project carried out somewhere does not lead to the cutting of trees in another area. If this were to happen, the carbon sequestrated by the projects would no longer represent a mitigation outcome that is additional, and the corresponding carbon credits would lose their value.

C. Corporate climate litigation and potential legislative action in the field of corporate and business law

29. Since the 2022 Study, the number of lawsuits brought against corporations has continued to rise all over the world. While energy companies were primarily targeted by these lawsuits,[34] climate litigation "is now being filed against a more diverse range of corporate actors than before".[35] Over the last two years, proceedings have been launched against companies acting in sectors such as transportation, food and agriculture, manufacturing, and finance. Among the most recent high-profile cases, one can mention the claim brought by a group of French NGOs, in February 2023, against the bank BNP Paribas for an alleged breach of the French duty of vigilance law[36] resulting from its financial support to fossil fuels projects.[37] Another example is the civil lawsuit that was lodged in Switzerland, the same month, by four inhabitants of a small Indonesian Island (Pari) against the Swiss-based cement producer Holcim for its alleged role in the climate crisis. In this case, the plaintiffs are seeking to obtain, among others, compensation for the damaged incurred by the effects of climate change.[38]

30. A noticeable trend in the field of corporate climate litigation is the diversification of the legal grounds on which the plaintiffs rely. For instance, NGOs

[31] In that regard, it should be noted that the European Commission has recently adopted a proposal for a first EU-wide framework to certify carbon removals. See: European Commission, *Proposal for a regulation of the European Parliament and of the Council establishing a Union certification framework for carbon removals*, COM(2022) 672 final, 2022.

[32] Sergio Pérez Correa, Julien Demenois, Matthieu Wemaëre, "Le régime des crédits carbone générés par les projets de boisement ou de reboisement dans le cadre du mécanisme pour un développement propre: un défi pour les juristes et les développeurs de projet", *Revue Juridique de l'Environnement*, vol. 36, n°3, 2011, pp. 345–364.

[33] Melina Thibault *et al.*, "Afforestation of abandoned agricultural lands for carbon sequestration: how does it compare with natural succession?", *Plant soil*, vol. 475, n°1–2, 2022, pp. 605–621.

[34] *Milieudefensie et al., v. Royal Dutch Shell plc.*, 2021 (Kingdom of the Netherlands); *Notre Affaire à tous et al., v. Total*, pending (France).

[35] Catherine Higham, Honor Kerry, "Taking companies to court over climate change: who is being targeted?", Grantham Research Institute on Climate Change and the Environment, 3 May 2022, www.lse.ac.uk/granthaminstitute/news/taking-companies-to-court-over-climate-change-who-is-being-targeted.

[36] Law No. 2017-399 concerning the duty of parent companies and contracting companies.

[37] *Notre Affaire à Tous et al., v. BNP Paribas*, pending (France).

[38] *Asmania et al., v. Holcim*, pending (Switzerland).

are now increasingly suing corporations when they deem that they mislead the consumers about the real climate impacts of their activities or the seriousness of their strategies to achieve carbon neutrality.[39] A prime example of this new wave of climate litigation is the lawsuit filed against KLM in the Kingdom of the Netherlands in June 2022, in which the plaintiffs claim that "KLM's *Fly Responsibly* campaign breaches the Dutch implementation of the EU's Unfair Commercial Practices Directive by giving customers the false impression that its flights won't worsen the climate emergency".[40] Another new avenue for the plaintiffs also consists in seeking company directors personally liable for the way in which they take climate change into consideration in their business decisions. In February 2023, the NGO ClientEarth launched a lawsuit against Shell's Board of Directors alleging that the members of the Board have breached their legal duties under the UK *Companies Act* by failing to adopt and implement an energy transition strategy that aligns with the Paris Agreement.[41]

31. While legal analysts expect this wave of corporate climate litigation to continue in the foreseeable future, this phenomenon shows how resourceful civil society can be in mobilizing non-climate specific private law tools (e.g., tort law, corporate law, business law, commercial law) to hold corporations accountable for their contribution to the climate problem. Yet, the fact that these cases rely on general (i.e., non-climate specific) legal grounds tends to create an unpredictable legal environment for the business sector. In these cases, domestic judges are asked to apply non-climate focused statuary provisions and legal concepts to climate-related issues, which often raises new questions. Thus, in the absence of common guidance on which to rely – doctrinal opinions apart[42] – judges are left with a wide margin of interpretation to decide the implications of these non-climate focused statuary provisions and legal concepts for the business sector in relation to climate change. Because corporate climate litigation is a worldwide phenomenon, this situation could result in major legal inconsistencies across jurisdictions. Coordinated legal initiatives at the global level aiming at integrating more explicitly climate considerations into corporate and business law could therefore send a clear signal to the business sector about what is excepted from them regarding climate change, contribute to reducing legal uncertainties and help levelling the playing field across jurisdictions.

D. Legal initiatives to foster the credibility of the private sector's climate commitments

32. Since the adoption of the Paris Agreement, a growing number of corporations have committed to reducing their carbon footprint and reaching carbon neutrality by, or around, 2030 or 2050. According to the organization Net Zero Tracker, out of the 2,000 largest publicly traded companies in the world by revenue, 909 have announced some form of net zero target.[43] However, despite their proliferation, the credibility of such commitments (i.e., their level of precision, the methodology on which they rely, their scope, whether they are backed by concrete implementation plans and follow-up mechanisms) is increasingly questioned. For instance, corporations rarely include scope 3 (i.e., indirect) emissions in their net zero pledges and their commitments are

[39] See section D below.

[40] ClientEarth, "Claim filed against KLM over greenwashing allegations", 6 July 2022, www.clientearth.org/latest/press-office/press/claim-filed-against-klm-over-greenwashing-allegations.

[41] *ClientEarth v. Shell's Board of Directors*, pending (United Kingdom).

[42] See for instance, the *Oslo principles on global climate obligations* (https://globaljustice.yale.edu/oslo-principles-global-climate-change-obligations) developed by a group of legal experts in 2014. While their authors contend that the principles express "the current obligations that all States and enterprises have to defend and protect the Earth's climate", the question of whether these principles set out in this document reflect the current state of the law is more debatable.

[43] Net Zero Tracker, https://zerotracker.net.

usually unclear as to how the announced targets will be achieved.[44] In addition, the credibility of the actions taken by the private sector to achieve their targets tends to be criticized, notably when those actions consist in purchasing offset credits. In January 2023, an investigation led by journalists found that the majority of the rainforest offset credits delivered by Verra (a leading carbon standard organization) – many of which had been bought by big corporations – did not represent genuine carbon reductions.[45]

33. As a result, the communication of corporations about climate change and what they do (or pledge to do) to address this issue is frequently qualified as "greenwashing" – or "climate-washing" – in the public discourse.[46] Yet, climate disinformation may hinder progress towards the achievement of the goals of the Paris Agreement by encouraging consumers and investors to rely on products and services that are not as climate-friendly as they think they are. In addition, it may create market distortions across several sectors of the economy. This situation has led to a surge in the number of claims seeking to hold private actors legally accountable for their actions or products that misleadingly claim to address climate change. At least 16 proceedings of this kind were launched in the United States between 2016 and 2021, and at least 26 others in the rest of the world. In addition, at least 27 complaints were filed before non-judicial oversight bodies against corporations relating to misleading advertising (e.g., United Kingdom of Great Britain and Northern Ireland, Australia, Italy, New Zealand, Denmark, the United States of America, Republic of Korea). This wave of greenwashing litigation involves a variety of sectors (e.g., aviation,[47] car manufacturers,[48] fossil fuels,[49] mining,[50] the food industry,[51] banking and finance,[52] sports[53]).

34. Against this backdrop, several jurisdictions have started to adjust their legislation to better prevent climate-washing. Recent updates in that regard include the entry into force of France's drastic limitation of carbon-neutral claims in advertising, as part of its recent climate and resilience law.[54] In particular, this law prohibits the use of the claim "carbon neutral" in advertising without this claim being substantiated and justified.[55] On 22 March 2023, the European Commission also

[44] Richard Black *et al.*, *Taking stock: a global assessment of net zero targets*, Energy and Climate Intelligence Unit and Oxford Net Zero, 2021, pp. 22–24.

[45] Patrick Greenfield, "Revealed: more than 90 per cent of rainforest carbon offsets by biggest provider are worthless, analysis shows", *The Guardian*, 18 January 2023, www.theguardian.com/environment/2023/jan/18/revealed-forest-carbon-offsets-biggest-provider-worthless-verra-aoe. In the wake of this investigation, Verra announced in March 2023 that it will update its methodologies in the coming months.

[46] Although no unique definition of the expression exists, the term "greenwashing" is usually understood as referring to environmental claims that are trivial, misleading and that cannot be substantiated, as well as misleading communication, or disinformation, about the environmental practices of a company. See Agostino Vollero, *Greenwashing. Foundations and emerging research on corporate sustainability and deceptive communication*, Emerald, 2022, pp. 6–10.

[47] *FossielVrij NL v. KLM*, pending (Kingdom of the Netherlands); *Advertising Standards Authority Ruling on Ryanair Ltd t/a Ryanair Ltd.*, 2020 (United Kingdom).

[48] *Australian Competition and Consumer Commission v. Goodyear Tyres*, 2008 (Australia).

[49] *Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France*, pending (France); *Greenpeace Canada v. Shell Canada*, pending (Canada); *The City of New York v. Exxon Mobil Corp., ExxonMobil Oil Corporation, Royal Dutch Shell plc, Shell Oil Company, BP p.l.c., and BP America Inc., and the American Petroleum Institute*, 2021 (United States).

[50] *PCWP and others v. Glencore*, pending (Australia).

[51] *Vegetarian Society et al. of Denmark v. Danish Crown*, pending (Denmark).

[52] *Abrahams v. Commonwealth Bank of Australia*, 2021 (Australia).

[53] *KlimaAllianz v. FIFA*, pending (Switzerland); *New Weather Institute v. FIFA*, pending (United Kingdom); *Australian Competition and Consumer Commission v. V8 Supercars Australia Pty. Ltd*, 2008 (Australia).

[54] Article L. 229-68 of the French Environmental Code, created by Law 2021-1104 of 22 August 2021 on combating climate change and strengthening resilience to its effects.

[55] Decree 2022-539 of 13 April 2022 defines the terms and conditions for advertisers to communicate the carbon neutrality of their products or services. Starting 1 January 2023, advertisers must publish a summary report on their website or, failing that, on their mobile application, describing the carbon footprint of the product or service being advertised and the

published a proposal for a directive on substantiation and communication of explicit environmental claims, also referred to as the "Green Claims Directive".[56] The proposal highlights the need to protect consumers against false environmental claims, as well as the consumers' role in contributing actively to the green transition through informed decisions. Yet, while there exist a variety of laws and legal principles under competition or consumer protection laws that can be used to regulate false or misleading climate-related claims, most jurisdictions do not possess a regulatory framework setting forth specific obligations for companies.[57]

35. The risks associated with climate-washing are increasingly drawing attention at the global level. Because of the absence of "clear, transparent, and generally accepted sets of standards and criteria for the development, measurement, assessment, and accountability of non-State net zero pledges and their associated implementation",[58] the Secretary-General of the United Nations established on March 2022 a High-Level Expert Group to develop recommendations on: (1) standards for setting net zero targets by non-state actors; (2) criteria to assess the credibility of the stated objectives; (3) processes to verify progress towards the achievement of net zero commitments; and (4) a roadmap to translate these standards and criteria into international and national level regulations.[59] In its report unveiled in November 2022 at COP 27, the High-Level Expert Group identified a set of recommendations, one being that "regulators should develop regulation and standards in areas including net zero pledges, transition plans and disclosure, starting with high-impact corporate emitters, including private and state-owned enterprises and financial institutions."[60] In the wake of this initiative, other global standard setters, such as the International Organisation of Securities Commissions (IOSCO), have also considered climate-washing as a priory area of regulation.[61]

E. Regulatory fragmentation risk

36. To further align business activities with the goals of the Paris Agreement, it is now relatively undisputed that global standards in various areas of private law (e.g., corporate law, business law, commercial law) need to be established. A key issue however is that different initiatives aiming at setting such standards, led by different actors (e.g., Task Force on Climate-Related Financial Disclosure; International Sustainability Standards Board, IOSCO, Basel Committee on Banking Supervision[62]), are already under way. In addition, some domestic regulators have recently shown an interest in setting their own standards, which could have a tremendous influence worldwide, but also lead to inconsistent outcomes. This is notably the case with the Securities and Exchange Commission which proposed in March 2022 rules to enhance standardized climate-related disclosure for investors. This situation creates a regulatory fragmentation risk that stakeholders have started to acknowledge. The

process by which the emissions generated by this product or service will be prevented, then reduced, and ultimately offset.

[56] European Commission, *Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims*, COM/2023/166 final, 2023.

[57] See for instance *Canada's Consumer Packaging and Labelling Act,* R.S.C., 1985, c. C-38, which prohibits false or misleading representation relating to pre-packaged products but does not explicitly refer to environmental or climate change claims.

[58] United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions*, 2022, p. 38, www.un.org/sites/un2.un.org/files/high-levelexpertgroupupdate7.pdf.

[59] Ibid.

[60] Ibid., p. 33.

[61] IOSCO, "IOSCO outlines regulatory priorities for sustainability disclosures, mitigating greenwashing and promoting integrity in carbon markets", 9 November 2022, www.iosco.org/news/pdf/IOSCONEWS669.pdf.

[62] Scott Atkins, "Climate greenwashing liability. Key risks for board in the transition to net zero", Norton Rose Fullbright, 6 November 2022, www.nortonrosefulbright.com/en/knowledge/publications/c8a01926/climate-greenwashing-liability.

International Monetary Fund and the European Central Bank recently expressed concern about this issue,[63] and in its 2022 report the High-Level Expert Group recommended that the "challenge of fragmented regulatory regimes should be tackled by launching a new Task Force on net zero Regulation that convenes a community of international regulators and experts to work together towards net zero".[64]

37. While climate-related information disclosure and climate-washing are topics that are being widely discussed, other relevant issues seem to have received less attention from global standard setters so far. For instance, it has not been possible to identify initiatives aiming at clarifying the implications of the fiduciary duties of corporate directors and officers in the context of climate change, or the conditions under which the behavior of an enterprise in relation to climate change could be considered as a civil fault (although this last point may have close links with the issues of climate-related information disclosure and climate-washing). In the field of carbon markets, a need remains for global standards designed to ensure that carbon credits correspond to genuine GHG reductions or absorptions.[65] This is notably the case in the VCM which is "fragmented" and "suffers from differing accounting methodologies and standards".[66]

38. Another strategy that could be pursued to foster the credibility of the private sector's climate commitments is the development of specific legal tools that could be used by corporations. In that regard, an author has proposed the "contractual carbon fee" as a "novel governance instrument to guide non-state climate mitigation efforts".[67] A contractual carbon fee would be a fee that a corporation commits to pay to another private actor (e.g., a charity, an environmental NGO, a governmental agency, a climate fund) by virtue of a contract for its GHG emissions, or the GHG emitted above a certain threshold. The contract would give the other party legal standing to enforce the corporation's commitment in case of a breach. The technical details of the fee to be paid (e.g., scope of the emissions covered by the fee, period to consider, amount of the fee) could be aligned with the climate commitment of the corporation. Concluding carbon fees contracts could represent an additional means for corporations to signal their seriousness about achieving their climate pledges. While the use of contractual carbon fees does not appear to be common practice at the moment, the development of a standardized contract in that area could draw attention on this tool and contribute to promote its diffusion.

[63] Huw Jones, "ECB, IMF call on climate standards setters to align company disclosures", *Reuters*, 8 August 2022, www.reuters.com/business/sustainable-business/ecb-imf-call-climate-standard-setters-align-company-disclosures-2022-08-08/.

[64] United Nations' High-Level Expert Group on the Net Zero Emissions Commitments of Non-State Entities, *Integrity Matters: Net Zero Commitments by Businesses, Financial Institutions, Cities and Regions*, supra note 26, p. 33.

[65] See section D above.

[66] John B. Quinn *et al.*, "Carbon offsets: a coming wave of litigation?", Quinn Emanuel, 7 September 2022, www.quinnemanuel.com/the-firm/publications/client-alert-carbon-offsets-a-coming-wave-of-litigation/#:~:text=Companies%20who%20mislead%20consumers%20by,exaggerated%20claims%20of%20eco%2D%20friendliness.

[67] Steve Lorteau, "Contractual carbon fees: a proposal", *McGill Journal of Sustainable Development Law*, vol. 15, n°2, 2020, pp. 176–201.

Annex

UNCITRAL Colloquium on Climate Change and the Law of International Trade

Vienna, 12–13 July 2023

Vienna International Centre

BACKGROUND

The UNCITRAL Colloquium on Climate Change and the Law of International Trade will be held in Boardroom D of the Vienna International Centre, on 12–13 July 2023, as part of the fifty-sixth session of the United Nations Commission on International Trade Law (UNCITRAL). The web page of the colloquium may be found at https://uncitral.un.org/en/climatechangecolloquium

The Colloquium is organized by the UNCITRAL secretariat, in cooperation with other relevant international organizations, pursuant to the request of the Commission at its fifty-fifth session in 2022 (A/77/17, para. 216). At that session, the Commission agreed on the importance of the topic and on the usefulness of exploring how UNCITRAL could offer its own contribution to the international community's efforts to combat climate change and mitigate its effects by updating existing private law instruments and developing new enabling legal mechanisms, if necessary. It was observed that global efforts to combat climate change were an integral part of the agenda of the United Nations and that, as a subsidiary body of the General Assembly, UNCITRAL was well placed to undertake work on those aspects of climate change falling within its mandate, and it would indeed be expected that UNCITRAL would provide its own contribution to support the efforts of other United Nations bodies and Secretariat units in that respect (A/77/17, para. 212).

For that purpose, the Commission requested the Secretariat to organize a colloquium on the various legal issues surrounding climate change mitigation, adaptation and resilience, in conjunction with relevant and interested international organizations, the results of which would facilitate its consideration at a future session.

The Colloquium will consider areas in which international trade law can effectively support the achievement of climate action goals set by the international community, the scope and value of legal harmonization in those areas and the need for international guidance for legislators, policymakers, courts and dispute resolution bodies. It should consider in particular: (a) the contribution that UNCITRAL could make in the light of its mandate to promote the harmonization and modernization of the law of international trade in the form of possible future work and (b) how existing UNCITRAL instruments in areas such as contract law, electronic commerce, public procurement, public-private partnerships and dispute resolution can be applied to support climate action.

Participants at the Colloquium are invited to contribute to the discussion of those issues. The main conclusions of the Colloquium will be presented to the Commission for consideration during the third week of its fifty-sixth session.

Programme
Wednesday, 12 July 2023

9:00	**Registration of participants**
9:30	**Welcome address by the Chairperson of UNCITRAL**
9:35	***1. The role of market mechanisms under the international framework on climate change*** *This session will provide a general overview of the international framework for climate action under the Kyoto protocol and the Paris Agreement, with a focus on the role envisaged for the private sector, in particular through market mechanisms for emission reduction and the promotion of clean investment.* ***Keynote speech:*** *Ms. Annette L. Nazareth, Integrity Council for the Voluntary Carbon Market (ICVCM)* ***Speakers:*** *United Nations Framework Convention on Climate Change (UNFCCC)* *United Nations Environnent Programme (UNEP)* *Mr. Thomas Clark, General Counsel, Asian Development Bank (ADB)*
	Open discussion
11:00	**Coffee break**
11:15	***2. Financial instruments to support emission reduction and carbon trading: regulatory aspects and legal underpinnings*** *This session will discuss market structures and financial instruments for green investment, focusing on regulatory and legal aspects to ensure interoperability, promote integrity and enhance legal certainty for ETS schemes.* ***Moderator:*** *[tbc]* ***Speakers:*** *Ms. Bénédicte Nolens, Head of the Hong Kong Innovation Hub, Bank for International Settlements (BIS)* *Mr. Dirk Forrister, CEO, International Emissions Trading Association (IETA)* *Mr. Peter Werner, Senior Counsel, International Swaps & Derivatives Association (ISDA)* *Ms. Flavia Rosembuj, Global Lead for Blended Finance, Climate Business Global Lead for Trust Funds, International Finance Corporate (IFC)*
	Open discussion
12:30	**Lunch**
14:00	***3. Green Investment Certification and Compliance*** *This session will discuss certification and compliance methods for promoting confidence in green investment and preventing "greenwashing".* ***Moderator****: [tbc]* ***Speakers****:* *Ms. Kris Nathanail-Brighton, Senior Policy Advisor for Special Projects, International Organization of Securities Commissions (IOSCO)* *Ms. Joanne Brinkman (tbc), General Counsel a.i, Green Climate Fund (GCF)* *Mr. Mauricio Moura Costa, BVRio, (Brazil)* *Ms. Ipshita Chaturvedi, Partner, Dentons Rodyk*

	Open discussion
16:00	**Coffee break**
16:15	***4. Green bonds and carbon credits as financial instruments: legal nature, trading and holding patterns*** *The session will discuss business models for issuance, intermediation and custodianship of green investment instruments, focusing on the legal nature of such instruments, their use as collateral and the rights of holders.* ***Moderator**: Mr. José Angelo Estrella-Faria, Principal Legal Officer, UNCITRAL Secretariat* ***Speakers**:* *Mr. Géraud de Lassus St-Geniès, Professor of Law, Laval University in Québec (Canada)* *Mr. Tianbao Qin, Professor of Law, Wuhan University (China)* *[tbc], Inter-American Development Bank (IADB)*
	Open discussion
17:00	**Closing of Day 1**

Programme
Thursday, 13 July 2023

9:30	**Welcome address by the Secretary of UNCITRAL**
9:35	***1. Corporate social responsibility, due diligence and disclosure of climate impact*** *This session will focus on the international, regional and state's efforts to call upon private sector support towards achieving climate goals by advocating and advancing climate-responsible corporate conduct. The discussion will touch upon, among others, existing international instruments and regional and domestic legislations aimed at increasing transparency and accountability for climate impact of business models and investment strategies through due diligence and information disclosure.* ***Moderator**: [tbc]* ***Speakers**:* *Mr. Juan Gómez-Riesco, Legal Officer - Corporate Governance [tbc], Directorate-General for Justice and Consumers (JUST), European Commission* *[tbc], Organisation for Economic Co-operation and Development (OECD)* *Ms. Meng Su, Partner, King & Wood Mallesons,* *Ms. Raelene Martin (tbc), Head of Sustainability, ICC Global Environment and Energy Commission*
	Open discussion
11:00	**Coffee break**
11:15	***2. Greening the Supply Chain: Contractual and Liability Enforcement Mechanisms*** *This session will discuss the various adaptation strategies and approaches available to private sector operators to promote sustainability in their supply chains, especially through incorporating corresponding contractual and liability enforcement mechanisms into existing commercial practices.* ***Moderator:** [tbc]* ***Speakers:*** *Ms. Vesselina Haralampieva, Senior Counsel, European Bank for Reconstruction and Development (EBRD)* *Ms. Yeşim M. Atamer, Professor of Law, University of Zurich* *Mr. Christian Richter-Schöller, Co-head of Sustainability Group, DORDA, Vienna* *Ms. Ipshita Chaturvedi, Partner Dentons Rodyk*
	Open discussion
12:30	**Lunch**
14:00	***3. Climate Change Dispute Resolution*** *The aim of the session is to explore and evaluate the current trends in climate change disputes and their legal implication for corporates to fulfil the duty of care and foster the incorporation of climate considerations into business and investment decision.* ***Moderator**: Ms. Anna Joubin-Bret, Secretary of UNCITRAL* ***Speakers**:* *Ms. Wendy Miles KC, London, Founder, Net Zero Lawyers Alliance* *Ms. Annette Magnusson, Stockholm, Co-Founder, Climate Change Counsel* *Ms. Aisha Abdallah, Partner, Head of Litigation and Disputes, Anjarwalla & Khanna,* *Ms. Tomoko Ishikawa, Vice Dean, Graduate School of International Development Nagoya University (Japan)*
	Open discussion

16:00	**Coffee break**
16:15	***4. Ambassadorial roundtable: Possible work by UNCITRAL on climate change and private law*** *The aim of the session is to assess on the basis of the preceding sessions, feasibility and desirability of work by UNCITRAL on climate change and private law and, if work were to be undertaken, its possible form and scope.* ***Moderator**: Chairperson, UNCITRAL 56th session*
	Open discussion
17:00	**Closing of the Colloquium**