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Exploratory work on the impact of COVID-19 on international trade law – Part II*

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* Part I may be found in document A/CN.9/1080.



I. Introduction

1. The present document constitutes Part II of the report to the Commission in response to the request made at its fifty-third session (2020)¹ that the secretariat explore further the proposal made regarding possible future work on whether measures implemented by States in response to the coronavirus disease (COVID-19) pandemic had exposed gaps or obstacles to cross-border trade and investment that could be overcome through work by UNCITRAL in harmonizing cross-border rules (A/CN.9/1039/Rev.1). Part I of the report may be found in document A/CN.9/1080, of which paragraphs 1 to 12 provide the detailed background for the entire report.

2. In this continuation of the report to the Commission, section II explores issues related to the proposal made during the fifty-third session of the Commission that an online platform should be established on which States could share their experiences on the implementation of measures to mitigate the effects of the COVID-19 pandemic. Section III summarizes work that has been undertaken by other international organizations in identifying COVID-19 mitigation measures having an impact on cross-border trade that have been implemented by States. Section IV reports on the webinar held on “Digitalization of International Trade”.

II. Proposed online platform to share experiences on COVID-19 measures

3. As outlined in Part I of the present report² and paragraph 1 above, at its resumed fifty-third session (2020), the Commission considered³ a proposal⁴ regarding whether the COVID-19 measures that had been implemented by States had revealed areas for possible future work by UNCITRAL. During discussion of that proposal in the Commission, it was suggested that, regardless of any legislative work that the Commission might wish to undertake, the secretariat should explore the possibility of developing an online information platform where States might share their experiences with legal response and recovery measures related to the COVID-19 pandemic, ideally in real time.⁵

4. Two options exist for sharing materials with States within the existing technical infrastructure of the secretariat. The first option is to create a dedicated page on the UNCITRAL website which could be used to post materials submitted by States. The page would be accessible to the public (a password-protected page is not currently supported by the UNCITRAL website). A second option is to post the materials on the existing password-protected page, hosted on an external website, which is used by the secretariat to share limited distribution information with member States.⁶ The page, which may be accessed through the link “UNCITRAL Information for Member States”,⁷ and which currently hosts the responses to the questionnaire on COVID-19 measures of those States that consented to their responses being consulted by other States.⁸ The Commission may wish to note that both options would involve the materials being posted in the form and language in which they are received. Moreover, neither option offers a search function of posted materials or allows States to post

¹ *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17* (A/75/17, part two), para. 89.

² Document A/CN.9/1080, paras. 1 and 12–13.

³ *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17* (A/75/17, part two), paras. 16(i) and 86–89.

⁴ See document A/CN.9/1039/Rev.1.

⁵ *Ibid.*, para. 89.

⁶ www.unodc.org/missions/en/uncitral/information.html.

⁷ <https://uncitral.un.org/en/about>; see also *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17* (A/74/17), para. 317.

⁸ See footnote 19 of Part I of this report in document A/CN.9/1080.

materials themselves. Accordingly, neither option offers States the opportunity to interact with posted materials or to exchange materials with each other.

5. Another option is for the secretariat to create a new information repository system modelled on the existing Transparency Registry⁹ and the CLOUT system.¹⁰ Both of these systems are searchable public databases that are accessible through the UNCITRAL website. This option may be more user-friendly than the options outlined in the previous paragraph, for example, in permitting content to be presented in different ways. Both the Transparency Registry and the CLOUT system involved the secretariat procuring a third-party provider to build and maintain the system for a fee (including a one-time fee for building the system and an annual maintenance fee of approximately \$6,000 and \$8,000, respectively). However, this option does not offer States the opportunity to interact with posted materials or to exchange materials with each other.

6. A further option that would provide the opportunity for States to interact with posted materials and to exchange materials with each other is to create a new web-based system. An example of such a system within the United Nations system is the portal developed by the United Nations Office on Drugs and Crime that is known as Sharing Electronic Resources and Laws on Crime (SHERLOC) (accessible at <https://sherloc.unodc.org>).¹¹ It should be noted that SHERLOC permits users to directly submit legislation to the secretariat, after which it is reviewed for publication and its accuracy is verified by the relevant national authorities. While the secretariat has not had experience to date in building such a system, developing a similar system, or one that would permit States to interact with posted materials and exchange them with each other, would involve procurement of a third-party provider to build and maintain the system, as well as possible fees for any additional administrative, technical and substantive support that might be necessary to maintain the system. The additional functionality offered by this approach, if preferred, could be expected to entail additional budgetary implications. Should the Commission wish to explore this possibility further, it might wish to request the secretariat to prepare a detailed proposal, including an estimate of the extrabudgetary resources that would be required to implement it.

7. The Commission may also wish to consider possible alternative means through which States could interact and exchange their experiences. One means might be to do so at a round-table session modelled on those that have been organized by the secretariat in the past (in 2019, on technical assistance activities relating to specific UNCITRAL instruments¹²), as well as during the current Commission session (on measures to support the recovery of MSMEs from the pandemic). Such round-table events bring together States, international and regional organizations and experts active in international commercial law reform and development assistance, and have offered valuable insights for further enhancement of the work of UNCITRAL.¹³ A further option that the Commission may wish to consider might be to request the secretariat to organize outside of the Commission session a dedicated webinar or virtual panel series, dealing with selected topics. States, intergovernmental organizations and relevant stakeholders could be invited to share their views in a virtual setting, so as to broaden participation and increase inclusiveness for the event. Should the Commission opt for such round tables or virtual events, they could be organized on an annual basis, subject to the availability of resources in the secretariat.

⁹ See document A/CN.9/1056.

¹⁰ Ibid.

¹¹ More information on the financing of the SHERLOC portal may be found in a recent report to the Conference of the Parties to the United Nations Convention against Transnational Organized Crime: www.unodc.org/documents/treaties/UNTOC/COP/SESSION_10/Website/CTOC_COP_2020_9/CTOC_COP_2020_9_E.pdf.

¹² *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17 (A/74/17)*, paras. 263–266.

¹³ Ibid., paras. 265–266.

III. Other international organizations: COVID-19 and cross-border trade

United Nations

8. The United Nations hosts a dedicated COVID-19 page¹⁴ on its website, linked to a number of resources, informational updates and calls to action. The dedicated page on “Information from the UN System”¹⁵ contains an extensive list of resource pages from organizations in the United Nations system, covering a broad range of topics. Of particular interest in the context of the present report might be the areas of: economic and social development;¹⁶ aviation;¹⁷ tourism;¹⁸ shipping;¹⁹ information and communication technology;²⁰ and building inclusive, sustainable and resilient economies.²¹

9. The United Nations Conference on Trade and Development (UNCTAD) has prepared a number of policy notes and publications to assist States in dealing with the effects of COVID-19 on manufacturing, trade, foreign direct investment and economic growth.²² These publications cover a number of general topics of interest, but also include matters more specifically related to areas of UNCITRAL activity, such as studies on the COVID-19 implications for commercial contracts in the carriage of goods by sea and related cargo claims²³ and the international sale of goods on CIF and FOB terms,²⁴ as well as the impact on e-commerce in terms of businesses and policy responses.²⁵

10. The Economic and Social Commission for Asia and the Pacific (ESCAP) also hosts a dedicated COVID-19 page,²⁶ via which may be found a link to an extensive list of policy briefs²⁷ in response to the pandemic, dealing with issues such as supply chains, challenges and opportunities for economies, freight transport, the impact on tourism and model provisions for trade in times of crisis and pandemic in regional and other trade agreements.

11. Similarly, the United Nations Economic Commission for Europe (UNECE) has a page of resources dedicated to COVID-19 response and recovery.²⁸ One of UNECE’s more recent publications, “COVID-19 Response Policies and the Care Economy: Mapping economic and social policies in the ECE region”,²⁹ may be of particular interest to the Commission.

12. The COVID-19 information on the International Trade Centre (ITC)³⁰ focuses on the impact of the pandemic on micro-, small and medium-sized enterprises (MSMEs), particularly those in developing countries, and provides insights and guidance on support that can be provided to assist such businesses.

¹⁴ www.un.org/en/coronavirus.

¹⁵ www.un.org/en/coronavirus/information-un-system.

¹⁶ www.un.org/en/desa/covid-19.

¹⁷ www.icao.int/Security/COVID-19/Pages/default.aspx.

¹⁸ www.unwto.org/tourism-covid-19-2020.

¹⁹ www.imo.org/en/MediaCentre/HotTopics/Pages/Coronavirus.aspx.

²⁰ www.itu.int/en/Pages/covid-19.aspx.

²¹ www.unido.org/unidos-comprehensive-response-covid-19.

²² <https://unctad.org/programme/covid-19-response>.

²³ <https://unctad.org/webflyer/covid-19-implications-commercial-contracts-carriage-goods-sea-and-related-cargo-claims>.

²⁴ <https://unctad.org/webflyer/covid-19-implications-commercial-contracts-international-sale-goods-cif-and-fob-terms>.

²⁵ <https://unctad.org/webflyer/covid-19-and-e-commerce-impact-businesses-and-policy-responses>.

²⁶ www.unescap.org/covid19.

²⁷ www.unescap.org/covid19/policy-briefs.

²⁸ <https://unece.org/coronavirus-advisory>.

²⁹ https://unece.org/sites/default/files/2021-01/Mapping%20ECE%20Care%20COVID_final_SDGU_with%20covers.pdf.

³⁰ www.intracen.org/covid19/.

International Monetary Fund

13. The International Monetary Fund (IMF) website hosts a large trove of information through its policy tracker,³¹ which summarizes the key economic responses that governments have taken to limit the human and economic impact of the COVID-19 pandemic. The tracker is regularly updated, is searchable by country, and contains information on 197 economies. A great deal of information on the economic impact of the pandemic and the IMF's efforts to support economies in combating it is available on the IMF's dedicated COVID-19 web page,³² including emergency financial assistance by region, a fiscal monitor database of country fiscal response measures, and a special series by experts on a variety of topics (fiscal issues, legal topics, macro-critical structural issues, monetary and financial policies, and statistical issues).

The World Bank Group

14. The World Bank Group has engaged in extensive support to assist countries in addressing the pandemic and transitioning to recovery through its crisis response to: save lives, protect the poor, ensure sustainable business growth and strengthen policies and institutions for resilience.³³ A country-by-country list of the projects in that regard is available on the website,³⁴ as are extensive resources reports and COVID-19 notes in areas of particular interest. For example, a recent publication provides an overview of insolvency and debt restructuring reforms in response to the pandemic and lessons for emerging markets;³⁵ while another note surveys the early evidence on business insolvency filings after the onset of COVID-19.³⁶ Data have also been collected in a global guide (created in cooperation with INSOL International) on measures taken in 62 economies to support distressed businesses through the COVID-19 crisis,³⁷ which were categorized into three main types: (a) increasing barriers for creditor-initiated insolvency filings; (b) suspending the duty to file for insolvency and the related liabilities; and (c) debt repayment emergency measures. The World Bank has also recently launched a revised version of its Principles for Effective Insolvency and Creditor/Debtor Regimes, which have been updated to include new principles addressing MSE insolvency.³⁸

15. Extensive work has also been done by the International Finance Corporation (IFC) in helping to sustain economies and preserve jobs, particularly in the poorest and most vulnerable countries.³⁹ Again, a detailed and searchable list of COVID-19 projects undertaken by the IFC is available on their website.

Asian Development Bank

16. The Asian Development Bank (ADB) website contains information on efforts to support its developing members in responding to the pandemic through finance, knowledge and partnerships.⁴⁰ In addition, the website houses a COVID-19 policy database⁴¹ that provides information on the key economic measures that are being

³¹ www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19.

³² www.imf.org/en/Topics/imf-and-covid19.

³³ www.worldbank.org/en/who-we-are/news/coronavirus-covid19.

³⁴ www.worldbank.org/en/about/what-we-do/brief/world-bank-group-operational-response-covid-19-coronavirus-projects-list.

³⁵ <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/182341615352260595/overview-of-insolvency-and-debt-restructuring-reforms-in-response-to-the-covid-19-pandemic-and-past-financial-crises-lessons-for-emerging-markets>.

³⁶ <http://documents1.worldbank.org/curated/en/962221615273849133/pdf/The-Calm-Before-the-Storm-Early-Evidence-on-Business-Insolvency-Filings-After-the-Onset-of-COVID-19.pdf>.

³⁷ <https://pubdocs.worldbank.org/en/194131592248086470/global-guide.pdf>.

³⁸ <http://documents1.worldbank.org/curated/en/391341619072648570/pdf/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf>.

³⁹ www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/covid-19.

⁴⁰ www.adb.org/what-we-do/covid19-coronavirus.

⁴¹ <https://covid19policy.adb.org/>.

taken as categorized according to: policy measures, data extraction, analysis, sector financial balances, COVID-19 cases and green recovery.

Inter-American Development Bank

17. The Inter-American Development Bank (IDB) Group has established a web page dedicated to its response to the pandemic,⁴² focusing on seven targeted areas: fiduciary and corporate responses, support to countries, support to the private sector, working with strategic partners, supporting entrepreneurs and open innovation and knowledge.

European Bank for Reconstruction and Development

18. The European Bank for Reconstruction and Development (EBRD) maintains a web page containing economic data and forecasts, as well as outlining its work to support economies in its region to counter the economic impact of COVID-19.⁴³

Organisation for Economic Co-operation and Development

19. The Organisation for Economic Co-operation and Development (OECD) website hosts a dedicated COVID-19 hub⁴⁴ which contains many resources in respect of responding to and recovering economically from the pandemic, and is not limited to its 37 member countries. The March 2021 Interim Report of its Economic Outlook⁴⁵ indicated improved economic prospects and signs of a rebound in goods trade and industrial production, indicating that global GDP is now projected to be 5.6 per cent in 2021, an increase of more than one percentage point over the December 2020 forecast. Detailed policy briefs in a number of key areas are available, including on the impact of the pandemic on job and skills demand; on the result of studying SME and entrepreneurship policy responses; on inclusive recovery; on green recovery; on responses and resources to transport issues; on specific regional approaches (such as in Europe and West Africa); on the responses of trade unions and social partners; and on quality education for all.

World Trade Organization

20. The website of the World Trade Organization (WTO) contains many resources relevant to the impact of the COVID-19 pandemic on world trade,⁴⁶ including trade forecasts and a series of WTO reports on various topics. Of particular interest may be information compiled on trade and trade-related measures taken by WTO members in the context of the COVID-19 crisis, as well as support measures taken by WTO members and observers in response to the pandemic, and proposals by WTO members in respect of COVID-19. As of 13 April 2021, WTO members had submitted a total of 355 notifications of trade and trade-related COVID-19 measures that had been taken.⁴⁷ Of this total, 152 notifications concerned technical barriers to trade; 88 were sanitary and phytosanitary measures; 64 were quantitative restrictions; 20 concerned market access for goods; 15 focused on agriculture, while 10 or less related to trade facilitation, export restrictions, and intellectual property. The notifications included a broad range of measures taken to address the pandemic, including import and export restrictions or accelerations of certain strategic goods and medical-related products and vaccines; accelerated authorization and regulatory processes for some products; changes to or relaxations of regulatory requirements for certain products considered key to addressing the pandemic; temporary elimination of duties on certain products; facilitation of trade in essential goods; temporary bans on certain agricultural products and live animals and insects, as well as plant-based, animal, biological and animal-

⁴² www.iadb.org/en/coronavirus.

⁴³ www.ebrd.com/what-we-do/coronavirus.

⁴⁴ www.oecd.org/coronavirus/en/.

⁴⁵ www.oecd.org/economic-outlook/.

⁴⁶ www.wto.org/english/tratop_e/covid19_e/covid19_e.htm.

⁴⁷ www.wto.org/english/tratop_e/covid19_e/notifications_e.htm.

based goods; and the facilitation of electronic and contactless means to obtain regulatory approvals.

International Labour Organization

21. The International Labour Organization (ILO) website contains information in respect of the pandemic, including data on country policy responses to combat the pandemic, while mitigating its harmful effects on the economy and labour market. Information on the policies implemented by governments, employer and worker organizations and the ILO in 188 countries and territories is available here,⁴⁸ searchable by country or territory. The data are presented under four main pillars: stimulating the economy and jobs; supporting enterprises, employment and incomes; protecting workers in the workplace; and using social dialogue between government, workers and employers to find solutions. Additional information on COVID-19 is available on a wide variety of topics, including global impact and policy recommendations; regional and country impact and policies; sectoral impact, responses and recommendations; as well as thematic analysis and practical advice.⁴⁹

Asia-Pacific Economic Cooperation

22. The Asia-Pacific Economic Cooperation (APEC) has also provided a dedicated COVID-19 page highlighting resources to assist in response and recovery efforts.⁵⁰

Hague Conference on Private International Law (HCCH)

23. The Hague Conference on Private International Law (HCCH) has compiled a COVID-19 toolkit⁵¹ that compiles references to HCCH resources and publications that are particularly relevant in the context of the pandemic, and which is designed to assist users of HCCH instruments.

International Institute for Unification of Private Law

24. The International Institute for Unification of Private Law (Unidroit) has developed a web page⁵² highlighting aspects of certain of its instruments that may be of particular interest to various stakeholders in light of COVID-19, including the Cape Town Convention, and its work in the areas of contract farming and agricultural land investment contracts. Of particular interest to the Commission may be the Unidroit Principles of International Commercial Contracts, which the Commission had previously endorsed and recommended for use by contract parties,⁵³ and which concern matters of relevance in the context of the COVID-19 pandemic, such as hardship, force majeure, contractual breach, and penalties for breach.⁵⁴

25. The survey work that has been undertaken by other international organizations in identifying COVID-19 mitigation measures having an impact on cross-border trade that have been implemented by States confirms generally the nature of measures reported in response to the questionnaire sent out by the UNCITRAL secretariat (see Part I of this report, as set out in A/CN.9/1080). In line with their respective mandates and focuses, most measures monitored and reported relate to business support and trade policy that are unrelated or only remotely relevant for the work of UNCITRAL (such as the effect of trade restrictions on the performance of international sales and shipping contracts). However, some relate to work currently under way at UNCITRAL (e.g. insolvency law, MSMEs, legal aspects of the digital economy), and

⁴⁸ www.ilo.org/global/topics/coronavirus/regional-country/country-responses/lang--en/index.htm.

⁴⁹ www.ilo.org/global/topics/coronavirus/lang--en/index.htm.

⁵⁰ www.apec.org/COVID-19.

⁵¹ <https://assets.hcch.net/docs/538fa32a-3fc8-4aba-8871-7a1175c0868d.pdf>; see also: <https://assets.hcch.net/docs/2aee3e82-8524-4450-8c9a-97b250b00749.pdf>.

⁵² www.unidroit.org/covid-19/586-covid-19/2891-covid-19-secretariat-notes.

⁵³ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 140.

⁵⁴ See also para. 42 in A/CN.9/1080.

many confirm the benefits that States may derive from adopting existing UNCITRAL instruments, in particular in the area of electronic commerce. At the current stage of its exploratory work, a preliminary assessment of those measures by the secretariat does not suggest the emergence of a new area of commercial law that would require an international harmonization effort, but the secretariat stands ready to examine any particular issue further if the Commission identifies a need.

IV. Webinar on digitalization of international trade

A. Overview

26. As noted in Part I of the report (A/CN.9/1080, para. 3), the third step taken by the secretariat in its exploration of the proposal was the holding of an open webinar on the digitalization of international trade. The webinar was held on 30 March 2021 in cooperation with the Ministry of Economic Development of the Russian Federation and the International Comparative and Law Research Center (ICLRC). The webinar was targeted to academia, legal practitioners, and representatives of international organizations and government agencies. It was attended by 984 viewers, with simultaneous interpretation provided in both Russian and English.

27. The purpose of the webinar was to discuss the role of digital technologies in restoring commercial ties disrupted by COVID-19 response measures, and to analyse different approaches for creating effective rules to facilitate the use of reliable electronic communications. The event was structured in three panels: panel 1 addressed e-commerce platforms, panel 2 addressed electronic cross-border transactions and trade documents, while panel 3 addressed automated contracting. The topics for the panels were drawn from two of the areas identified in the proposal for possible future harmonization efforts (see A/CN.9/1080, para. 12), namely (i) the digitalization of legal procedures in the formation and execution of contracts, and (ii) the elaboration of provisions on smart contracts. Panellists were drawn from academia and the business community in the Russian Federation, Europe, North America, and Asia.

B. Summary of discussions

28. The webinar was opened by the General Director of the ICLRC, which was followed by welcome addresses delivered by the Deputy Minister of Economic Development of the Russian Federation and the Secretary of UNCITRAL. The keynote speakers emphasized the importance of digital transformation to the COVID-19 response and recovery, while attendees were informed of current legal reform initiatives in the Russian Federation aimed at facilitating the use of electronic transport documents, the deployment of “smart contracts”, and the formulation of basic principles for the development and use of artificial intelligence (AI) technologies.

29. **Panel 1** began by grappling with the definition of online platforms. Support was expressed for the functional definition developed by the Organisation for Economic Co-operation and Development (OECD), according to which an online platform is “a digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact through the service via the Internet”. It was noted that the functional definition presupposes the existence of a separate platform operator. It was added that, while decentralized distributed ledger systems may be referred to as “platforms”, the absence of a platform operator means that they are outside the scope of enquiry.

30. There was consensus among panellists that platform operators do not merely act as a facilitator or intermediary between platform users, but rather that they constitute a sui generis legal actor with special rights and obligations. It was noted that the

OECD definition belies the wide variety of online platforms in existence, and may not be appropriate for laws seeking to regulate or restrict the operation of platforms.

31. It was noted that a focus on the different roles played by the platform operator is essential to understanding the legal status of online platforms. That is determined first and foremost by the terms of the “membership agreement”, which constitutes a contract between the operator and each user. The membership agreement establishes not only the rules of conduct for the platform, but also the procedures for varying those rules and for monitoring and enforcing their compliance. It may also provide for reputation systems and for the resolution of disputes between users. It was noted that the contract-based governance model offered platform operators ultimate flexibility in structuring their relations with users, and effectively established “private” legal systems for each platform. At the same time, it was emphasized that platforms are not immune from “public” laws, especially laws on privacy and data protection, consumer protection, anti-competitive behaviour, and intellectual property. It was noted that fragmented national laws could pose challenges for the effective operation of platforms, while also incentivizing forum shopping.

32. Three types of roles were identified: (a) “trade assurance” (i.e. the role in creating a safe, reliable and trustworthy online space in which users can transact); (b) “trade process” (i.e. the role of facilitating transactions); and (c) “trade facilitation”.

(a) With regard to the “trade assurance” role, it was observed that a key component is identity management (IdM), which promotes trust in the platform. A link was drawn with the current work of UNCITRAL Working Group IV, which is developing a legislative text on IdM and trust services. Another aspect is the provision of other “value-add” trust services, such as secure messaging and the management of a reputation system.

(b) With regard to the “trade process” role, it was observed that a key component is the deployment of automated systems for concluding contracts on the platform. While this raises “peripheral” issues surrounding the disclosure of information about the use of the system, a core legal issue is the allocation of legal risk as between the parties in the event of a system failure or security breach. Another key component is the deployment of AI-enabled services to connect users, such as targeted advertising and search functions. These services rely on user data and can be programmed in such a way as to enable traders to apply discriminating pricing strategies in violation of consumer protection laws. It was also noted that advances in AI technology deployed by platform operators are making it easier to detect unlawful activities on the platform, which has flow-on effects for the liability of platform operators with respect to those activities.

(c) With regard to the “trade facilitation” role, it was emphasized that platforms can play a critical role in implementing paperless trade. Reference was made to the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific (“Framework Agreement on Paperless Trade”), which entered into force on 20 February 2021 (see also A/CN.9/1058).

33. Attendees were informed of recent legislative initiatives to regulate aspects of e-commerce platforms. One objective of regulation is to limit party autonomy, whether by restricting the matters that can be covered by the membership agreement or by mandating certain matters to be covered. Another objective is providing users with access to data, namely the data that they provide in using the platform. It was noted that correlating obligations on platform operators were balanced against the benefits accrued – and influence gained – from aggregating data collected from users.

34. After discussion, a consensus emerged among panellists on a number of points, namely:

(a) The sui generis nature of online platforms raises novel legal issues, and addressing those issues is a concern for cross-border trade, particularly given the

global reach of those platforms. Existing laws do not sufficiently take account of the special role of platform operators in the digital economy;

(b) Online platforms blur the line between business-to-business and business-to-consumer relations;

(c) Party autonomy is central to the promotion of international trade in both the offline and online environments. However, as platform operators have the potential to disrupt the level playing field through the influence that they exert over platform users, legislative intervention may be justified;

(d) There is a role for UNCITRAL to play in developing international standards for legislative intervention, including for establishing baseline rules of conduct based on fairness and transparency, and rules on the liability of platform operators.

35. **Panel 2** focused on several areas of past and present legislative work by UNCITRAL, namely electronic transactions, electronic transferable records, and IdM.

36. It was noted that the COVID-19 response exposed the challenges of doing business remotely and trusting the authenticity of electronic communications, electronic transactions and electronic payments. It was added that the validity of these tools often presupposes – or may even require – the proper identification of the parties involved. Against that backdrop, attendees were given an update on the status of work within UNCITRAL Working Group IV on the development of a legislative text on IdM and trust services. It was noted that the experience of UNCITRAL in e-commerce over the past 25 years is testimony to the need for legal, organizational and technical interoperability, and the current legislative text seeks to bridge legal diversity – or “trust domains” – in each of these respects.

37. Attendees heard from practical experience of the obstacles encountered by businesses in concluding contracts remotely and the need to retain certain paper-based practices (e.g. verification of paper documents, in-person involvement of notaries). It was noted that, while the COVID-19 response has fast-tracked digital transformation, particularly within the finance sector, the legal system has not caught up. It was added that obstacles were compounded by fragmented national laws, particularly with respect to electronic signatures, and the lack of clear standards in those laws, which together reduce confidence in electronic transactions. The point was emphasized that international standards are needed, and it was suggested that efforts to overcome obstacles to digital trade should be based on legal and organizational cooperation and mutual recognition. It was added that legislative intervention should ultimately be guided by the needs of the parties involved, and that in some technological ecosystems, the parties are not calling for legislative support.

38. Attendees were also advised of new frontiers for digitalization, particularly in the form of electronic transferable records such as bills of lading. It was noted that only 0.1 per cent of bills of lading are issued electronically, despite the rise of online platforms, and the expense, inefficiency and insecurity of dealing with paper-based equivalents. It was added that the inefficiency of paper-based bills of lading has only been amplified in the wake of the pandemic. While some “closed loop” platforms support electronic bills of lading, they rely on contracts for legal effect, and are therefore not binding on third parties, let alone interoperable with other platforms. It was added that legislative intervention was needed to recognize electronic bills of lading, and that the enactment of the UNCITRAL Model Law on Electronic Transferable Records (MLETR) was the solution. Against that backdrop, attendees were informed of the main features of the MLETR and the status of its enactment. It was noted that the MLETR has been enacted in Bahrain and Singapore, and by the Abu Dhabi Global Market, and that other States including Paraguay and the United Kingdom of Great Britain and Northern Ireland are considering its enactment. It was also noted that its enactment was part of policy platforms for the International Chamber of Commerce, the G7, and the United Nations Economic and Social

Commission for Asia and the Pacific (UNESCAP) to support the implementation of the Framework Agreement on Paperless Trade.

39. **Panel 3** focused on automated contracting with a particular focus on so-called “smart contracts”. The point was made that contracts concluded via online platforms were facilitated not by AI but rather by automation. It was added that making sense of automated contracting required not only the identification of the parties (as discussed in panel 2) but also an understanding of how algorithms can express the will of the parties with respect to the relevant transaction.

40. There was consensus among panellists that smart contracts should be viewed as a matter of automation and not as a matter of AI. It was noted that their legal consideration requires an understanding of the governance and structure of the distributed ledger systems on which they are deployed. There was also consensus that that the term “smart contract” is a misnomer, particularly in that smart contracts embody not the conclusion but rather the performance of the contract (i.e. the secure execution and fulfilment of its terms). It was noted that, for the time being, smart contracts are only being deployed for basic transactions.

41. Nevertheless, it was observed that there is still scope to develop “smart” contract law to enable their deployment and safeguard fundamental values in view of their “immutability”. It was noted that a question may arise as to the legal enforceability of smart contracts, with some jurisdictions (e.g. Italy, Malta, Serbia, and several states of the United States of America) enacting laws that expressly recognize their use to attract technological investment. Another question may arise as to how smart contracts fit within existing contract law, including rules of interpretation, mistake, and duress. It was noted that the application of those rules is still to be tested in the courts.

42. Several options for law reform were identified. The first is to do nothing, on the basis that existing law provides an adequate response. The second is to update contract law to adapt. The third is to leave smart contracts outside the protection of the law based on the “code is law” precept. A preference was expressed for exploring the need to adapt certain areas of contract law, especially remedies, and to address issues of liability as between the party deploying the smart contract and the party programming it. There was consensus among panellists that any legislative work on smart contracts should proceed on the basis of a gap analysis of existing law.

43. A particular question was posed as to whether and how the United Nations Convention on Contracts for the International Sale of Goods (CISG) applies to smart contracts. Several issues were raised in this regard. First, it was noted that smart contracts could be deployed for payment of goods by cryptocurrency, which raises a question as to whether the underlying contract is a contract for the sale of goods or a barter contract. Second, it was noted that smart contracts could be deployed for the sale of cryptocurrency, which raises a question as to whether the underlying contract is a contract for the sale of “goods”, noting that (a) the concept of goods has traditionally been interpreted for the purposes of the CISG as referring to tangible things, and (b) in any event, article 2(d) of the CISG excludes from its scope “stocks, shares, investment securities, negotiable instruments or money”. Third, it was noted that contracts deploying smart contracts were often concluded via platforms in circumstances where the parties do not know, and are unable to identify, one another.

C. Final observations

44. The webinar discussions confirmed the desirability of harmonized legal standards to keep pace with the digitalization of trade practices, particularly in the wake of the pandemic. In that regard, panellists emphasized the need for a renewed focus on electronic transactions and further work on online platforms and automated contracting, as well as reaffirming the importance of work to harmonize legal standards for IdM. Overall, the outcome of the webinar discussions is consonant with the findings of the virtual panel series from the fifty-third session of the Commission

as outlined in Part I of this report (see paras. 4 to 11) in terms of the soundness of past and present work of UNCITRAL and its ongoing development of a future workplan aimed at facilitating the transition to digital trade, particularly on legal issues related to the digital economy. In that regard, the webinar discussions demonstrated the desirability of future work on the use of automated contracting to look more broadly at provisions dealing with electronic transactions, as well as the need for that work to address questions arising from the automated performance of contracts using smart contracts (see the proposal in A/CN.9/1065 and the revised draft section of the legal taxonomy on AI and automation contained in A/CN.9/1064/Add.1). They also reaffirmed the utility of exploring harmonized legal standards for online platforms (as reported in A/CN.9/1064 and elaborated in the draft section of the legal taxonomy on online platforms (A/CN.9/1064/Add.3)).

V. Conclusion

45. In light of the above, and in light of the preliminary conclusions outlined in paragraph 42 of Part I of this report (A/CN.9/1080), the Commission may wish to consider the desirability for the secretariat to study further any particular areas identified above and in Part I (A/CN.9/1080) of this survey that are not currently being addressed in other parts of the work programme and to establish the relevant priority of such study within the context of its overall work programme (see A/CN.9/1068).

46. The Commission may also wish to consider whether one of the options for information exchange by States in paragraphs 3 to 7 above might be an appropriate model and ask the secretariat to make relevant inquiries with a view to reporting to the Commission at its fifty-fifth session (2022) on the feasibility and resource implications of that model, as well as on its prospect for scalability to address other needs that may arise for information exchange.
