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Settlement of commercial disputes

Interim measures of protection

Note by the Secretariat

Introduction

1. At its thirty-sixth session (New York, 4-8 March 2002) and at its thirty-seventh session (Vienna, 7-11 October 2002), the Working Group discussed a draft of article 17 of the UNCITRAL Model Law on International Commercial Arbitration (“the UNCITRAL Model Law”) relating to the power of an arbitral tribunal to order interim measures of protection (A/CN.9/523, paras. 15-76; A/CN.9/508, paras. 51-94; for earlier discussions, see A/CN.9/468, paras. 60-87; A/CN.9/485, paras. 78-106; A/CN.9/487, paras. 64-87) and considered various proposals for a revision of that article (A/CN.9/WG.II/WP.119, para. 74; A/CN.9/WG.II/WP.121).
2. At its thirty-ninth session (Vienna, 10-14 November 2003), the Working Group continued its deliberations on draft article 17 of the UNCITRAL Model Law (“the previous draft”), on the basis of a note prepared by the Secretariat (A/CN.9/WG.II/WP.123). The report of that session is contained in document A/CN.9/545.
3. To facilitate the resumption of discussions, this note sets out a newly revised version of article 17 of the UNCITRAL Model Law (“the revised draft”), taking account of discussions and decisions made at the thirty-ninth session of the Working Group.

*The late submission of the document is a reflection of the current shortage of staffing resources in the secretariat.



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

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures of protection.
 - (2) An interim measure of protection is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
 - (a) Maintain or restore the status quo pending determination of the dispute;
 - (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm;
 - (c) Provide a [preliminary] means of [securing] [preserving] assets out of which a subsequent award may be satisfied; or
 - (d) Preserve evidence that may be relevant and material to the resolution of the dispute.
 - (3) The party requesting the interim measure of protection shall satisfy the arbitral tribunal that:
 - (a) [Irreparable harm] is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
 - (b) There is a reasonable possibility that the requesting party will succeed on the merits, provided that any determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
 - (4) The arbitral tribunal may require the requesting party and any other party to provide appropriate security as a condition to granting an interim measure of protection.
 - (5) The requesting party shall inform the arbitral tribunal promptly of any material change in the circumstances on the basis of which the party made the request for, or the arbitral tribunal granted, the interim measure of protection. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party.
 - (6) The arbitral tribunal may modify, suspend or terminate an interim measure of protection [it has granted], at any time, upon application of any party or, in exceptional circumstances, on the tribunal's own initiative, upon prior notice to the parties.
- [(6 bis) The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed from the date the measure has been granted and for as long as it is in effect [to the extent appropriate, taking into account all of the circumstances of the case, in light of

the final disposition of the claims on the merits]. The arbitral tribunal may order an immediate award of damages.]

- (7) (a) [Unless otherwise agreed by the parties] [If expressly agreed by the parties], the arbitral tribunal may [in exceptional circumstances,] grant an interim measure of protection, without notice to the party against whom the measure is directed, [when] [if the requesting party shows that]:
- (i) There is an urgent need for the measure;
 - (ii) [The conditions set out in paragraph (3) are met]; and
 - (iii) The requesting party [shows] [satisfies the arbitral tribunal] that it is necessary to proceed in that manner in order to ensure that the purpose of the measure is not frustrated before it is granted;
- (b) The requesting party shall be liable for any costs and damages caused by the interim measure of protection to the party against whom it is directed from the date the measure has been granted and for as long as it is in effect [to the extent appropriate, taking into account all of the circumstances of the case, in light of the final disposition of the claims on the merits]. The arbitral tribunal may order an immediate award of damages;
- (c) The arbitral tribunal shall require the requesting party and any other party to provide appropriate security as a condition to granting an interim measure of protection;
- (d) *Variant 1:* The arbitral tribunal shall have jurisdiction, inter alia, to determine all issues arising out of or relating to subparagraph (b) [and (c)] above, [at any time during the arbitration proceedings];
- Variant 2:* A party may, at any time during the arbitration proceedings, bring a claim under subparagraph (b);
- (e) *Variant A:* The party against whom the interim measure of protection is directed shall be given immediate notice of the measure and an opportunity to present its case before the arbitral tribunal at the earliest possible time and in any event no later than [forty-eight] hours after that notice, or on such other date and time as is appropriate in the circumstances;
- Variant B:* Any party affected by the interim measure of protection granted under this paragraph shall be given immediate notice of the measure and an opportunity to present its case before the arbitral tribunal within [forty-eight] hours of the notice, or on such other date and time as is appropriate in the circumstances.
- (f) Any interim measure of protection ordered under this paragraph shall expire after twenty days from the date on which the arbitral tribunal orders the measure, unless that measure has been confirmed, extended or modified by the arbitral tribunal [, upon application by the requesting party and] after the party against whom the measure is directed has been given notice and an opportunity to present its case. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party;

(g) A party requesting an interim measure of protection under this paragraph shall [inform the arbitral tribunal of] [place before the arbitral tribunal information relating to] all circumstances that the arbitral tribunal is likely to find relevant and material to its determination [whether the requirements of this paragraph have been met] [whether the arbitral tribunal should grant the measure].

Notes on the revised draft

Paragraph (1)

4. The Working Group adopted paragraph (1) without modification (A/CN.9/545, para. 20).

Paragraph (2)

Exhaustive nature of the list of provisional measures

5. The Working Group agreed that, to the extent that the revised list of circumstances in paragraph (2) generically covered all the purposes for which interim measures could be ordered, it was not necessary to make the list non-exhaustive by providing a subparagraph to leave open the possibility that an arbitral tribunal might order an interim measure in exceptional circumstances (A/CN.9/545, para. 21).

Chapeau

6. The chapeau of paragraph (2) is reproduced without modification from the previous draft.

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

7. The Working Group decided to delete the bracketed text “[in order to ensure or facilitate the effectiveness of a subsequent award]” because it could be misinterpreted as imposing an additional condition to be met before an interim measure could be granted (A/CN.9/545, para. 22).

Subparagraph (a)—“maintain or restore the status quo”

8. It was agreed to retain subparagraph (a), which set out the concept of maintaining the status quo, since that concept was well established and understood in many legal systems as one purpose of an interim measure (A/CN.9/545, para. 23).

Subparagraph (b)—“is likely to cause”

9. The words “is likely to cause” have replaced the words “would cause” to reflect the decision of the Working Group that account be taken of the fact that, at the time an interim measure is sought, there is often insufficient facts to provide proof that, unless a particular action was taken or refrained from being taken, harm would inevitably result. A number of delegations expressed concern that this formulation might make the threshold for obtaining an interim measure too low and

result in excessive discretion being granted to the arbitral tribunal with respect to the issuance of an interim measure (A/CN.9/545, para. 25).

Subparagraph (c)—“[preserving] [securing] assets”

10. The Working Group took note that the drafting group, to be established at a later stage by the Secretariat to ensure consistency between the linguistic versions, should consider using wording along the lines of “preserving assets”, instead of “securing assets”, to indicate that what is intended to be covered is the preservation of assets and that this should not be interpreted as requiring a legal guarantee or security in all cases (A/CN.9/545, para. 26).

Subparagraph (c)—“preliminary”

11. The Working Group may wish to further consider whether to maintain or delete the word “preliminary”, which was viewed as potentially misleading by some delegations at the thirty-ninth session of the Working Group (A/CN.9/545, para. 26).

Subparagraph (d)—preserving evidence

12. Notwithstanding the view that subparagraph (d) was superfluous in some legal systems, the Working Group agreed to retain subparagraph (d) on the basis that the presentation of evidence was not necessarily adequately dealt with by all domestic rules of civil procedure (A/CN.9/545, para. 27).

Paragraph (3)

Chapeau

13. The inclusion of the phrase “The party requesting the interim measure of protection shall satisfy the arbitral tribunal that” reflects the Working Group’s decision to provide a neutral formulation of the standard of proof, while establishing clearly that the burden of proof lies on the requesting party (A/CN.9/545, para. 28).

Subparagraph (a)—“[irreparable harm]”

14. The Working Group may wish to further discuss the term “irreparable harm”, which was considered as too narrow in the commercial context where most harm may be cured by monetary compensation, whereas others pointed out that the notion of “irreparable harm” is well known in many legal systems and constitutes an ordinary prerequisite for ordering an interim measure (A/CN.9/545, para. 29).

Subparagraph (a)—“is likely to result”

15. For the same reasons as explained above in paragraph 9, the words “will result” have been replaced by the words “is likely to result” (A/CN.9/545, para. 30).

Subparagraph (a)—“the party against whom the measure is directed”

16. The wording of this paragraph has been modified to ensure consistency with the decision made by the Working Group that the phrase “the party against whom the measure is directed”, should be retained instead of the phrase “the party affected by the measure” (A/CN.9/545, para. 54). For the sake of consistency, this

modification has been applied to paragraph 7, subparagraphs (a), (b) and Variant A of subparagraph (e) of the revised draft (see paras. 35, 44 and 49, below).

Subparagraph (b)

17. The Working Group adopted subparagraph (b) without modification (A/CN.9/545, paras. 31 and 32).

Paragraph (4)

18. The drafting of paragraph (4) reflects the decision of the Working Group that the wording in square brackets “[Subject to paragraph (7)(b)(ii),] [except where the provision of a security is mandatory under paragraph (7)(b)(ii),]” should be deleted, as the remainder of paragraph (4) makes it clear that the arbitral tribunal retains the right, in all circumstances, to require the provision of security as a condition to granting an interim measure of protection (A/CN.9/545, paras. 33 and 34).

Paragraph (5) (paragraph 6 of the previous draft)

Placement of paragraphs 5 and 6

19. The revised draft reflects the decision of the Working Group that placing paragraph (6) before paragraph (5) would appropriately emphasize the obligation of the parties to inform the arbitral tribunal of any change in the circumstances on the basis of which the interim measure had been granted (A/CN.9/545, paras. 39 and 44).

Communication of information to both parties

20. The second sentence of paragraph 5 mirrors the first sentence of article 24 (3) of the UNCITRAL Model Law, in order to address the decision of the Working Group that all information supplied to the arbitral tribunal by one party pursuant to that paragraph should also be communicated to the other party (A/CN.9/545, para. 45).

“from the time of the request onward”

21. As decided by the Working Group, the words “from the time of the request onward” in the previous draft have been deleted given that the point in time at which the duty to inform arises is evident from the remainder of the paragraph, particularly from the words “on the basis of which the party sought the interim measure of protection” (A/CN.9/545, para. 46).

“sought”

22. To clarify the duty to inform, the word “sought” has been replaced by “made the request for” (A/CN.9/545, para. 46).

Paragraph (6) (paragraph 5 of the previous draft)

Placement of paragraph (6)

23. For the reasons expressed in the context of the discussion of paragraph (5) of the revised draft, (see above, para. 19), the Working Group decided that

paragraph (6) would be renumbered paragraph (5), and paragraph (5) be renumbered paragraph (6) (A/CN.9/545, paras. 39 and 44).

“modify or terminate”

24. For the sake of completeness and for better consistency between draft articles 17 and 17 bis, the words “modify or terminate” have been amended to read “modify, suspend or terminate” (A/CN.9/545, para. 35).

“[in light of additional information or a change of circumstances]”

25. The Working Group agreed to delete the words “[in light of additional information or a change of circumstances]” as contained in the previous draft, in view of the fact that arbitrators would generally explain in the text of their decision the reasoning they followed when deciding to grant an interim measure, and also that the words might be misread as unduly restricting the discretion of arbitrators when making the decision to grant an interim measure (A/CN.9/545, para. 36).

Modification of an interim measure of protection on the initiative of the arbitral tribunal

26. After discussion on whether the arbitral tribunal could modify or terminate on its own motion an interim measure of protection and, in the affirmative, on the conditions to be fulfilled (A/CN.9/545, paras. 37 - 40), the Working Group agreed to amend the wording of paragraph 6, as reflected in the revised draft.

27. The Working Group may wish to consider whether the revised draft, which includes the words in brackets “it has granted” reflects its decision that the arbitral tribunal could only modify or terminate the interim measures issued by that arbitral tribunal, irrespective of whether it acted at the request of a party or on its own initiative (A/CN.9/545, para. 41).

Paragraph (6 bis)

General provision on liability

28. Concern was expressed that, in contrast to paragraph (7)(b), no liability provision was included in the context of *inter partes* interim measures of protection, that were subsequently shown to have been unjustified (A/CN.9/545, paras. 48, 60 and 61). In support of establishing such a general liability provision, it was stated that, in either case, the measure could ultimately be found to have been unjustified to the detriment of the responding party. However, some opposition was expressed to the suggestion that paragraph (7)(b) should apply generally to both *ex parte* and *inter partes* measures, as the strict liability imposed under paragraph (7)(b) was appropriate given the nature of an *ex parte* measure, due to the risks inherent in such procedure. It was also said that misrepresentation or fault in relation to the *inter partes* regime could be dealt with by procedural national laws.

29. Paragraph (6 bis) of the revised draft reflects the decision of the Working Group that a new paragraph, mirroring the text of paragraph (7)(b) in the context of *inter partes* measures should be included in the revised draft for further consideration (A/CN.9/545, para. 60). Paragraph (6 bis) also includes the following modifications as agreed by the Working Group in respect of the corresponding provision for *ex parte* interim measures (see comments in respect of

paragraph (7)(b) of the revised draft, paragraph 43, below and A/CN.9/545, para. 66):

- the party against whom the measure is directed has a right to claim for compensation immediately after the interim measure has been granted by the arbitral tribunal and to obtain immediate awarding of damages; and
- damages for the interim measure are available only for the time period starting when the interim measure is granted and ending when the measure ceases to be in effect.

It should be noted that, as currently drafted, paragraph (6 bis) does not provide a solution for a possible discrepancy between the time when the measure is granted and the time when the measure enters into effect. The Working Group may wish to give further consideration to that issue.

30. When discussing paragraph (6 bis), the Working Group may wish to bear in mind other concerns that were raised at its previous session concerning the fact that the reference to damages and the circumstances when damages might be payable was not sufficiently defined as it could cover both direct and indirect or consequential damages caused by the measure, or be granted depending on whether the measure was found to be justified or unjustified. Diverging views were expressed as to whether a wider definition of damages (which would provide appropriate safeguards) or a more limited one (restricting the scope of the rule to direct damages) should be retained (A/CN.9/545, para. 64) and as to whether the requesting party should be liable only if the measure was ultimately found to have been unjustified. Questions were raised as to the meaning to be attributed to the word “unjustified” and whether the notion of an “unjustified” measure should be considered per se, or in the light of the results on the merits. It was strongly felt that the final decision on the merits should not be an essential element in determining whether the interim measure was justified or not (A/CN.9/545, para. 65). It was said that the phrase “to the extent appropriate” should be maintained, to show that the measure is legitimate. Other views were expressed stating that the bracketed text was not necessary, as it did not provide any new element. The Working Group may wish to further discuss these issues (A/CN.9/545, para. 68).

31. In preparation for the continuation of the deliberations of the Working Group on this topic, it was agreed that additional research on the liability regimes in the context of national laws on interim measures of protection was needed. Delegations were invited to provide information on the liability regimes contained in national laws relating to interim measures of protection. The information provided by delegations is contained in document A/CN.9/WG.II/WP.127.

Paragraph (7)

Subparagraph (a)

“[Unless otherwise agreed by the parties] [If expressly agreed by the parties]”

32. The wording in square brackets “[Unless otherwise agreed by the parties] [If expressly agreed by the parties]” reflects the discussion of the Working Group on whether *ex parte* interim measures should be available by default or only when the parties have expressly agreed to opt into the legal regime created by paragraph (7).

Some support was expressed for both options and the Working Group may wish to take a decision on that matter (A/CN.9/545, para. 52).

“in exceptional circumstances”

33. The Working Group did not reach consensus on whether the words “in exceptional circumstances” should be retained (A/CN.9/545, para. 53) and the Working Group may wish to continue its discussion on this matter.

34. The following views were expressed (A/CN.9/545, para. 53):

- one view was that these words were redundant given that the circumstances listed in subparagraphs (a)(i) to (iii) only referred to exceptional circumstances;
- another view was that it was necessary to clarify that the words “in exceptional circumstances” referred to those circumstances listed in subparagraphs (a)(i) to (iii) only;
- a contrary view was that the words should be retained to underscore that the *ex parte* measure should only be granted in truly exceptional circumstances. In support of that view, it was said that the circumstances listed in subparagraph (a) were not necessarily exceptional circumstances.

“[against whom the measure is directed] [affected by the measure]”

35. The Working Group agreed that the words “against whom the measure is directed” were preferable to the words “affected by the measure”, as the latter phrase was ambiguous in view of the multiplicity of parties potentially “affected” by an interim measure (A/CN.9/545, para. 54). This modification has been applied to paragraphs (3)(a), (7)(b) and Variant A of paragraph (7)(e) of the revised draft (see para. 16, above, and paras. 44 and 49, below).

“[when] [if the requesting party shows that]”

36. This bracketed wording reflects the suggestion that the phrase “the requesting party shows”, or any other phrase as may be agreed in the context of subparagraph (a)(iii) (see below, para. 40), be transposed to the chapeau of paragraph (7)(a) to make it clear that it applies to all the elements of paragraph (7)(a) and not only to subparagraph (a)(iii) (A/CN.9/545, para. 58). If this suggestion is adopted by the Working Group, the wording in subparagraph (a)(iii) will need to be adjusted accordingly.

Subparagraph (a)(i)

37. The Working Group found the substance of subparagraph (a)(i) to be generally acceptable (A/CN.9/545, para. 55).

Subparagraph (a)(ii)

38. The drafting reflects the decision of the Working Group to replace the word “circumstances” with the word “conditions” to better reflect the nature of the list contained in paragraph (3) (A/CN.9/545, para. 56).

39. The Working Group made no final decision on whether to retain subparagraph (a)(ii). A view was expressed that subparagraph (a)(ii), which only referred to “the circumstances set out in paragraph (3)”, could be misinterpreted as

excluding the application of paragraphs (5) and (6) to *ex parte* interim measures. It was recalled that subparagraph (a)(ii) had been included for the avoidance of any doubt that all the prerequisites applying to the granting of an *inter partes* interim measure should also apply to an interim measure that was ordered *ex parte*. It was said that, if re-emphasizing that point cast doubt on whether or not the other paragraphs applied, then paragraph (a)(ii) should be deleted (A/CN.9/545, para. 56). The Working Group may wish to further consider this issue.

Subparagraph (a)(iii)

40. The Working Group made no final decision on whether the words “the requesting party shows” should be harmonized with the amended text agreed to in the chapeau of paragraph (3), which provides that “the requesting party satisfies the arbitral tribunal” (see above, para. 13). Some opposition was expressed to that proposal on the basis that a higher standard of proof should be required in respect of *ex parte* interim measures (A/CN.9/545, para. 57). The Working Group may wish to further discuss this matter.

41. However, the Working Group took note of a suggestion that the phrase “the requesting party shows” should be transposed to the chapeau of paragraph 7(a) to make it clear that it applies to all the elements of paragraph 7(a) and not only to subparagraph (a)(iii) (A/CN.9/545, para. 58). The revised draft takes account of that suggestion.

Subparagraph (b) (subparagraph (b)(i) of the previous draft)

42. The current drafting reflects the suggestion that the provisions contained in subparagraphs (b)(i) and (ii) of the previous draft should not be grouped together in one paragraph since those subparagraphs deal with different issues, respectively liability and security (A/CN.9/545, para. 62).

Specific liability provision for ex parte interim measures

43. As mentioned above under paragraphs 28 to 31, the Working Group agreed that it would continue its deliberations on the issue of the liability regime having regard to the liability provision to be discussed in the context of *inter partes* measures (A/CN.9/545, para. 60). If a general liability regime is included, the Working Group will need to consider whether an additional specific liability provision that applies in respect of *ex parte* interim measures is required.

“[against whom it is directed] [affected by the measure]”

44. Support was expressed for the retention of the first bracketed text for the sake of consistency with the words used in subparagraphs 3(a), 7(a) and Variant A of subparagraph 7(e) (A/CN.9/545, para. 67) (see paras 16 and 35, above, and para. 49, below).

Subparagraph (c) (subparagraph (b)(ii) of the previous draft)

45. The drafting of this subparagraph reflects the decision of the Working Group that, as a matter of consistency, it should be aligned with the wording used in paragraph (4) relating to the provision of security in the context of *inter partes*

interim measures, except for the word “may” which could be replaced by the word “shall” (A/CN.9/545, para. 69).

46. The revised draft reflects the decision of the Working Group that in order to enhance the safeguards necessary in the context of *ex parte* interim measures, subparagraph (c) be a mandatory condition to the granting an *ex parte* interim measure (A/CN.9/545, para. 70).

Subparagraph (d) (subparagraph (c) of the previous draft)

47. Subparagraph (d) of the revised draft contains two variants. Variant 1 is, with some modification, based on the text contained in subparagraph (c) of the previous draft. As decided by the Working Group, the words “For the avoidance of doubt”, have been deleted (A/CN.9/545, para. 73).

48. Variant 2 of subparagraph (d) gives effect to a suggestion made at the previous session of the Working Group that, since there is no doubt that the arbitral tribunal has jurisdiction on the issue of security under paragraph (7)(c), the scope of subparagraph (d) should be restricted to paragraph (7)(b) (A/CN.9/545, para. 72). The Working Group agreed to further discuss whether paragraph (7)(d) should apply to both subparagraphs (b) and (c) or only to paragraph (b), and to further consider a proposal to make it clear that the jurisdiction of the arbitral tribunal only applies until the award is made (A/CN.9/545, para. 72).

Subparagraph (e) (subparagraph (d) of the previous draft)

49. It is recalled that, after discussion, the Working Group decided that its deliberations in respect of this subparagraph should be continued at its next session on the basis of the two variants reproduced in the revised draft (A/CN.9/545, paras. 75-79 and 81). It is recalled that whilst support was expressed for Variant A of subparagraph (e) as it provided flexibility and some discretion for the tribunal in respect of when the responding party should be heard, concern was expressed that the proposal did not make sufficiently clear the point of time at which notice should be given. Should Variant B of subparagraph (e) be retained, the Working Group may wish to confirm whether the words “the party against whom it is directed” should also be retained (A/CN.9/545, para. 74) or whether, in the context of paragraph (e), the words “any party affected by the interim measure of protection” are preferred.

50. Some reservations were expressed as to the inclusion of a time period of forty-eight hours or any other specific time period, which might prove too rigid and inadequate, depending on the circumstances. It was also pointed out that introducing wording to allow the tribunal to consider another time and date as was appropriate in the circumstances might provide flexibility but might also make it illogical to maintain a reference to a fixed period of time within that same provision. A widely shared view, however, was that the inclusion of a specific time period served two purposes; first to underscore that the opportunity to be heard was urgent and also to put the arbitral tribunal on notice that it should be ready to reconvene to allow an opportunity for the responding party to be heard (A/CN.9/545, para. 79).

51. The Working Group agreed that the words “opportunity to be heard” should be replaced by “opportunity to present its case”, in order to encompass both a hearing of the responding party and a written submission from that party (A/CN.9/545, para. 80).

52. The drafting of subparagraph (e) will need to be revisited when the Working Group examines the question whether enforcement of an *ex parte* interim measure should be permitted (A/CN.9/545, para. 82).

Subparagraph (f) (subparagraph (e) of the previous draft)

53. The revised draft reflects the decision of the Working Group to simplify this subparagraph (A/CN.9/545, paras. 83 and 84) and to include a requirement that the material on which the application was based should be provided to the responding party (A/CN.9/545, para. 86).

54. The Working Group may wish to further consider whether the party benefiting from the measure should bear the burden of seeking its maintenance beyond twenty days (A/CN.9/545, para. 87), as provided for in the bracketed text in the revised draft.

Subparagraph (g) (subparagraph (f) of the previous draft)

55. The draft paragraph has been revised, taking account of the following proposals: (A/CN.9/545, paras. 91 and 92):

- One proposal was to replace the phrase “shall have an obligation to inform” by “shall promptly inform”. However, it was said that the word “promptly” was more appropriate in the context of a continuous obligation to inform of any change in circumstances. A view was also expressed that the requirement to “inform the arbitral tribunal” might be too narrow and that wording along the lines of “place before the tribunal” might be preferable.
- The paragraph was proposed to be redrafted along the following lines: “A party requesting an interim measure of protection under this paragraph shall [promptly inform] the arbitral tribunal of all circumstances relevant and material to the arbitral tribunal’s determination whether the requirements of this paragraph have been met”. With a view to clarifying that the arbitral tribunal retained the discretion whether or not to order an interim measure of protection, it was suggested that the reference to “whether the requirements of this paragraph have been met”, could be replaced by “whether the arbitral tribunal should make the order requested”. If this second alternative is preferred by the Working Group, the Working Group may wish to consider replacing the words “make the order requested” with the words “grant the interim measure”, for the sake of consistency with paragraph (1).
- Another view was that an effort should be made to introduce in the proposed text some of the flexibility reflected in the original formulation of subparagraph (f). To that effect, language referring to “circumstances that the arbitral tribunal is likely to find relevant and material to its determination” is maintained in the revised draft.