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Arbitration: interim measures of protection

Proposal by the United States of America

Note by the Secretariat

In preparation for the thirty-seventh session of Working Group II (Arbitration and conciliation), during which the Working Group is expected to proceed with its review of a revised draft article 17 of the UNCITRAL Model Law on International Commercial Arbitration (see the report of the thirty-sixth session, A/CN.9/508, paras. 51-94), the Government of the United States of America, on 23 September 2002, submitted the text of a proposed revised version of article 17 for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat.

* The date of submission of the document reflects the date at which the proposal was received by the Secretariat.

Annex. Proposal by the United States of America

1. The Report of the Working Group on Arbitration on the work of its thirty-sixth session (New York, 4-8 March 2002) (A/CN.9/508) sets forth in paragraph 88 the text of a proposal for a redraft of paragraph (5) and the remainder of the draft article 17. As noted in paragraph 90 of the Report, discussion of this text and other suggestions was not completed for lack of sufficient time.

2. At the Congress of the International Council for Commercial Arbitration (ICCA) in May 2002, a proposal to refine the text in paragraph 88 was discussed. The text discussed at ICCA is as follows:

Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order another party to take interim measures of protection.

(2) An interim measure of protection is any temporary measure, whether reflected in an interim award or otherwise, 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, in order to ensure or facilitate the effectiveness of an eventual award;
- (b) take action that would prevent, or refrain from taking action that would cause, current or imminent harm, in order to ensure or facilitate the effectiveness of an eventual award;
- (c) provide security for the enforcement of an eventual award, including an award of costs; or
- (d) preserve evidence that may be relevant and material to the resolution of the dispute.

(3) The arbitral tribunal may order an interim measure of protection when the requesting party has demonstrated that

- (a) there is an urgent need for the measure;
- (b) irreparable harm will result if the measure is not ordered, and that harm substantially outweighs the harm that will result to the party opposing the measure if the measure is granted; and
- (c) there is a substantial possibility that the requesting party will succeed on the merits of the dispute.

(4) (a) The arbitral tribunal may grant an interim measure of protection without notice to the party against whom the measure is directed or before the party against whom the measure is directed has had an opportunity to respond when, in addition to meeting the requirements of paragraph (3), the requesting party demonstrates that it is necessary to proceed in that manner in order to ensure that the measure is effective.

(b) Any interim measure of protection ordered under this paragraph shall be effective for no more than twenty days, which period cannot be extended. This subparagraph shall not affect the authority of the arbitral tribunal to grant, confirm, extend, or modify an interim measure of protection under paragraph (1) after the party against whom the measure is directed has been given notice and an opportunity to be heard.

(c) Except to the extent that the arbitral tribunal has determined under paragraph (4)(a) that it is necessary to proceed without notice to the party against whom the interim measure of protection is directed in order to ensure that the measure is effective, that party shall be given notice of the measure and an opportunity to be heard at the earliest practicable time.

(d) [A party requesting an interim measure of protection under this paragraph shall have an obligation to inform the arbitral tribunal of 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.]

(5) The arbitral tribunal may require the requesting party to provide appropriate security as a condition to granting an interim measure of protection.

(6) The requesting party shall, from the time of the request onwards, inform the arbitral tribunal promptly of any material change in the circumstances on the basis of which the party sought or the arbitral tribunal granted the interim measure of protection.

(7) The arbitral tribunal may modify or terminate an interim measure of protection at any time.