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DEPARTAMENT PRAWNO-TRAKTATOWY MSZ

**Tworzenie, studiowanie i rozpowszechnianie prawa międzynarodowego.
Dokumenty Komisji Prawa Międzynarodowego
i Komisji NZ ds. Międzynarodowego Prawa Handlowego**

**Elaboration, study and dissemination of international law.
Documents of the International Law Commission
and the UN Commission on International Trade Law**

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Wstęp:
Tworzenie, studiowanie i rozpowszechnianie prawa międzynarodowego

Umacnianie prawa międzynarodowego, jako kompleksowego systemu regulującego najważniejsze dziedziny stosunków międzynarodowych, następuje poprzez jego kodyfikację, stopniowy rozwój oraz upowszechnianie wiedzy o tym prawie.

Zasadniczą rolę w tym procesie odgrywa Organizacja Narodów Zjednoczonych. Jednym bowiem z podstawowych celów tej Organizacji jest – zgodnie z Kartą Narodów Zjednoczonych – „stworzenie warunków umożliwiających utrzymanie sprawiedliwości i poszanowanie zobowiązań międzynarodowych wynikających z umów międzynarodowych i innych źródeł prawa międzynarodowego”[1].

Organem odpowiedzialnym za osiągnięcie tego celu jest Zgromadzenie Ogólne Narodów Zjednoczonych, które stosownie do artykułu 13 ustęp 1 Karty „inicjuje badania i udziela zaleceń w celu: (a) rozwijania współpracy międzynarodowej w dziedzinie politycznej i popierania stopniowego rozwoju prawa międzynarodowego i jego kodyfikacji”[2].

Zadanie to jest realizowane przy udziale organów utworzonych przez Zgromadzenie Ogólne, a mianowicie: Komisji Prawa Międzynarodowego (ILC)[3] i Komisji Narodów Zjednoczonych do spraw Międzynarodowego Prawa Handlowego (UNCITRAL)[4]. Są to organy pomocnicze Zgromadzenia zajmujące się: Komisja Prawa Międzynarodowego – kodyfikacją i rozwojem prawa międzynarodowego publicznego, a Komisja do spraw Międzynarodowego Prawa Handlowego – harmonizacją i ujednoliceniem międzynarodowego prawa handlowego.

Przekształcenie rezultatów prac tych ciał eksperckich w wiążące dokumenty prawnomiędzynarodowe to długotrwały i żmudny proces o zróżnicowanym charakterze.

Jednym ze stosowanych sposobów jest nadanie im po wielu latach pracy nad nimi przez wspomniane komisje – na specjalnie zwołanych konferencjach dyplomatycznych – formy wielostronnych umów międzynarodowych. Miało to miejsce na przykład w przypadku wypracowanych przez te komisje projektów artykułów o: stosunkach dyplomatycznych[5], stosunkach konsularnych[6], prawie traktatowym[7] czy kontraktów dotyczących międzynarodowej sprzedaży towarów[8].

Innym sposobem, zastosowanym w przypadku projektu artykułów o odpowiedzialności państw za czyny niedozwolone przez prawo międzynarodowe – po ponad 40 latach pracy nad nim przez KPM – jest jedynie odnotowanie tych artykułów przez Zgromadzenie Ogólne Narodów Zjednoczonych i „polecenie ich uwadze rządów, bez przesądzania kwestii przyjęcia ich w przyszłości lub podjęcia innego odpowiedniego działania”[9]. Uważa się bowiem dość powszechnie, że to pomnikowe dzieło dotyczące samej istoty prawa międzynarodowego i stosunków międzynarodowych, nie jest jeszcze w pełni dojrzałe do nadania mu formy wiążącego dokumentu międzynarodowego. Brak jest nadal szerokiego konsensusu państw, co do zwołania już teraz konferencji dyplomatycznej w tej sprawie. Konferencja taka, otwierając dyskusję nad projektem artykułów mogłaby podważyć delikatny konsensus osiągnięty w czasie prac nad nim. Ponadto, nawet, jeśli umowa w tej sprawie zostałaby przez taką konferencję przyjęta, mogłaby nie uzyskać powszechnej akceptacji państw wyrażonej w jej późniejszej ratyfikacji i w ogóle nie wejść w życie, albo też wiązałaby się nią niewielka ilość państw. Sytuacja taka mogłaby więc oznaczać podważenie skodyfikowanych w niej istniejących już zasad i norm prawa międzynarodowego.

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1 Dz. U. z 1947 r. nr 23, poz. 91.

2 *Ibidem.*

3 UN.. Doc. rezolucja Zgromadzenia Ogólnego NZ nr 94 (I) z dnia 11 grudnia 1946 r.

4 UN. Doc. rezolucja Zgromadzenia Ogólnego NZ nr 2205 (XXI) z dnia 17 grudnia 1966 r.

5 United Nations Conference on Diplomatic Intercourse and Immunities, Wiedeń 2 marca – 14 kwietnia 1961r.; UN Doc. rezolucja Zgromadzenia Ogólnego NZ nr 1450 (XIV).

6 United Nations Conference on Consular Relations, Wiedeń 4 marca – 22 kwietnia 1963 r.; UN Doc. rezolucja Zgromadzenia Ogólnego NZ nr 1813 (XVII).

7 United Nations Conference on the Law of Treaties, Wiedeń 26 marca – 24 maja 1968r. i 9 kwietnia – 22 maja 1969 r.; UN Doc. rezolucje Zgromadzenia Ogólnego NZ nr 2166 (XXI) oraz nr 2287 (XXII).

8 United Nations Conference on Contracts for the International Sale of Goods, Wiedeń 10 marca – 11 kwietnia 1980 r.; UN Doc. rezolucja Zgromadzenia Ogólnego NZ A/RES/33/93.

9 UN. Doc. A/RES/56/83 oraz A/RES/59/35; tekst w: aneks do rezolucji nr 56/83.

Komisje te, a w szczególności UNCITRAL, opracowują także wiele dokumentów mających z założenia mieć charakter tzw. „soft law", które mają służyć następnie jako założenia i ogólne wskazówki dla wiążących uregulowań międzynarodowych i legislacji wewnątrzkrajowej tworząc w ten sposób podstawę dla unifikacji i harmonizacji praktyki w skali światowej. Wskazać tu można przyjęte przez komisje takie dokumenty jak:

– Przewodnie zasady stosujące się do jednostronnych oświadczeń państw tworzących zobowiązania prawne[10]; oraz

– Prawo Modelowe UNCITRAL w zakresie międzynarodowego arbitrażu handlowego[11].

Są również takie tematy rozpatrywane przez komisje, którym nie ma być nadany charakter dokumentu prawnego, jak na przykład fragmentacja prawa międzynarodowego[12]. Mają one bowiem jedynie charakter pogłębionych studiów grona wybitnych prawników nad zakresem, charakterem, przyczynami i skutkami zmian zachodzących w prawie międzynarodowym. Posiadają one jednak istotne znaczenie dla kierunków dalszych prac nad rozwojem i kodyfikacją prawa międzynarodowego.

We wszystkich tych przypadkach ważne i niezbędne jest, aby wypracowane przez komisje projekty uregulowań prawnych i studiów zostały rozpowszechnione w państwach członkowskich i stały się przedmiotem refleksji pozwalającej na stopniowe ich „dojrzewanie" do przekształcenia – tam gdzie okaże się to wskazane – w prawo wiążące.

Taki skutek mają na celu odpowiednie rezolucje Zgromadzenia Ogólnego Narodów Zjednoczonych wzywające państwa członkowskie do rozpowszechniania tych dokumentów i zachęcania do studiów nad nimi.

Mając to na uwadze, Ministerstwo Spraw Zagranicznych postanowiło publikować corocznie treść dokumentów, nad którymi Komisja Prawa Międzynarodowego i Komisja Narodów Zjednoczonych do spraw Międzynarodowego Prawa Handlowego zakończyły na danym etapie swoje prace, i co do których Zgromadzenie Ogólne NZ zaleciło podjęcie wspomnianych działań.

Wspomniane zalecenia Zgromadzenia Ogólnego NZ na temat rozpowszechnienia takich tekstów mają stwarzać organom państw członkowskich, sądom, trybunałom arbitrażowym oraz nauce lepszą możliwość zapoznania się z nimi oraz dać czas potrzebny na studia nad tymi dokumentami, w tym uwzględnienie ich w praktycznej działalności tych instytucji, w uregulowaniach legislacyjnych, badaniach naukowych itp.

Podczas 61 sesji Zgromadzenie Ogólne NZ przyjęło z takim właśnie zaleceniem następujące dokumenty:

– projekt artykułów dotyczących ochrony dyplomatycznej[13];

– projekt zasad dotyczących alokacji strat poniesionych w rezultacie szkód transgranicznych wynikających z działań o wysokim stopniu ryzyka[14];

– przewodnie zasady stosujące się do jednostronnych oświadczeń państw tworzących zobowiązania prawne[15];

– konkluzje dotyczące tematu „Fragmentacja prawa międzynarodowego: trudności wynikające ze zróżnicowania i ekspansji prawa międzynarodowego"[16];

– projekt zrewidowanych artykułów Prawa Modelowego UNCITRAL w zakresie międzynarodowego arbitrażu handlowego[17]; oraz

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10 UN. Doc. A/RES/61/34; tekst w: Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), para. 176.

11 UN. Doc. rezolucja Zgromadzenia Ogólnego NZ nr 40/72 z dnia 11 grudnia 1985 r. tekst w: Official Records of the General Assembly, forty Session, Supplement No. 17 (A/40/17), aneks I.

12 UN. Doc. A/RES/61/34; tekst w: Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), para. 251.

13 UN. Doc. A/RES/61/35; tekst w: Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), para. 49.

14 UN. Doc. A/RES/61/36; tekst w aneksie.

15 UN. Doc. A/RES/61/34; tekst w: Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), para. 176.

16 UN. Doc. A/RES/61/34; tekst w: Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), para. 251.

17 UN. Doc. A/RES/61/33; tekst w: Official Records of the General Assembly, sixty-first Session, Supplement No. 17 (A/40/17), aneks I.

– zalecenie dotyczące interpretacji artykułu II ustęp 2 i artykułu VII ustęp 1 Konwencji w sprawie uznawania i wykonywania zagranicznych wyroków arbitrażowych z 1958 r.[18]

Publikowane są one w języku angielskim. Dokumenty te w innych językach oficjalnych ONZ, to jest w arabskim, chińskim, francuskim, hiszpańskim i rosyjskim dostępne są na stronie internetowej Organizacji[19].

* * *

Polska przywiązuje duże znaczenie do działalności Organizacji Narodów Zjednoczonych mającej na celu umacnianie prawa międzynarodowego w stosunkach międzynarodowych. W działaniach tych Ministerstwo Spraw Zagranicznych współpracuje ze środowiskiem naukowym w zakresie tworzenia, studiowania i rozpowszechniania prawa międzynarodowego publicznego i prywatnego

Istotnym elementem tej współpracy jest inspirowanie środowiska prawniczego, między innymi przez Grupę Polską Stowarzyszenia Prawa Międzynarodowego, do podejmowania w swej działalności naukowej wspomnianej problematyki prawnomiędzynarodowej.

Ministerstwo Spraw Zagranicznych poprzez otrzymywane uwagi i sugestie przedstawicieli nauki, a także przedstawianie przez nich swoich publikacji oraz rezultatów badań naukowych może bowiem w bardziej efektywny sposób korzystać z bogatego dorobku nauki polskiej w wypracowywaniu stanowiska Polski w omawianym zakresie.

Dalsze rozszerzenie takiej roboczej współpracy między praktykami z zakresu stosunków międzynarodowych a naukowcami stworzy sprzyjające warunki dla współdziałania przedstawicieli nauki w opracowywaniu dokumentacji i ekspertyz, a także dla ich udziału w konferencjach międzynarodowych, seminariach itp.

31 lipca 2007 r.
*Dr Andrzej Kremer**

[18] *Ibidem*, aneks II.

[19] www.un.org/law.

* Dyrektor Departamentu Prawno-Traktatowego Ministerstwa Spraw Zagranicznych.

Introduction:
The Elaboration, Study and Dissemination of International Law

The strengthening of international law, as a comprehensive system regulating the most important spheres of international relations, takes place through its codification, progressive development and dissemination of knowledge about the law.

The United Nations plays a key role in that process. That is so, because—in accordance with the Charter of the United Nations—it is one of the fundamental goals of the United Nations "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained".[1]

The body responsible for attaining that goal is the UN General Assembly, which pursuant to article 13, paragraph 1 of the Charter "shall initiate studies and make recommendations for the purpose of *inter alia*: (a) promoting international co-operation in the political field and encouraging the progressive development of international law and its codification."[2]

The task is implemented with the involvement of bodies established by the General Assembly: the International Law Commission (ILC)[3] and the UN International Trade Law Commission (UNCITRAL).[4] These are subsidiary bodies of the General Assembly. The ILC is concerned with the codification and development of international public law, while the UNCITRAL has the task of further harmonization and unification of the law of international trade.

The transformation of the results of work of these expert bodies into binding international legal documents is a protracted and painstaking process of a diversified character.

One of the approaches applied—after many years of work by the aforementioned commissions—is to lend them the form of multilateral treaties, at specially convened diplomatic conferences. That has taken place, for example, in the case of draft articles elaborated by these bodies concerning diplomatic relations,[5] consular relations,[6] treaty law,[7] or contracts for the international sale of goods.[8]

Another approach, applied in the case of draft articles on responsibility of States for internationally wrongful acts, is that—after over forty years of work on it by the ILC—the General Assembly is only taking notes of these articles and "commends them to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action."[9] For it is generally believed that that monumental work, addressing the very essence of international law and international relations, is not yet mature enough to be given the form of a binding international document. There is still no broad consensus concerning a speedy convocation of a diplomatic conference on the subject. Such a conference, opening the debate of the draft articles, could upset the delicate consensus reached during the work on their elaboration. Furthermore, even if the conference adopted a treaty on the subject, it could fail to obtain universal acceptance expressed through its subsequent ratification and could fail to come into force, or else only a small number of states would become bound by it. That situation could undermine the codified in it existing rules and norms of international law.

The two commissions, particularly the UNCITRAL, elaborate many documents of a "soft law" character, which are intended to serve as the assumptions and general guidelines for binding international regulations

1 Journal of Laws of 1947, No. 23, item 91.

2 *Ibidem*.

3 UN Doc. Resolution of the UN General Assembly No. 94 (I) of 11 December 1946.

4 UN Doc. Resolution of the UN General Assembly No. 2205 (XXI) of 17 December 1966.

5 United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, 2 March – 14 April 1961; UN Doc. Resolution of the UN General Assembly No. 1450 (XIV).

6 United Nations Conference on Consular Relations, Vienna, 4 March – 22 April 1963; UN Doc. Resolution of the UN General Assembly No. 1813 (XVII).

7 United Nations Conference on the Law of Treaties, Vienna, 26 March – 24 May 1968 and 9 April – 22 May 1969; UN Doc. resolutions of the UN General Assembly No. 2166 (XXI) and No. 2287 (XXII).

8 United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March – 11 April 1980; UN Doc. Resolution of the UN General Assembly A/RES/33/93.

9 UN Doc. A/RES/56/83 and A/RES/59/35, text in Official Records of the General Assembly, 56th session, Supplement No.10 and corrigendum (A/56/10 and Corr.1), chapter IV.

and national legislation, thus creating the basis for the unification and harmonization of practice on a global scale. One could cite here the following documents adopted by the commissions:

– "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations";[10]

– UNCITRAL Model Law on international commercial arbitration.[11]

Certain issues addressed by the commissions, such as fragmentation of international law, are not meant to be given the form of legal documents.[12] They merely have the character of thorough studies by groups of eminent lawyers on the scope, nature, causes and consequences of changes occurring in international law. However, they do have essential significance for the directions of further works on the development and codification of international law.

In all these cases it is crucial that the commission drafts of legal regulations and studies be disseminated in the member States and become the subject of reflection, permitting their gradual "maturation" to become transformed—when appropriate—into binding law.

That is the intended effect of the General Assembly resolutions calling on member States to disseminate the documents and encouraging their study.

With that in mind, the Ministry of Foreign Affairs of the Republic of Poland has decided to annually publish documents on which the ILC and the UNCITRAL have concluded works at the given stage and with regard of which the General Assembly has recommended the said actions.

The General Assembly recommendation concerning the dissemination of such texts is designed to help the relevant organs of the member States, the judiciary, arbitration tribunals and academics to become acquainted with them and to give them time to reflect on the documents and to take them into consideration in the practical activity of these institutions, in legislative work, research etc.

During its 61st session, the General Assembly adopted the following documents with precisely such recommendation:

– draft articles on diplomatic protection;[13]

– draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities;[14]

– "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations;[15]

– conclusions on the topic "Fragmentation of international law: difficulties arising from diversification and expansion of international law";[16]

– draft revised articles of Model Law on International Commercial Arbitration of the UNCITRAL;[17]

– recommendation regarding the interpretation of Article II, paragraph 2 and article VII, paragraph 1 of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[18]

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10 UN Doc. A/RES/61/34; text in Official Records of the General Assembly, 61st session, Supplement No.10 (A/61/10), para.176.

11 UN Doc. Resolution of the UN General Assembly No. 40/72 of 11 December 1985, text in Official Records of the General Assembly, 40th session, Supplement No.17 (8A/40/17), annex I.

12 UN Doc. A/RES/61/34; text in Official Records of the General Assembly, 61st session, Supplement No. 10 (A/61/10), para. 251.

13 UN Doc. A/RES/61/35; text in Official Records of the General Assembly, 61st session, supplement No. 10 (A/61/10), para. 49.

14 UN Doc. A/RES/61/36 of 11 December 1946, text in annex (I).

15 UN Doc. A/RES/61/34; text in Official Records of the General Assembly 61st session, Supplement No. 10 (A/61/10) para.176.

16 UN Doc. A/RES/61/34; text in Official Records of the General Assembly, 61st session, Supplement No. 10 (A/61/10) para. 251.

17 UN Doc. A/RES/61/33; text in Official Records of the General Assembly 61st session, Supplement No. 17 (A/61/17), annex I.

18 *Ibidem*, annex II.

The above mentioned documents are published in the English language. Their versions in other official languages of the UN (Arabic, Chinese, French, Russian and Spanish) are available at the UN website.[19]

* * *

Poland attaches major importance to activities within the United Nations aimed at the strengthening of international law. In so doing, the Ministry of Foreign Affairs has collaborated with the academic community regarding the elaboration, study and dissemination of international public and private law.

Encouraging the legal community, *inter alia* through the Polish Branch of the International Law Association, to take up the issues in question in their research work, represents a significant element of such cooperation.

In utilizing observations and ideas contained in their scholarly publications, the Ministry of Foreign Affairs can be more effective in preparing Poland's position on issues related to the subject matter at hand.

Further expansion of working relations between foreign relations practitioners and their academic counterparts will facilitate more frequent opportunities for the latter's involvement in the preparation of research and position papers and offer new occasions for their participation in international gatherings.

31 July 2007
*Dr. Andrzej Kremer**

19 www.un.org/law.

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Dokumenty Komisji Prawa Międzynarodowego
International Law Commission Documents

1. Projekt artykułów dot. opieki dyplomatycznej
Draft articles on Diplomatic Protection

PART ONE

GENERAL PROVISIONS

Article 1
Definition and scope

For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

Article 2
Right to exercise diplomatic protection

A State has the right to exercise diplomatic protection in accordance with the present draft articles.

PART TWO

NATIONALITY

CHAPTER I
GENERAL PRINCIPLES

Article 3
Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

2. Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8.

CHAPTER II
NATURAL PERSONS

Article 4
State of nationality of a natural person

For the purposes of the diplomatic protection of a natural person, a State of nationality means

a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law.

Article 5
Continuous nationality of a natural person

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.

4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim.

Article 6
Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Article 7
Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

Article 8
Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

CHAPTER III

LEGAL PERSONS

Article 9
State of nationality of a corporation

For the purposes of the diplomatic protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.

Article 10
Continuous nationality of a corporation

1. A State is entitled to exercise diplomatic protection in respect of a corporation that was a national of that State, or its predecessor State, continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.

2. A State is no longer entitled to exercise diplomatic protection in respect of a corporation that acquires the nationality of the State against which the claim is brought after the presentation of the claim.

3. Notwithstanding paragraph 1, a State continues to be entitled to exercise diplomatic protection in respect of a corporation which was its national at the date of injury and which, as the result of the injury, has ceased to exist according to the law of the State of incorporation.

Article 11
Protection of shareholders

A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless:

(a) The corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or

(b) The corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.

Article 12
Direct injury to shareholders

To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals.

Article 13
Other legal persons

The principles contained in this chapter shall be applicable, as appropriate, to the diplomatic protection of legal persons other than corporations.

PART THREE

LOCAL REMEDIES

Article 14
Exhaustion of local remedies

1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.

2. “Local remedies” means legal remedies which are open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.

3. Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in draft article 8.

Article 15
Exceptions to the local remedies rule

Local remedies do not need to be exhausted where:

(a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) There was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;

(d) The injured person is manifestly precluded from pursuing local remedies; or

(e) The State alleged to be responsible has waived the requirement that local remedies be exhausted.

PART FOUR

MISCELLANEOUS PROVISIONS

Article 16
Actions or procedures other than diplomatic protection

The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles.

Article 17
Special rules of international law

The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.

Article 18
Protection of ships' crews

The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act.

Article 19
Recommended practice

A State entitled to exercise diplomatic protection according to the present draft articles, should:

(a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred;

(b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and

(*c*) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

2. Projekt zasad dotyczących alokacji strat poniesionych w rezultacie szkód transgranicznych wynikających z działań o wysokim stopniu ryzyka
Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities

The General Assembly,

Reaffirming Principles 13 and 16 of the Rio Declaration on Environment and Development,

Recalling the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities,

Aware that incidents involving hazardous activities may occur despite compliance by the relevant State with its obligations concerning prevention of transboundary harm from hazardous activities,

Noting that as a result of such incidents other States and/or their nationals may suffer harm and serious loss,

Emphasizing that appropriate and effective measures should be in place to ensure that those natural and legal persons, including States, that incur harm and loss as a result of such incidents are able to obtain prompt and adequate compensation,

Concerned that prompt and effective response measures should be taken to minimize the harm and loss which may result from such incidents,

Noting that States are responsible for infringements of their obligations of prevention under international law,

Recalling the significance of existing international agreements covering specific categories of hazardous activities and stressing the importance of the conclusion of further such agreements,

Desiring to contribute to the development of international law in this field,

Principle 1
Scope of application

The present draft principles apply to transboundary damage caused by hazardous activities not prohibited by international law.

Principle 2
Use of terms

For the purposes of the present draft principles:

(*a*) "damage" means significant damage caused to persons, property or the environment; and includes:

(i) loss of life or personal injury;

(ii) loss of, or damage to, property, including property which forms part of the cultural heritage;

(iii) loss or damage by impairment of the environment;

(iv) the costs of reasonable measures of reinstatement of the property, or environment, including natural resources;

(v) the costs of reasonable response measures;

(*b*) "environment" includes natural resources, both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors, and the characteristic aspects of the landscape;

(*c*) "hazardous activity" means an activity which involves a risk of causing significant harm;

(*d*) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the hazardous activity is carried out;

(*e*) "transboundary damage" means damage caused to persons, property or the environment in the territory or in other places under the jurisdiction or control of a State other than the State of origin;

(*f*) "victim" means any natural or legal person or State that suffers damage;

(*g*) "operator" means any person in command or control of the activity at the time the incident causing transboundary damage occurs.

Principle 3
Purposes

The purposes of the present draft principles are:

(*a*) to ensure prompt and adequate compensation to victims of transboundary damage; and

(*b*) to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement.

Principle 4
Prompt and adequate compensation

1. Each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.

2. These measures should include the imposition of liability on the operator or, where appropriate, other person or entity. Such liability should not require proof of fault. Any conditions, limitations or exceptions to such liability shall be consistent with draft principle 3.

3. These measures should also include the requirement on the operator or, where appropriate, other person or entity, to establish and maintain financial security such as insurance, bonds or other financial guarantees to cover claims of compensation.

4. In appropriate cases, these measures should include the requirement for the establishment of industry-wide funds at the national level.

5. In the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources are made available.

Principle 5
Response measures

Upon the occurrence of an incident involving a hazardous activity which results or is likely to

result in transboundary damage:

(*a*) the State of origin shall promptly notify all States affected or likely to be affected of the incident and the possible effects of the transboundary damage;

(*b*) the State of origin, with the appropriate involvement of the operator, shall ensure that appropriate response measures are taken and should, for this purpose, rely upon the best available scientific data and technology;

(*c*) the State of origin, as appropriate, should also consult with and seek the cooperation of all States affected or likely to be affected to mitigate the effects of transboundary damage and if possible eliminate them;

(*d*) the States affected or likely to be affected by the transboundary damage shall take all feasible measures to mitigate and if possible to eliminate the effects of such damage;

(*e*) the States concerned should, where appropriate, seek the assistance of competent international organizations and other States on mutually acceptable terms and conditions.

Principle 6
International and domestic remedies

1. States shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control.

2. Victims of transboundary damage should have access to remedies in the State of origin that are no less prompt, adequate and effective than those available to victims that suffer damage, from the same incident, within the territory of that State.

3. Paragraphs 1 and 2 are without prejudice to the right of the victims to seek remedies other than those available in the State of origin.

4. States may provide for recourse to international claims settlement procedures that are expeditious and involve minimal expenses.

5. States should guarantee appropriate access to information relevant for the pursuance of remedies, including claims for compensation.

Principle 7
Development of specific international regimes

1. Where, in respect of particular categories of hazardous activities, specific global, regional or bilateral agreements would provide effective arrangements concerning compensation, response measures and international and domestic remedies, all efforts should be made to conclude such specific agreements.

2. Such agreements should, as appropriate, include arrangements for industry and/or State funds to provide supplementary compensation in the event that the financial resources of the operator, including financial security measures, are insufficient to cover the damage suffered as a result of an incident. Any such funds may be designed to supplement or replace national industry-based funds.

Principle 8
Implementation

1. Each State should adopt the necessary legislative, regulatory and administrative measures to implement the present draft principles.

2. The present draft principles and the measures adopted to implement them shall be applied without any discrimination such as that based on nationality, domicile or residence.

3. States should cooperate with each other to implement the present draft principles.

3. Przewodnie zasady stosujące się do jednostronnych oświadczeń państw tworzących zobowiązania prawne
Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations

The International Law Commission,

Noting that States may find themselves bound by their unilateral behaviour on the international plane,

Noting that behaviours capable of legally binding States may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other States may reasonably rely,

Noting also that the question whether a unilateral behaviour by the State binds it in a given situation depends on the circumstances of the case,

Noting also that in practice, it is often difficult to establish whether the legal effects stemming from the unilateral behaviour of a State are the consequence of the intent that it has expressed or depend on the expectations that its conduct has raised among other subjects of international law,

Adopts the following Guiding Principles which relate only to unilateral acts *stricto sensu*, i.e. those taking the form of formal declarations formulated by a State with the intent to produce obligations under international law,

1. Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected;

2. Any State possesses capacity to undertake legal obligations through unilateral declarations;

3. To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise;

4. A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence;

5. Unilateral declarations may be formulated orally or in writing;

6. Unilateral declarations may be addressed to the international community as a whole, to one or several States or to other entities;

7. A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated;

8. A unilateral declaration which is in conflict with a peremptory norm of general international law is void;

9. No obligation may result for other States from the unilateral declaration of a State. However, the other State or States concerned may incur obligations in relation to such a unilateral declaration to the extent that they clearly accepted such a declaration;

10. A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:

(i) Any specific terms of the declaration relating to revocation;

(ii) The extent to which those to whom the obligations are owed have relied on such obligations;

(iii) The extent to which there has been a fundamental change in the circumstances.

4. Konkluzje pracy Grupy Studyjnej ds. Fragmentaryzacji prawa międzynarodowego: trudności wynikające ze zróżnicowania i ekspansji prawa miedzynarodowego
Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law

1. General

(1) *International law as a legal system*. International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time.

(2) In applying international law, it is often necessary to determine the precise relationship between two or more rules and principles that are both valid and applicable in respect of a situation.[1] For that purpose the relevant relationships fall into two general types:

Relationships of interpretation. This is the case where one norm assists in the interpretation of another. A norm may assist in the interpretation of another norm for example as an application, clarification, updating, or modification of the latter. In such situation, both norms are applied in conjunction.

Relationships of conflict. This is the case where two norms that are both valid and applicable point to incompatible decisions so that a choice must be made between them. The basic rules concerning the resolution of normative conflicts are to be found in the VCLT.

(3) *The VCLT*. When seeking to determine the relationship of two or more norms to each other, the norms should be interpreted in accordance with or analogously to the VCLT and especially the provisions in its articles 31–33 having to do with the interpretation of treaties.

(4) *The principle of harmonization*. It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.

1. The maxim lex specialis derogat legi generali

(5) *General principle*. The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. The principle may be applicable in several contexts: between provisions within a single treaty, between provisions within two or more treaties, between a treaty and a non-treaty standard, as well as between two non-treaty standards.[2] The source of the norm (whether treaty, custom or general principle of law) is not decisive for the determination of the more specific standard. However, in practice treaties often act as *lex specialis* by reference to the relevant customary law and general principles.[3]

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1 That two norms are *valid* in regard to a situation means that they each cover the facts of which the situation consists. That two norms are *applicable* in a situation means that they have binding force in respect to the legal subjects finding themselves in the relevant situation.

2 For application in relation to provisions within a single treaty, see *Beagle Channel Arbitration (Argentina v. Chile)* ILR vol. 52 (1979) p. 141, paras. 36, 38 and 39; Case C-96/00, *Rudolf Gabriel*, Judgment of 11 July 2002, ECR (2002) I-06367, pp. 6398–6399, paras. 35–36 and p. 6404, para. 59; *Brannigan and McBride v. The United Kingdom*, Judgment of 28 May 1993, ECHR Series A (1993) No. 258, p. 57, para. 76; *De Jong, Baljet and van den Brink v. the Netherlands*, Judgment of 22 May 1984*,* ECHR Series A (1984) No. 77, p. 27, para. 60; *Murray v the United Kingdom*, Judgment of 28 October 1994*,* ECHR Series A (1994) No. 300*,* p. 37, para. 98 and *Nikolova v. Bulgaria*, Judgment of 25 March 1999*,* ECHR 1999-II, p. 25, para. 69. For application between different instruments, see *Mavrommatis Palestine Concessions case, P.C.I.J. Series A*, No. 2 (1924) p. 31. For application between a treaty and non-treaty standards, *INA Corporation v. Government of the Islamic Republic of Iran*, Iran-US C.T.R. vol. 8, 1985-I, p. 378. For application between particular and general custom, see *Case concerning the Right of Passage over Indian Territory (Portugal v. India) (Merits) I.C.J. Reports 1960*, p. 6 at p. 44. The Court said: "Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules."

3 In Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits) I.C.J. Reports 1986, p. 14 at p. 137, para. 274, the Court said: "In general, treaty rules being lex specialis, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of a such a claim."

(6) *Contextual appreciation*. The relationship between the *lex specialis* maxim and other norms of interpretation or conflict solution cannot be determined in a general way. Which consideration should be predominant – i.e. whether it is the speciality or the time of emergence of the norm – should be decided contextually.

(7) *Rationale of the principle*. That special law has priority over general law is justified by the fact that such special law, being more concrete, often takes better account of the particular features of the context in which it is to be applied than any applicable general law. Its application may also often create a more equitable result and it may often better reflect the intent of the legal subjects.

(8) *Functions of lex specialis*. Most of international law is dispositive. This means that special law may be used to apply, clarify, update or modify as well as set aside general law.

(9) *The effect of lex specialis on general law*. The application of the special law does not normally extinguish the relevant general law.[4] That general law will remain valid and applicable and will, in accordance with the principle of harmonization under conclusion (4) above, continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter.[5]

(10) *Particular types of general law*. Certain types of general law[6] may not, however, be derogated from by special law. *Jus cogens* is expressly non-derogable as set out in conclusions (32), (33), (40) and (41), below.[7] Moreover, there are other considerations that may provide a reason for concluding that a general law would prevail in which case the *lex specialis* presumption may not apply. These include the following:

– Whether such prevalence may be inferred from the form or the nature of the general law or intent of the parties, wherever applicable;

– Whether the application of the special law might frustrate the *purpose* of the general law;

– Whether third party beneficiaries may be negatively affected by the special law; and

– Whether the balance of rights and obligations, established in the general law would be negatively affected by the special law.

3. Special (self-contained) regimes

(11) *Special ("self-contained") regimes as lex specialis*. A group of rules and principles concerned with a particular subject matter may form a special regime ("Self-contained regime") and be applicable as *lex specialis*. Such special regimes often have their own institutions to administer the relevant rules.

(12) Three types of special regime may be distinguished:

– Sometimes violation of a particular group of (primary) rules is accompanied by a special set of (secondary) rules concerning breach and reactions to breach. This is the main case provided for under article 55 of the articles on Responsibility of States for internationally wrongful acts.[8]

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4 Thus, in the Nicaragua case, *ibid*. p. 14 at p. 95 para. 179 the Court noted: "It will … be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content."

5 In the *Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, I.C.J. Reports 1996*, p. 240, para. 25, the Court described the relationship between human rights law and the laws of armed conflict in the following way: "…the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of article 4 of the Covenant … The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself".

6 There is no accepted definition of "general international law". For the purposes of these conclusions, however, it is sufficient to define what is "general" by reference to its logical counterpart, namely what is "special". In practice, lawyers are usually able to operate this distinction by reference to the context in which it appears.

7 In the *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention, (Ireland v.United Kingdom)* (Final Award, 2 July 2003) ILR vol. 126 (2005) p. 364, para. 84, the tribunal observed: "[e]ven then, [the OSPAR Convention] must defer to the relevant *jus cogens* with which the parties' *lex specialis* may be inconsistent."

8 *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 76. In the *Case concerning the United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran) I.C.J. Reports 1980* at p. 40, para. 86, the Court said: "The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving States to counter any such abuse."

– Sometimes, however, a special regime is formed by a set of special rules, including rights and obligations, relating to a special subject matter. Such rules may concern a geographical area (e.g. a treaty on the protection of a particular river) or some substantive matter (e.g. a treaty on the regulation of the uses of a particular weapon). Such a special regime may emerge on the basis of a single treaty, several treaties, or treaty and treaties plus non-treaty developments (subsequent practice or customary law).[9]

– Finally, sometimes all the rules and principles that regulate a certain problem area are collected together so as to express a "special regime". Expressions such as "law of the sea", "humanitarian law", "human rights law", "environmental law" and "trade law", etc. give expression to some such regimes. For interpretative purposes, such regimes may often be considered in their entirety.

(13) *Effect of the "speciality" of a regime*. The significance of a special regime often lies in the way its norms express a unified object and purpose. Thus, their interpretation and application should, to the extent possible, reflect that object and purpose.

(14) *The relationship between special regimes and general international law*. A special regime may prevail over general law under the same conditions as *lex specialis* generally (see conclusions (8) and (10) above).

(15) *The role of general law in special regimes: Gap-filling*. The scope of special laws is by definition narrower than that of general laws. It will thus frequently be the case that a matter not regulated by special law will arise in the institutions charged to administer it. In such cases, the relevant general law will apply.[10]

(16) *The role of general law in special regimes: Failure of special regimes*. Special regimes or the institutions set up by them may fail. Failure might be inferred when the special laws have no reasonable prospect of appropriately addressing the objectives for which they were enacted. It could be manifested, for example, by the failure of the regime's institutions to fulfil the purposes allotted to them, persistent non-compliance by one or several of the parties, desuetude, withdrawal by parties instrumental for the regime, among other causes. Whether a regime has "failed" in this sense, however, would have to be assessed above all by an interpretation of its constitutional instruments. In the event of failure, the relevant general law becomes applicable.

4. Article 31 (3) (c) VCLT

(17) *Systemic integration*. Article 31 (3) (c) VCLT provides one means within the framework of the VCLT, through which relationships of interpretation (referred to in conclusion (2) above) may be applied. It requires the interpreter of a treaty to take into account "any relevant rules of international law applicable in relations between the parties". The article gives expression to the objective of "systemic integration" according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact.

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9 See *Case of the S.S. "Wimbledon", P.C.I.J. Series A*, No. 1 (1923) pp. 23–24, noting that the provisions on the Kiel Canal in the Treaty of Versailles of 1919: "… differ on more than one point from those to which other internal navigable waterways of the [German] Empire are subjected … the Kiel Canal is open to the war vessels and transit traffic of all nations at peace with Germany, whereas free access to the other German navigable waterways … is limited to the Allied and Associated Powers alone … The provisions of the Kiel Canal are therefore self-contained".

10 Thus, in *Bankovic v. Belgium and others*, Decision of 12 December 2001, Admissibility, ECHR 2001-XII, p. 351, para. 57, the European Court of Human Rights canvassed the relationship between the European Convention on Human Rights and Fundamental Freedoms and general international law as follows: "the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty. The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part".
Similarly in *Korea – Measures Affecting Government Procurement* (19 January 2000) WT/DS163/R, para. 7.96, the Appellate Body of the WTO noted the relationship between the WTO Covered agreements and general international law as follows: "We take note that Article 3 (2) of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary international law rules of interpretation of public international law. However, the relationship of the WTO agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between WTO members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it. To put it another way, to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that applies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO."

(18) *Interpretation as integration in the system*. Systemic integration governs all treaty interpretation, the other relevant aspects of which are set out in the other paragraphs of articles 31-32 VCLT. These paragraphs describe a process of legal reasoning, in which particular elements will have greater or less relevance depending upon the nature of the treaty provisions in the context of interpretation. In many cases, the issue of interpretation will be capable of resolution with the framework of the treaty itself. Article 31 (3) (c) deals with the case where material sources external to the treaty are relevant in its interpretation. These may include other treaties, customary rules or general principles of law.[11]

(19) *Application of systemic integration*. Where a treaty functions in the context of other agreements, the objective of systemic integration will apply as a presumption with both positive and negative aspects:

(*a*) The parties are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms;[12]

(*b*) In entering into treaty obligations, the parties do not intend to act inconsistently with generally recognized principles of international law.[13] Of course, if any other result is indicated by ordinary methods of treaty interpretation that should be given effect, unless the relevant principle were part of *jus cogens.*

(20) *Application of custom and general principles of law*. Customary international law and general principles of law are of particular relevance to the interpretation of a treaty under article 31 (3) (c) especially where:

(*a*) The treaty rule is unclear or open-textured;

(*b*) The terms used in the treaty have a recognized meaning in customary international law or under general principles of law;

(*c*) The treaty is silent on the applicable law and it is necessary for the interpreter, applying the presumption in conclusion (19) (a) above, to look for rules developed in another part of international law to resolve the point.

(21) *Application of other treaty rules*. Article 31 (3) (c) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.

(22) *Inter-temporality*. International law is a dynamic legal system. A treaty may convey whether in applying article 31 (3) (c) the interpreter should refer only to rules of international law in force at the time of the conclusion of the treaty or may also take into account subsequent changes in the law. Moreover, the meaning of a treaty provision may also be affected by subsequent developments, especially where there are subsequent developments in customary law and general principles of law.[14]

(23) *Open or evolving concepts*. Rules of international law subsequent to the treaty to be interpreted may be taken into account especially where the concepts used in the treaty are open or evolving. This is the

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11 In the *Oil Platforms* case *(Iran v. United States of America) (Merits) I.C.J. Reports 2003*, at para. 41, the Court spoke of the relations between a bilateral treaty and general international law by reference to article 31 (3) (c) as follows: "Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account 'any relevant rules of international law applicable in the relations between the parties' (Article 31, paragraph 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law … The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by … the 1955 Treaty."

12 *Georges Pinson* case *(France v. United Mexican States)* Award of 13 April 1928, UNRIAA, vol. V, p. 422. It was noted that parties are taken to refer to general principles of international law for questions which the treaty does not itself resolve in express terms or in a different way.

13 In the *Case concerning the Right of Passage over Indian Territory (Portugal v. India) (Preliminary Objections) I.C.J. Reports 1957*, p. 125 at p. 142, the Court stated: "It is a rule of interpretation that a text emanating from a government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."

14 The traditional rule was stated by Judge Huber in the *Island of Palmas* case (*the Netherlands v. United States of America*) Award of 4 April 1928, UNRIAA, vol. II, p. 829, at p. 845, in the context of territorial claims: "… a juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or fails to be settled … The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words, its continued manifestations, shall follow the conditions required by the evolution of law".

case, in particular, where: (a) the concept is one which implies taking into account subsequent technical, economic or legal developments;[15] (b) the concept sets up an obligation for further progressive development for the parties; or (c) the concept has a very general nature or is expressed in such general terms that it must take into account changing circumstances.[16]

5. Conflicts between successive norms

(24) *Lex posterior derogat legi priori*. According to article 30 VCLT, when all the parties to a treaty are also parties to an earlier treaty on the same subject, and the earlier treaty is not suspended or terminated, then it applies only to the extent its provisions are compatible with those of the later treaty. This is an expression of the principle according to which "later law supersedes earlier law".

(25) *Limits of the "lex posterior" principle*. The applicability of the *lex posterior* principle is, however, limited. It cannot, for example, be automatically extended to the case where the parties to the subsequent treaty are not identical to the parties of the earlier treaty. In such cases, as provided in article 30 (4) VCLT, the State that is party to two incompatible treaties is bound *vis-à-vis* both of its treaty parties separately. In case it cannot fulfil its obligations under both treaties, it risks being responsible for the breach of one of them unless the concerned parties agree otherwise. In such case, also article 60 VCLT may become applicable. The question which of the incompatible treaties should be implemented and the breach of which should attract State responsibility cannot be answered by a general rule.[17] Conclusions (26)–(27) below lay out considerations that might then be taken into account.

(26) *The distinction between treaty provisions that belong to the same "regime" and provisions in different "regimes"*. The *lex posterior* principle is at its strongest in regard to conflicting or overlapping provisions that are part of treaties that are institutionally linked or otherwise intended to advance similar objectives (i.e. form part of the same regime). In case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them. Instead, States bound by the treaty obligations should try to implement them as far as possible with the view of mutual accommodation and in accordance with the principle of harmonization. However, the substantive rights of treaty parties or third party beneficiaries should not be undermined.

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15 In the *Case concerning the Gabèikovo-Nagymaros Project (Hungary v. Slovakia) I.C.J. Reports 1997*, p. 7 at pp. 67–68, para. 112, the Court observed: "By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan." *In the Arbitration regarding the Iron Rhine (ÏJZEREN RIJN) Railway (Belgium v. Netherlands* of 24 May 2005, a conceptual or generic term was not in issue but a new technical development relating to the operation and capacity of a railway. Evolutive interpretation was used to ensure the effective application of the treaty in terms of its object and purpose. The Tribunal observed in paragraphs 82 and 83: "The object and purpose of the 1839 Treaty of Separation was to resolve the many difficult problems complicating a stable separation of Belgium and the Netherlands: that of Article XII was to provide for transport links from Belgium to Germany, across a route designated by the 1842 Boundary Treaty. This object was not for a fixed duration and its purpose was 'commercial communication'. It necessarily follows, even in the absence of specific wording, that such works, going beyond restoration to previous functionality, as might from time to time be necessary or desirable for contemporary commerciality, would remain a concomitant of the right of transit that Belgium would be able to request. That being so, the entirety of Article XII, with its careful balance of the rights and obligations of the Parties, remains in principle applicable to the adaptation and modernisation requested by Belgium", Text of award available on <http://www.pcacpa.org>. (last visited on 14 July 2006).

16 See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa)notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 at p. 31, para. 53. The Court said that the concept of "sacred trust" was by definition evolutionary. "The parties to the Covenant must consequently be deemed to have accepted [it] as such. That it is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half a century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary international law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation."

17 There is not much case-law on conflicts between successive norms. However, the situation of a treaty conflict arose in *Slivenko and others v. Latvia* (Decision as to the admissibility of 23 January 2002) ECHR 2002-II, pp. 482, 483, paras. 60–61, in which the European Court of Human Rights held that a prior bilateral treaty between Latvia and Russia could not be invoked to limit the application of the European Convention on Human Rights and Fundamental Freedoms: "It follows from the text of Article 57 (1) of the [European Convention on Human Rights], read in conjunction with Article 1, that ratification of the Convention by a State presupposes that any law then in force in its territory should be in conformity with the Convention … In the Court's opinion, the same principles must apply as regards any provisions of international treaties which a Contracting State has concluded prior to the ratification of the Convention and which might be at variance with certain of its provisions."

(27) *Particular types of treaties or treaty provisions*. The *lex posterior* presumption may not apply where the parties have intended otherwise, which may be inferred from the nature of the provisions or the relevant instruments, or from their object and purpose. The limitations that apply in respect of the *lex specialis* presumption in conclusion (10) may also be relevant with respect to the *lex posterior.*

(28) *Settlement of disputes within and across regimes*. Disputes between States involving conflicting treaty provisions should be normally resolved by negotiation between parties to the relevant treaties. However, when no negotiated solution is available, recourse ought to be had, where appropriate, to other available means of dispute settlement. When the conflict concerns provisions within a single regime (as defined in conclusion (26) above), then its resolution may be appropriate in the regime-specific mechanism. However, when the conflict concerns provisions in treaties that are not part of the same regime, special attention should be given to the independence of the means of settlement chosen.

(29) *Inter se agreements*. The case of agreements to modify multilateral treaties by certain of the parties only (*inter se* agreements) is covered by article 41 VCLT. Such agreements are an often used technique for the more effective implementation of the original treaty between a limited number of treaty parties that are willing to take more effective or more far-reaching measures for the realization of the object and purpose of the original treaty. *Inter se* agreements may be concluded if this is provided for by the original treaty or it is not specifically prohibited and the agreement:

"(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole" (article 41 (1) (b) VCLT).

(30) *Conflict clauses*. When States enter into a treaty that might conflict with other treaties, they should aim to settle the relationship between such treaties by adopting appropriate conflict clauses. When adopting such clauses, it should be borne in mind that:

(*a*) They may not affect the rights of third parties;

(*b*) They should be as clear and specific as possible. In particular, they should be directed to specific provisions of the treaty and they should not undermine the object and purpose of the treaty;

(*c*) They should, as appropriate, be linked with means of dispute settlement.

6. Hierarchy in international law: Jus cogens, Obligations erga omnes,

Article 103 of the Charter of the United Nations

(31) *Hierarchical relations between norms of international law.* The main sources of international law (treaties, custom, general principles of law as laid out in Article 38 of the Statute of the International Court of Justice) are not in a hierarchical relationship *inter se*.[18] Drawing analogies from the hierarchical nature of domestic legal system is not generally appropriate owing to the differences between the two systems. Nevertheless, some rules of international law are more important than other rules and for this reason enjoy a superior position or special status in the international legal system. This is sometimes expressed by the designation of some norms as "fundamental" or as expressive of "elementary considerations of humanity"[19] or "intransgressible principles of international law."[20] What effect such designations may have is usually determined by the relevant context or instrument in which that designation appears.

(32) *Recognized hierarchical relations by the substance of the rules*: *Jus cogens*. A rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law (*jus cogens*, Article 53 VCLT), that is, norms "accepted and recognized by the international community of States as a whole from which no derogation is permitted."[21]

(33) *The content of jus cogens*. The most frequently cited examples of *jus cogens* norms are the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination apartheid and torture, as well as

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18 In addition, Article 38 (d) mentions "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

19 *Corfu Channel case (United Kingdom v. Albania) I.C.J. Reports 1949*, p. 22.

20 *Legality of the Threat or Use of Nuclear Weapons case*, Advisory Opinion, *I.C.J. Reports 1996*, para. 79.

21 Article 53 VCLT: A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination.[22] Also other rules may have a *jus cogens* character inasmuch as they are accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted.

(34) *Recognized hierarchical relations by virtue of a treaty provision*: *Article 103 of the Charter of the United Nations*. A rule of international law may also be superior to other rules by virtue of a treaty provision. This is the case of Article 103 of the United Nations Charter by virtue of which "In the event of a conflict between the obligations of the Members of the United Nations under the … Charter and their obligations under any other international agreement, their obligations under the …Charter shall prevail."

(35) *The scope of Article 103 of the Charter*. The scope of Article 103 extends not only to the Articles of the Charter but also to binding decisions made by United Nations organs such as the Security Council.[23] Given the character of some Charter provisions, the constitutional character of the Charter and the established practice of States and United Nations organs, Charter obligations may also prevail over inconsistent customary international law.

(36) *The status of the United Nations Charter*. It is also recognized that the United Nations Charter itself enjoys special character owing to the fundamental nature of some of its norms, particularly its principles and purposes and its universal acceptance.[24]

(37) *Rules specifying obligations owed to the international community as a whole: Obligations erga omnes.* Some obligations enjoy a special status owing to the universal scope of their applicability. This is the case of obligations *erga omnes*, that is obligations of a State towards the international community as a whole. These rules concern all States and all States can be held to have a legal interest in the protection of the rights involved.[25] Every State may invoke the responsibility of the State violating such obligations.[26]

(38) *The relationship between jus cogens norms and obligations erga omnes*. It is recognized that while all obligations established by *jus cogens* norms, as referred to in conclusion (33) above, also have the character of *erga omnes* obligations, the reverse is not necessarily true.[27] Not all *erga omnes* obligations are

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22 *Official Records of the General Assembly, Fifty-sixth Session, Supplement 10* (A/56/10), commentary to article 40 of the draft articles on State Responsibility, paras. (4)–(6). See also commentary to article 26, para. (5). See also *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Rwanda) I.C.J. Reports 2006*, para. 64.

23 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) (Provisional Measures) I.C.J. Reports 1998, para. 42 and *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. the United Kingdom) (Provisional Measures) I.C.J. Reports 1992*, paras. 39–40.

24 See Article 2 (6) of the Charter of the United Nations.

25 In the words of the International Court of Justice: "… an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase) I.C.J.Reports 1970*, p. 3 at p. 32, para. 33. Or, in accordance with the definition, by the Instutut de droit international, an obligation *erga omnes* is "[a]n obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action". Institut de droit international, "Obligations and Rights *Erga Omnes* in International Law", Krakow Session, *Annuaire de l'Institut de droit international* (2005), article 1.

26 *Official Records of the General Assembly, Fifty-sixth Session, Supplement 10* (A/56/10), articles on Responsibility of States for internationally wrongful acts, article 48 (1) (b). This would include common article 1 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; the Geneva Convention relative to the Treatment of Prisoners of War, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, all of 12 August 1949.

27 According to the International Court of Justice "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law … others are conferred by international instruments of a universal or quasi-universal character." *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase) I.C.J. Reports 1970*, p. 3 at p. 32, para. 34. See also *Case concerning East Timor (Portugal v. Australia) I.C.J. Reports 1995*, p. 90 at p. 102, para. 29. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion, I.C.J. Reports 2004*, paras. 155 and 159 (including as *erga omnes* obligations "certain … obligations under international humanitarian law" as well as the right of self-determination). For the prohibition of genocide as an *erga omnes* obligation, see *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 595 at para. 31, and *Caseconcerning armed activities on the territory of the Congo (Democratic Republic of the Congo/Rwanda) I.C.J. Reports 2006*, at para. 64. In the Furundzija case, torture was defined as both a peremptory norm and an obligation *erga omnes*, see *Prosecutor v. Anto Furundzija*, Judgment of 10 December 1998, Case No. IT-95-17/1, Trial Chamber II, ILR, vol. 121 (2002), p. 260, para. 151.

established by peremptory norms of general international law. This is the case, for example, of certain obligations under "the principles and rules concerning the basic rights of the human person,"[28] as well as of some obligations relating to the global commons.[29]

(39) *Different approaches to the concept of obligations erga omnes.* The concept of *erga omnes* obligations has also been used to refer to treaty obligations that a State owes to all other States parties (obligations *erga omnes partes*)[30] or to non-party States as third party beneficiaries. In addition, issues of territorial status have frequently been addressed in *erga omnes* terms, referring to their opposability to all States.[31] Thus, boundary and territorial treaties have been stated to "represent[] a legal reality which necessarily impinges upon third States, because they have effect *erga omnes*."[32]

(40) *The relationship between jus cogens and the obligations under the United Nations Charter.*The United Nations Charter has been universally accepted by States and thus a conflict between *jus cogens* norms and Charter obligations is difficult to contemplate. In any case, according to Article 24 (2) of the Charter, the Security Council shall act in accordance with the Purposes and Principles of the United Nations which include norms that have been subsequently treated as *jus cogens*.

(41) *The operation and effect of jus cogens norms and Article 103 of the Charter*:

(*a*) A rule conflicting with a norm of *jus cogens* becomes thereby *ipso facto* void;

(*b*) A rule conflicting with Article 103 of the United Nations Charter becomes inapplicable as a result of such conflict and to the extent of such conflict.

(42) *Hierarchy and the principle of harmonization*. Conflicts between rules of international law should be resolved in accordance with the principle of harmonization, as laid out in conclusion (4) above. In the case of conflict between one of the hierarchically superior norms referred to in this section and another norm of international law, the latter should, to the extent possible, be interpreted in a manner consistent with the former. In case this is not possible, the superior norm will prevail.

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28 *Barcelona Traction case, ibid*.

29 The obligations are illustrated by article 1 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, United Nations, *Treaty Series*, vol. 610, p. 205 and article 136 of the United Nations Convention on the Law of the Sea, United Nations, *Treaty Series*, vol. 1834, p. 396.

30 Institut de droit international, "Obligations *Erga Omnes* in International Law", Krakow Session, *Annuaire de l'Institut de droit international* (2005), article 1 (b).

31 "In my view, when a title to an area of maritime jurisdiction exists – be it to a continental shelf or (*arguendo*) to a fishery zone – it exists *erga omnes*, i.e. is opposable to all States under international law", Separate Opinion of Judge Oda, *Case concerning maritime delimitation in the area between Greenland and Jan Mayen (Denmar v. Norway) Judgment, I.C.J. Reports 1993*, p. 38 at p. 100, para. 40. See likewise, Separate Opinion by Judge De Castro, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16 at p. 165: "… a legal status – like the *iura in re* with which it is sometimes confused – is effective *inter omnes* and *erga omnes*". See also Dissenting Opinion by Judge Skubiszewski, in *Case concerning East Timor (Portugal v. Australia) I.C.J. Reports 1995*, p. 90 at p. 248, paras. 78-79.

32 Government of the State of Eritrea v. the Government of the Republic of Yemen (Phase one: Territorial sovereigntyand scope of the dispute), Arbitration Tribunal, 9 October 1998, ILR, vol. 114 (1999), p. 1 at p. 48, para. 153.

Dokumenty Komisji Narodów Zjednoczonych ds. Międzynarodowego Prawa Handlowego
United Nations Commission on International Trade Law Documents

1. Projekt zrewidowanych artykułów Prawa Modelowego UNCITRAL w zakresie międzynarodowego arbitrażu handlowego
Draft revised articles of the Model Law on International Commercial Arbitration of the UNCITRAL

[Article 1, paragraph 2]

2.The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

Article 2 A.
International origin and general principles

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

[Article 7]

Option I

Article 7.
Definition and form of arbitration agreement

1. "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

2. The arbitration agreement shall be in writing.

3. An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

4. The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

5. Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

6. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7.
Definition of arbitration agreement

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Chapter IV A.
Interim measures and preliminary orders

Section 1.
Interim measures

Article 17.
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, grant interim measures.

2. An interim measure 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 or prejudice to the arbitral process itself;

(c) Provide a means of 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.

Article 17 A.
Conditions for granting interim measures

1. The party requesting an interim measure under article 17, paragraph 2 (a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages 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 of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

2. With regard to a request for an interim measure under article 17, paragraph 2 (d), the requirements in paragraph 1 (a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2.
Preliminary orders

Article 17 B.
Applications for preliminary orders and conditions for granting preliminary orders

1. Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

2. The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

3. The conditions defined under article 17 A apply to any preliminary order, provided that the harm to be assessed under article 17 A, paragraph 1 (a), is the harm likely to result from the order being granted or not.

Article 17 C.
Specific regime for preliminary orders

1. Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

2. At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

3. The arbitral tribunal shall decide promptly on any objection to the preliminary order.

4. A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

5. A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3.
Provisions applicable to interim measures and preliminary orders

Article 17 D.
Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E.
Provision of security

1. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

2. The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 F.
Disclosure

1. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

2. The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph 1 of this article shall apply.

Article 17 G.
Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4.
Recognition and enforcement of interim measures

Article 17 H.
Recognition and enforcement

1. An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

2. The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

3. The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a

determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I.
Grounds for refusing recognition or enforcement[33]

1. Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36, paragraph 1 (a)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36, paragraph 1 (b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

2. Any determination made by the court on any ground in paragraph 1 of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5.
Court-ordered interim measures

Article 17 J.
Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

[Article 35, paragraph 2]

2. The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

33 The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

2. Zalecenie dotyczace interpretacji artykulu II ustęp 2 i artykułu VII ustęp 1 Konwencji w sprawie uznawania i wykonywania zagranicznych wyroków arbitrażowych z 1958 r.

Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,[34] has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes",

Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

Considering the wide use of electronic commerce,

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,[35] as subsequently revised, particularly with respect to article 7,[36] the UNCITRAL Model Law on Electronic Commerce,[37] the UNCITRAL Model Law on Electronic Signatures[38] and the United Nations Convention on the Use of Electronic Communications in International Contracts,[39]

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

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34 United Nations, *Treaty Series*, vol. 330, No. 4739.

35 *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I, and United Nations publication, Sales No. E.95.V.18.

36 *Ibid., Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

37 *Ibid*., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

38 *Ibid., Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

39 General Assembly resolution 60/21, annex.

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.