INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

DIPLOMATIC CONFERENCE TO ADOPT A CONVENTION ON SUBSTANTIVE RULES REGARDING INTERMEDIATED SECURITIES
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Comments

(submitted by the Government of Spain)

1. As an answer to the invitation by the UNIDROIT Secretariat to the delegations to submit requests to amend the text of the draft Convention and the draft Official Commentary, Spain wants to make the following comments.

2. This delegation has no intention to make any proposal to amend the text at this stage. However, we would like to express our position with regard to two documents produced so far: the "Memorandum submitted by the Editors of the Draft Official Commentary" (UNIDROIT 2009 – CONF. 11/2 - Doc. 6 Corr.) and the comments submitted by the French Government (The French Proposal – CONF. 11/2 – Doc. 8).

3. With regard to the Memorandum, we can accept all the proposals contained therein. We still have some reservations about the wording employed in the new articles X and Y, but we think that in general those proposals clarify the sense and purpose of the concerned provisions and therefore they improve the current version of the text.

4. With regard to the French comments, we would like to express our views on three proposals it contains: (a) The introduction of a list of "core-duties of the intermediary"; (b) the modification of Article 24; and (c), the modification of Article 4.

a) We support the proposal to introduce a list of "core-duties" that would function as a minimum or basic global standard. We can discuss the drafting of the provision and whether it is preferable to lay down an autonomous article containing that list or to distribute the list of core-duties among different provisions, however we are convinced that the creation of a universal standard on those core-duties will improve the quality of the future Convention.

b) Article 24(1) only deals with the securities of the account holders of the intermediary. This provision only requires that the intermediary holds sufficient securities or intermediated securities to satisfy the amount credited to its customers. The intermediary itself is not included in this category. It implies that Article 24 (1) does not impose an obligation on the intermediary to maintain securities sufficient to cover the intermediated securities credited to itself. The French comments seek to expand the scope of Article 24 and to impose an obligation on the intermediary to hold sufficient securities to meet also the securities that it has credited to himself (i.e. when the intermediary maintains a securities account for itself, in relation to the securities credited to that account). This seems reasonable from a regulatory standpoint, from an accounting practices standpoint and even from a company-law standpoint, but we think that this aspect does not fit well with the nature of the Convention. The Convention only deals with private-law issues; in particular

mainly with contractual and proprietary law issues. From this point of view, it makes sense to impose obligations on the intermediary with regard to the assets that he is holding on behalf of other persons, his account holders, but it does not make sense to impose that obligation with regard to assets that the intermediary is holding for himself. In more colloquial term, there is not a contractual law or a proprietary law obligation on the intermediary "to be honest with himself". The futility of this obligation can be appreciated if we think about the consequences: what are the contractual-law or the property-law consequences if an intermediary maintains a security account for himself where securities are credited but the intermediary does not really hold those securities? The fact that a person is cheating himself does not have any private-law consequences.

Having said that, if there is a strong feeling among the delegations about the need of that modification, we could also accept it, since we also think that it does not do any irreparable harm to the text.

c) Finally, the French comments propose a modification to Article 4 so that the Convention only applies to intermediaries which are subject to authorization, regulation or supervision by a public authority. According to the legal framework applicable in Europe, the professional activity of custody of securities is subject to authorization and supervision. We think that there are strong policy arguments to favour this approach. It enhances the stability of financial markets, reduces systemic risk and is an effective way to ensure the protection of investors. Hence, we support the proposal of the French delegation, since it may be an incentive to third countries to adopt a sound legal framework and also it may strengthen the protection of European investors who are investing in the markets of third countries.

Notwithstanding the above, we do not want this aspect to frustrate the adoption of the Convention. Hence, if the majority of the delegations prefer the current text of Article 4, we could accept it.

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