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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Third Meeting
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REPORT

(prepared by the UNIDROIT Secretariat)

Agenda item No. 1: Opening of the meeting

1. The third meeting of the Committee on Emerging Markets Issues, Follow-up and Implementation (hereafter the Committee) was held in Istanbul (Turkey) at the kind invitation of the Capital Markets Board of Turkey (hereafter CMB) from 11 to 13 November 2013 under the co-chairmanship of Ms Niu Wenjie (China) and Mr Alexandre Pinheiro dos Santos (Brazil), represented by Ms Nora Rachman, and was attended by representatives of 28 States,[1] one regional economic integration organisation, five intergovernmental organisations, five non-governmental organisations and a large number of other participants and attendees (cf. the list of participants in Annexe I).

2. The *Co-Chair of the Committee*, a *representative of China*, welcomed all delegates, speakers, participants, and observers to the third meeting of the Committee and invited the Secretary-General of UNIDROIT to present the Committee's schedule.

3. The *Secretary-General of UNIDROIT*, in recalling the establishment of the Committee at the diplomatic Conference to Adopt a Convention on Substantive Rules regarding Intermediated Securities in Geneva and its composition,[2] welcomed Turkey as a full member of the Committee, at the invitation of the other Committee members, since May 2013. He noted that Turkey had expressed a wish to participate and that members of the Committee had been consulted in writing ahead of the meeting and had expressed their consent. He also noted the presence of non-member States of UNIDROIT, including Cameroon, a member of the Committee but not of UNIDROIT, and Sri Lanka and Thailand, that had expressed an interest in participating in the meeting as observers and had encountered no objections by any member States. The proposal was then made to transition to an open-committee format moving forward. This proposal was accepted by consensus of the Committee.

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[1] Members of the Committee, pursuant to the Final Act of the final session of the diplomatic Conference are the following: Argentina, Cameroon, Chile, France, Greece, India, Japan, Nigeria, Republic of Korea, South Africa, United States of America, European Community. In May 2013, Turkey joined the Committee. *See* § 3 of this Report. The Observers are: Indonesia, European Central Bank, Hague Conference of International Private Law (HCCH), EuropeanIssuers, Trade Association for the Emerging Markets.

[2] *See id.*

Agenda item No. 2: Adoption of the Agenda

3. The agenda proposed by the UNIDROIT Secretariat was adopted (cf. Annexe II to this report), with the understanding that item No. 7 (Consideration of activities to promote the dissemination and national implementation of the UNIDROIT Principles on the Operation of Close-Out Netting Provisions) would be discussed together with item no. 5 (Consideration of State legislative measures to implement the UNIDROIT Convention on Substantive Rules for Intermediated Securities, in particular in emerging countries) in order to reserve the latter part of the meeting for consideration of item No. 6 (Consideration of the preparation of a Legislative Guide on Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets).

Agenda item No. 3: Colloquium on Financial Markets Law

4. The Colloquium entitled "Enhancing Financial Integrity: The Geneva Convention and the UNIDROIT Principles on Close-Out Netting under National Law" took place on 11 and 12 November 2013. The *Chairman of the Capital Markets Board of Turkey* welcomed participants to the Colloquium and described CMB's pleasure at hosting the meeting and making such a contribution to the important harmonisation efforts of UNIDROIT. Noting Turkey's role in the development of the UNIDROIT Convention on Substantive Rules for Intermediated Securities (hereafter Geneva Securities Convention) and the UNIDROIT Principles on the Operation of Close-Out Netting Provisions (hereafter Netting Principles), as well as CMB's satisfaction that Turkey had joined the Committee, he stated that Turkey had undergone over the last decade a great transformation, both domestically and within the world's financial markets. This transformation coincided with the unfolding of the global financial crisis, which brought both risks and opportunities to developing countries. Given Istanbul's position at the crossroads between Europe, the Middle East, Central Asia, and North Africa, Turkey was seeking to make Istanbul one of the world's foremost financial hubs and was taking significant steps to improve and strengthen its financial system. Among these steps, he briefly described Turkey's new Capital Market Law, in which increased harmonisation with UNIDROIT rules and EU regulations was emphasised. He concluded by thanking organisers and participants and expressing his hope that the Colloquium would provide a basis for productive talks.

5. The *Secretary-General* thanked CMB for hosting the meeting and recalled that it was the third of its kind organised by UNIDROIT since the diplomatic conference that adopted the Geneva Securities Convention. Noting the extraordinary combined value of securities held in custody around the world, estimated by the Bank for International Settlements to be roughly $50 trillion US dollars, he emphasised the importance of the meeting's discussions on the development of securities trading systems, in particular in emerging markets. He stated that, while few industries were as international or even subject to such developed regulatory regimes as the financial industry, the private law foundations upon which transactions were based had not been keeping pace with the industry. Since the widespread dematerialisation of securities, efforts to adapt the law to technological developments and trading practices had led to a complex web of divergent legal solutions that hindered the interoperability of financial markets. He stated that, in this regard, the Geneva Securities Convention represented a major contribution by UNIDROIT to the enhancement of cross-border legal certainty in securities trading. He noted, however, that the Convention governed only some of the private law securities issues, leaving room for domestic adaptation.

6. The Secretary-General then acknowledged that the first session of the diplomatic Conference on the Geneva Securities Convention in September 2008 had coincided with the most dramatic moment of the global financial crisis and had provided a valuable opportunity for the negotiating States to examine whether UNIDROIT could add to the Convention rules capable of preventing systemic risk or the collapse of financial institutions in the future. He emphasised, however, that

private law had not been the cause of the financial crisis and that a wealth of knowledge and expertise had went into the creation of the Convention, which reached the limit of what a private law convention could hope to do to enhance legal certitude. Nevertheless, he recognised that the discussion and development of principles and recommendations in related areas, during the Colloquium and Committee meeting, could usefully supplement the Convention and promote the sound functioning of financial markets.

7. In addition to the members of the Committee, participation in the Colloquium was open to UNIDROIT member States, as well as to invited guests and speakers. A large number of Turkish and other professionals positively replied to the invitation (see Annexe I to this report). The Colloquium focused particular attention on the disparities between national law and the Geneva Securities Convention, the need for national and cross-border insolvency rules, the potential effect of corporate governance systems on securities trading, and the role of specialised investment instruments. It also covered the impact of the UNIDROIT Principles on the Operation of Close-Out Netting Provisions in reducing systemic and counter-party risk in emerging markets and the manner in which they could be incorporated into national law (for a detailed programme of the Colloquium, see Annexe III).[3]

Agenda item No. 4: Consideration of follow-up and promotional measures to implement the UNIDROIT Convention on Substantive Rules for Intermediated Securities

8. The *Secretary-General* recalled that, ahead of the first meeting of the Committee in 2010, the Secretariat had prepared a draft Accession Kit (UNIDROIT 2010 – S78B/CEM/1/Doc. 3). It was a lengthy document comprised of explanations on the system of declarations under the Geneva Securities Convention and on other sources of law outside of the Convention. At that meeting, it was suggested to split that document into two: (1) a declarations memorandum following the example of what UNIDROIT produced for the Cape Town Convention (UNIDROIT 2012 – DC11/DEP/Doc. 1 rev.), and (2) a document providing information for Contracting States in respect of the Geneva Securities Convention's references to sources of law outside the Convention (UNIDROIT 2011 – S78B/CEM/2/Doc. 2). The second document was produced for the second meeting of the Committee in 2011, during which comments were solicited. The Secretary-General proposed the publication of the second document as a self-standing document. He further proposed publication of the text of the Geneva Securities Convention with the declarations memorandum and suggested also including in the same booklet the document relating to the sources of law. He noted, moreover, that the Netting Principles had been published and hoped that they would be available at the meeting. He then invited delegations to share any developments regarding implementation of the Geneva Securities Convention.

9. The *representative of South Africa* noted that her country's Financial Markets Act of 2012 had come into operation in June 2013. She stated that the process of developing and implementing subordinate regulations under that law was underway. Further legislation was also being developed which, it was hoped, would address appropriately the relationship between insolvency, intermediated securities, and financial institutions. Another representative of South Africa noted that, associated with the work regarding the Geneva Securities Convention and the Netting Principles, South Africa had not started any ratification process for the Convention. She stated that South Africa was first aligning its legislation with these rules and that ratification would remain as a step to take after finalisation of the alignments.

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[3] The detailed programme of the Colloquium is also available at http://www.unidroit.org/english/documents/2013/study78b/cem-03/s-78b-cem03-progr-e.pdf and includes embedded hyperlinks to the presentations, as authorized by the speakers.

10. The *representative of India* stated that the Ministry of Finance in India had been in touch with various sector regulators, including the Central Bank and the Securities and Exchange Board of India. She noted that the Central Bank had expressed some concerns with respect to government securities, but she stated that there was an understanding that the concerns of the Central Bank could be addressed by signing the Geneva Securities Convention, with the exclusion of Chapter V. Negotiations were still underway among sector regulators regarding the formalities by which India should ratify the Convention and, subsequent to reaching an agreement, the Ministry of Finance would seek the approval of the Cabinet of Ministers.

11. The *representative of Brazil* stated that the Brazilian Ministry of External Relations had been working with the Securities Commission and other government institutions to coordinate activities designed to promote proper understanding of the legal and normative structure of the Geneva Securities Convention. She noted two pieces of legislation: a federal law on the constitution of collateral in the operation of financial and capital markets, and a regulatory project on central security depositary activities that was in public hearing procedures. She stated that these developments had demonstrated that, in due time, ratification of the Convention would find a regulatory environment in line with the Convention's principles.

12. The *representative of China* stated that the Geneva Securities Convention was an important harmonisation document and noted that several seminars had been organised in China to discuss the Convention, the Official Commentary, and related issues, in the context of China's legal system. He further noted that there was a plan in place for translation of the Official Commentary into Chinese, in order to provide the securities industry with a better understanding of the Convention. He also highlighted the proposal of the Electronic Securities Bookkeeping Law to China's legislative body.

13. The *representative of the European Commission* indicated that, in accordance with the Commission's work plan, the European Commission would not come forward with a proposal on European securities law that year, nor the next year. She stated that this omission from the work plan was due to a number of reasons. First, she stated that it had been difficult to reach a consensus with member States on the appropriate way forward. Second, she noted that there was a need to prioritise particular work within the European Union, such as the banking union. The European Union, moreover, had been very busy, over the last four years, producing union legislation in financial markets, some of which was still under negotiation and related to the field of law to be discussed at the meeting. This work included a proposal on central securities depositaries, which was in the final stages of adoption, as well as revisions to the Markets in Financial Instruments Directive (MiFID), which was the basic charter for stock exchanges in Europe and had some provisions on custodians and client asset protections. Third, she pointed out that the European Parliament was in the final stages of its legislative period and that, following the elections in May 2014, the work plan would be reassessed.

14. The *representative of Cameroon* noted that, although the Convention had not yet been ratified, it was a priority for the government. He stated that the Ministry of Finance had received instructions from the Prime Minister to accelerate the process in conjunction with the Ministry of External Affairs. He also noted that Cameroon, after the second meeting of the Committee, had wanted to organise a regional session to promote and popularise the UNIDROIT rules, thereby asking for the Secretariat's support to make such a session a reality in central Africa.

15. The *Secretary-General* thanked the representative of Cameroon for informing the Committee that its government considers it a priority to accede to the Geneva Securities Convention and for Cameroon's intention of organising a sub-regional event in the near future. He stated that the Secretariat was at Cameroon's disposal for any information needed to expedite that process.

Agenda items No. 5 and No. 7: ***Consideration of State legislative measures to implement the UNIDROIT Convention on Substantive Rules for Intermediated Securities, in particular in emerging countries, and activities to promote the dissemination and national implementation of the UNIDROIT Principles on the Operation of Close-Out Netting Provisions[4]***

16. The *Secretary-General* remarked that the intervention of the representative of Cameroon had bridged the connected topics of legislative and promotional activities for the Geneva Securities Convention and the Netting Principles. He noted that, independently from any work on the Legislative Guide on Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets (hereafter Legislative Guide), national activities or seminars could be organised to promote the Convention. Such activities could be organised independently from the UNIDROIT Secretariat, but the Secretariat remained ready to support joint initiatives to the extent of its means. He proposed that another meeting be organised in the fall of 2014, subject to the availability of resources and interest, and that in order to maximise the use of resources, there could be an exchange of information on the promotion of the Convention and an examination of the progress on the work on the Legislative Guide. It was hoped that draft chapters could be submitted for consideration, comments, and discussion at that meeting. He then asked delegates for their views on this proposal or any alternative proposals.

17. The *representative of France* supported the proposal to have another meeting of the Committee within the period of one year.

18. The *representative of the United States* also supported the proposal, but noted that the plans to discuss the Legislative Guide at a meeting in another year should not preclude the Committee from working on the Guide and discussing it informally in between meetings. It was hoped that work could continue via email and teleconference and that such coordination would allow the Committee's work to proceed expeditiously.

19. The *Secretary-General*, having requested further views, noted that the Committee was in general agreement with the proposal to plan another meeting within a year. He stated that the Committee should consider the point raised by the representative of the United States later in the day, during its discussion on the scope and methodology of the work on the Legislative Guide.

20. He stated that this plan also addressed promotion of the Netting Principles insofar as the meeting could include another colloquium, which would cover netting. This was of course without prejudice to any other promotional activities that countries or interested organisations might undertake to promote the Netting Principles. In this regard, he noted that UNIDROIT resources for promotional activities were limited and that it was not possible to organise a yearly promotional conference for each of UNIDROIT's instruments. He invited all States to do as much as they could internally to promote and discuss the Netting Principles. He acknowledged a willingness to explore the possibility of working with the International Monetary Fund and other institutions, including regional organisations, to promote the Netting Principles as well as the Geneva Securities Convention. He then drew the attention of the Committee to the proposals that had been raised for the discussion of the treatment of financial contracts in other forums and invited members States to follow up on those activities.

21. The *representative of the United States* noted, in connection with the last point raised by the Secretary-General, UNCITRAL's upcoming work on insolvency-related issues, which included a

[4] Pursuant to the agreement of the Committee regarding the adoption of the Agenda (*see* Agenda item No. 2 *supra*), these two Agenda items were discussed together.

colloquium and meeting of Working Group V during December 2013. He further noted that the treatment of financial contracts and insolvency was one of the topics on the agenda for possible future work at UNCITRAL, but stated that it was not a topic about which the United States was very enthusiastic to embark upon in that forum because of the recently completed work at UNIDROIT, in particular the Netting Principles. He suggested that all of those who were interested and available should consider attending and participating in UNCITRAL's discussions as their involvement would also be useful there.

22. The *Co-Chair of the Committee*, a *representative of China*, stated that the Geneva Securities Convention and the Netting Principles were quite important for capital markets throughout the world and had not been prepared solely for emerging markets. She then made two proposals in this regard. First, she suggested that the UNIDROIT Secretariat set up an information exchange mechanism or include additional information on its website, in order to provide a very general introduction about each country's attitude towards the Convention and the Netting Principles. This would facilitate UNIDROIT member States in gathering information on the progress of those two documents and evaluating the trends of capital market legislation.

23. Second, in acknowledging that UNIDROIT had only limited means for promoting a considerable number of legal documents, the Co-Chair suggested cooperation with observers and other organisations, such as the Committee on Payment and Settlement Systems (CPSS) of the Bank for International Settlements, the International Organization of Securities Commissions (IOSCO), and the World Forum on CSDs (WFC). She noted that these organisations had their own channels for the promotion of legal documents and could also introduce the Convention and the Netting Principles to their own members. She felt that, personally, such cooperation was the way to promote these two documents in the world capital markets.

24. The *Secretary-General* thanked the Co-Chair for her very useful suggestions. With regard to the development of a platform to facilitate the exchange of information, he stated that the UNIDROIT Secretariat was finalising a new version of the UNIDROIT website and that he would ensure that it contained some sort of facility to achieve that purpose. With regard to cooperation with other organisations, he stated that the Secretariat would raise that suggestion with those organisations to see if a plan for joint activities, in connection with their own promotional activities, could be devised, to increase awareness of both the Geneva Securities Convention and the Netting Principles.

25. The *representative of UNCITRAL* then raised three main points. First, he noted that, with respect to the statement made by the representative of the United States, the UNCITRAL colloquium would take place in Vienna from the 16-18 December 2013 and include a number of financial contracts and insolvency issues. The colloquium would be followed by a meeting of UNCITRAL Working Group V.

26. Second, he drew the attention of the Committee to the joint UNCITRAL, Hague Conference, and UNIDROIT publication regarding texts on security interests, which discussed among other things the interrelationship of the Geneva Securities Convention with texts prepared by UNCITRAL and the Hague Conference.[5] He stated that this was a way for the three organisations to send a message to the world that the organisations had cooperated and coordinated their work to the extent possible over the last 20 years, and had been able to present internally coherent and complete sets of rules on security interests and assets of all types.

[5] This document is available in Arabic, Chinese, English, French, Spanish, and Russian at the following link: http://www.unidroit.org/uncitral-hague-conference-and-unidroit-texts-on-security-interests.

27. Third, he informed the Committee that UNCITRAL Working Group VI would meet from 2-6 December 2013 to discuss a revised version of the Draft Model Law on Secured Transactions, which for the time being did not address any type of securities. He noted, however, that there were thoughts of presenting in cooperation with experts from UNIDROIT a suggestion regarding how to address non-intermediated securities, which had been on UNCITRAL's agenda for some time pending agreement on how to deal with this issue with UNIDROIT. He mentioned that such presentation could occur during the April 2014 session of UNCITRAL Working Group VI, but noted that any proposal for inclusion of treatment of non-intermediated securities within the Draft Model Law would have to be approved by the UNCITRAL Commission, which was to meet in July 2014.

28. The *Secretary-General* thanked the representative of UNCITRAL for the information provided and, with respect to his third point regarding the scope of the Model Law, he noted that this point depended upon decisions made regarding the scope of the Legislative Guide, to be discussed later in the meeting.

29. The *representative of the United States* enquired whether other members of the Committee might think it to be helpful to offer formally the Committee's assistance to UNCITRAL Working Group VI, to the extent that it would consider non-intermediated securities. He stated that it could be useful for the Committee to notify formally Working Group VI that the experts on the Committee would be more than willing to consult and be of assistance, which could be helpful for ensuring the consistency of the work between the two fora.

30. The *Secretary-General* explained that, for those members and observers of the Committee that were not as familiar with the points raised by the representatives of the United States and UNCITRAL, the UNCITRAL Legislative Guide on Secured Transactions did not address securities, which were excluded entirely from its scope. He noted that UNIDROIT was very grateful that securities had been excluded because that agreement between UNIDROIT and UNCITRAL meant that securities that did not fall under the Geneva Securities Convention's definition of intermediated securities were also excluded from UNCITRAL's Legislative Guide, thereby avoiding possible repetition or even conflict. He further noted, however, that there had now been discussion at UNCITRAL regarding whether there was a gap that needed to be filled with respect to non-intermediated securities. He stated that UNIDROIT was hesitant to see non-intermediated securities included in any work by UNCITRAL because for a certain time UNIDROIT had understood differently what was meant by the term intermediated securities. It seemed that some experts participating in UNCITRAL's earlier work understood that term to mean any securities held by a holding system different from the holding system prevailing in North America. That definition, however, would have encroached upon the Geneva Securities Convention, which defined intermediated securities as any securities capable of being the object of a credit to a securities account.

31. He observed that the Geneva Securities Convention's definition now seemed to reflect the understanding of UNCITRAL as well, so that UNCITRAL viewed intermediated securities to mean what the Convention means. He further observed that, as a result, non-intermediated securities were now a fairly discrete, identifiable set of securities and that it was an appropriate time for UNCITRAL to decide on the desirability of filling any gap with respect to such securities. He expressed that, with this clarification, there would be no potential conflict or overlap. He further expressed that it was always a healthy practice for governments to ensure that whoever represents them in one organisation be well informed of what is happening in other organisations.

32. The *representative of France* expressed appreciation for the update on the progress of Working Group VI and noted his participation in both UNCITRAL and UNIDROIT work in this area. He recounted that he had participated in a February 2007 session, which was devoted to extensive discussion of the definition of securities. Since then, including the first meeting of the Committee in September 2010 in Rome, there had been the extremely important practice of UNCITRAL

representation, by the Secretary of Working Group VI, at such meetings. He stated that UNIDROIT should also be represented at the meetings of Working Group VI so that, should the need arise, the negotiators of the future model law could be informed on this issue and other possible issues.

33. The *Secretary-General*, in thanking the representative of France, noted that he had participated in a colloquium organised on this topic by UNCITRAL last year, and that the discussion was very useful and had provided clarification, removing the confusion caused by the different understandings both organisations had at different times expressed. Regarding whether the UNIDROIT Secretariat could afford, on the organisation's budget, to send a representative for a certain number of years to alternating one week UNCITRAL Working Group VI sessions in New York and Vienna, he stated that the suggestion would require further consideration and that it would be best to first coordinate with UNCITRAL the exact date of discussion of the issue and then ensure representation for that time.

Agenda item No. 6: Consideration of the preparation of a Legislative Guide on Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets

34. The *Secretary-General*, having asked whether any other delegations wished to further address the issue of promotion of the two instruments, moved the Committee onto the next agenda item and proposed that his colleague introduce the topic and the thinking behind the preparation of the documents provided to the Committee before proceeding with the discussion.

35. *Mr Wilson* (UNIDROIT Senior Officer) recalled that the initial document to be prepared after the Geneva Securities Convention was the draft Accession Kit (UNIDROIT 2010 – S78B/CEM/1/Doc. 3), a lengthy document considered in some circles as difficult to read or not as useful as it had originally been intended. He further recalled that the Committee, at its first meeting in Rome in 2010, decided to further work on the Accession Kit by splitting it in two and preparing a declarations memorandum with regard to the specific rules contained in the Geneva Securities Convention (UNIDROIT 2012 – DC11/DEP/Doc. 1 rev.) and a separate document. The latter would deal with approaches regarding non-Convention law or the national law that was not included in the original drafting of the Convention (UNIDROIT 2011 – S78B/CEM/2/Doc. 2), but was included to a certain extent in the draft Accession Kit.

36. He then referred to the initial Annotated Draft Outline of the Legislative Guide on Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets, which included a range of issues to serve as a starting basis for the drafting of the Guide.[6] He explained that there were several proposals by States at the Committee's meetings in Rome in 2010 and in Rio in 2012 regarding what should be included in the Legislative Guide, as well as additional proposals from informal discussions conducted during the final meeting of the Committee of Governmental Experts on close-out netting. He noted that, overall, there were topics coming from the Geneva Securities Convention, the draft Accession Kit and its follow-up documentation, and the Committee's meetings. He said that the Secretariat and the informal working group set up by the Committee at the Rio meeting (hereafter the Rio working group), in preparing the Annotated Draft Outline, had tried to provide a universal view of all of the potential issues for consideration. The outline therefore was much broader than what would be necessary or advisable for the Committee to include in the Legislative Guide and was intended to allow the Committee to focus more specifically on the necessary individual aspects.

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[6] *See* Annexe IV (containing the Annotated Draft Outline from UNIDROIT 2013 – S78B/CEM/3/Doc. 2).

37. He explained that there were many ways the outline could be organised and represented and that the present format was just one way that was agreed with the Rio working group. In describing the Annotated Draft Outline, he noted that it had identified by use of the legend and text whether topics were viewed as public, regulatory matters (by including them in grey text), hybrid matters (black text), or private, contractual matters (black, bold text), stating that the work of UNIDROIT and the Committee would focus exclusively on the latter and avoid replicating work already done by UNIDROIT or elsewhere.

38. Reaffirming that the purpose of the document was just to provide a starting point for discussions, he noted that a shorter Sample Final Outline,[7] which was only prepared by the Secretariat and was not developed by the Rio working group, had been included in Annexe 1 to the Annotated Draft Outline. He further noted that the Committee had very recently received a more focused proposal from a group calling themselves the Friends of the Committee, which provided a shorter list of topics for inclusion in the Legislative Guide, and merited further discussion.[8]

39. He then stated that the timeframe in which the Committee would draft a document was another matter for discussion. He noted that much of the timing had to do with the discussion that followed on the Legislative Guide and how the Committee would propose to draft the different topics or content selected for inclusion.

40. The *Secretary-General* then opened the floor for general comments on the Annotated Draft Outline presented by the Secretariat and any other matters that members of the Committee and observers would wish to raise.

41. The *representative of France* thanked the Secretariat for the Annotated Draft Outline of the Legislative Guide. She stated that it indicated well the intention of the Guide. She said that, according to her understanding, the Annotated Draft Outline was a first review of all of the topics which could be addressed by the Committee in the Guide and showed the immensity of the task at hand, that many of the subjects had already been addressed in other places, and that other subjects were simply too long or too complex to enter into much detail. She then said that the Sample Final Outline, however, was more like the Legislative Guide as she understood it, stating that the Guide should be a presentation of different options and existing models and their attributes, for example, either civil law or common law models.

42. She said that the Guide should function as a sort of toolbox available to emerging countries to see the different existing models and manners for implementing the Geneva Securities Convention. In this regard, she expressed that the Friends' Outline, even if France was not involved in its preparation, merited discussion as it presented an approach that was even shorter than the Sample Final Outline. She said that the first part of the Friends' Outline, which presented the different national legal systems, was particularly useful because it could illustrate in a clear manner how different national models could be perfectly consistent with the Convention. She further said that the Friends' Outline also worked through the different attributes of the legal systems, notably those which could refer to property rights, as that notion was understood in different models, and the level at which the protection of investors was ensured. She concluded by stating that the initiative was good and should be encouraged and that the Legislative Guide was to be a non-binding instrument for emerging countries that would contain some of the topics addressed in the Sample Final Outline and some from the draft of the Friends' Outline.

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[7] *See* Annexe V (containing the Sample Final Outline from Annexe 1, UNIDROIT 2013 – S78B/CEM/3/Doc. 2).

[8] *See* Annexe VI (containing the Friends' Outline from Annexe 2, UNIDROIT 2014 – C.D. (93) 5).

43. The *representative of Germany* expressed appreciation for the preliminary work done by the informal working group and the Secretariat and noted that the draft outlines that had been provided would be a useful starting point for discussion. He emphasised that future work in this area should focus on private law issues and stated that the Sample Final Outline had provided a list of possible private law issues from a German law perspective, including, for example, items from securities law like the nature of securities, types, and transfer of securities, and items from company law like shares, voting rights, and dividends. Some of the listed items, however, had a regulatory or prudential element, or even focus. This was particularly true, for example, for obligations and liabilities of intermediaries. He stated that too much guidance on those issues might thus be outside the scope of UNIDROIT's mandate. He further stated that some of the items listed in the Friends' Outline might also be outside the mandate of UNIDROIT as well.

44. He said that the legal nature of the Legislative Guide should be dealt with first and he expressed support for what other delegations had already suggested at the last meeting of the Committee, namely that the Guide should be a compilation of information presenting different options in a neutral manner without drafting specific recommendations or even trying to harmonise issues that the Geneva Securities Convention did not harmonise. He then said that the Guide should not be about rules, principles, and recommendations, but provide an appropriate overview of existing approaches in various legal systems and traditions. He acknowledged that it would be challenging to draw a well-balanced picture of possibly very different approaches in common law and civil law jurisdictions given that there may be significant differences within those systems themselves. He concluded by noting that Germany had not been a member of the Committee, but would very happy to assist, if and whenever the Committee thought it may be of use.

45. The *Secretary-General* thanked the representative of Germany for the generous offer and welcomed it. He stated that it had always been the intention of those who conceived the Annotated Draft Outline and, in particular of the Secretariat, that the work was to be within the framework of the Geneva Securities Convention and to provide information and, only where strictly speaking appropriate and feasible, advice on how the rules of the Convention may best interconnect with the underlying legal system. By doing so, any regulatory methods should be very strictly avoided.

46. The *representative of Brazil* congratulated the Secretariat for the Annotated Draft Outline of the Legislative Guide. Regarding the Friends' Outline, she enquired about whether the Friends group included both members and non-members of the Committee. She stated that she had not yet had a chance to form an opinion on the Friends' Outline because it was just distributed and noted that that outline mentioned Brazil, so she wanted to take time to ensure that the references to Brazil's system were correct.

47. Regarding the title of the Guide ("Legislative Guide on Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets"), she provided three main comments. First, she enquired whether the title had been decided and whether the work to be undertaken would result in a legislative guide instead of, for example, principles.

48. Second, she drew attention to the terms "capable of enhancing trading of securities" and commented generally that she had understood the intent of the Guide to be to elaborate on practices, to prepare a roadmap for safe implementation of the Geneva Securities Convention, and to fill some gaps that appeared during the preparation of the Convention, while also finding room to exist independently from the Convention. She stated that, if this understanding was correct, then the term "enhancing trading" seemed to be in some ways incorrect because it was infrastructure, legal certainty, and legal frameworks that could be enhanced.

49. Third, she noted that, as titled, the Guide was supposedly only applying to or capable of enhancing trading in emerging markets and stated that this aspect seemed to be too restrictive.

The Colloquium, for example, had included discussions on how emerging economies were different than emerging markets, with different variables and stages. In this regard, she suggested that the title should be clarified as there was no reason to restrict the Guide to emerging markets and noted that the Committee was not only responsible for emerging market matters, but also for follow up and Geneva Securities Convention implementation issues.

50. The *representative of South Africa* stated that the Legislative Guide would be of great interest and very helpful. In agreeing with the representative of Brazil, she said that the title seemed to be slightly restrictive and that it should be considered further. She suggested that the term "intermediated securities" be incorporated into the title, as that would better align it to the Geneva Securities Convention and bring it within the scope of what was previously discussed. Even in non-emerging markets or developed countries, it was possible to find degrees of development, for example, in the areas of corporate government bonds and securities, so the relevance of the Guide should be as wide as the Convention. Regarding whether the Guide was to enhance trading or give practical examples and guidelines, she said that that issue should be debated further and noted that, as a starting point, the Friends' Outline appeared to accommodate all of the different holding models.

51. The *representative of the United States* expressed appreciation for the very helpful Annotated Draft Outline, noting that it was extremely useful to have the issues put on the table to allow consideration of the range of possible topics for the Legislative Guide. He emphasised the work that was done in classifying the topics according to whether they were hybrid, regulatory or private law matters and noted that some may have different views regarding what falls into each category. In agreeing with the representative of Germany, he stated that, generally, the focus of the work ought to be entirely on the private law matters as that was the particular area in which the Committee had expertise. He then stated that, also in agreement with what was mentioned earlier, the intent of the Guide was not the harmonisation of additional areas of law beyond what had been done in the Geneva Securities Convention, but the provision of a menu of possible options for modernisation rather than harmonisation. He stated that, for each topic, it would be useful to explain a range of options that various systems have taken and to explain the different possible approaches. He further stated that it would be useful for drafting to start out in a narrow manner with a particular core of topics and then expand to other topics later to the extent needed, once some progress on the core areas had been made. He noted that the Friends' Outline that had been distributed earlier appeared to be one possible approach to narrowing that list and was worthy of consideration.

52. The *representative of the European Commission* enquired about the drafting process since the last meeting in Rio in 2012 and sought clarification about whether the Annotated Draft Outline had been prepared by the Rio working group or by the UNIDROIT Secretariat.

53. The *Secretary-General* responded that the document had been developed by both members of the informal Rio working group and the UNIDROIT Secretariat. He explained that a certain group of States representatives and experts that participated in the Rio meeting had agreed to volunteer to do this work. He stated that, one of the leading forces, however, seemed to have been prevented from providing a very active contribution to the process and that, in the meantime, the Secretariat had, as its priority, the Netting Principles. As a result, the outcome of the process after Rio was that the Annotated Draft Outline was prepared by the Secretariat in consultation with those who had volunteered to participate at the Rio meeting.

54. He then addressed the title of the Legislative Guide, noting that the title was something normally adjusted to the content and that, at that point in time, the exact content was unknown. He stated that, as a matter of background, the same title has been used for years, specifically since it was added to the work program and that this time was before his own appointment as

Secretary-General. He further stated that he did not believe much thought had been given at that time to the title, but that the idea was to develop a guide to help countries to establish a legal framework favourable to promoting trading in securities. He expressed that, if he were ever permitted to have a personal preference, the work would be more in line with the draft Accession Kit, as a document explaining in further detail what was not covered by the Geneva Securities Convention, in the way of a menu of options. He provided the following example to be addressed: when the Convention refers to being effective against third parties, how is that translated into many legal systems in terms of property rights and other securities entitlements. He noted that the shorter list of topics in the Friends' Outline went in that direction and the Committee should keep an open mind on the title, suggesting that it might ultimately be called something like "Legislative Guide on Intermediated Securities" or more simply "Accession Kit to the Geneva Securities Convention." If the scope of work was reduced to what was on the Friends' Outline, he suggested that it would look more like an accession kit. If the scope was more expansive than that, he suggested that it then might deserve a self-standing title. He concluded by stating that the title should not hold up the discussion too much.

55. The *representative of the European Commission* expressed gratitude to the Secretary-General for his explanations and for clarifying that the objective was not to harmonise this field of law but to create a document that looks beyond the issues just covered by the Geneva Securities Convention and assists countries that would like to implement the Convention and modernise their laws. Having seen the title, however, she enquired whether there had been a debate in the informal Rio working group on the nature of these principles or rules because it seemed infeasible to draft a legislative guide without drafting any principles, the drafting of which would effectively constitute the selection of a certain policy option. Based on ten years of intensive work within the EU Commission together with member States to try to agree on policy choices regarding an integrated internal market, she questioned whether it was a feasible task to speak about principles or even rules in the context of this worldwide work.

56. The *representative of France* stated that, on the question of principles and rules, it was not the intention to give precise recommendations. Instead, it was more to guide and provide a menu of different possible options to apply. She further stated that the debate on the title should not be important now, if everyone agrees that the Legislative Guide is to be a presentation of different options and is not binding.

57. The *representative of the United Kingdom* stated that the Annotated Draft Outline was very extensive and that there was a focusing in the Sample Final Outline and then a further focusing in the Friends' Outline. Noting that the scope of the work needed to be defined, he said that, to the extent the Committee believed it should concentrate on issues flowing from or touched upon in the Geneva Securities Convention, then it would be very useful to highlight that at this stage because there was a danger of overly ambitious coverage of issues. He then agreed with the various interventions that had been made supporting the work as a menu of options, which would be of assistance to countries that wish to implement the Convention and not a legally binding text with established recommendations and principles.

58. The *Secretary-General*, having asked whether anyone else wished to intervene on this point, noted that there was an agreement around the table that the list of topics provided in the Annotated Draft Outline, reflecting the consultation that took place among those who participated in the Rio working group and put together by the Secretariat, was too ambitious. He further noted, however, that there had not been a discussion on specific topics and the exclusion of some of them, but suggested that such discussion be put aside. He stated that, based on the discussions, the will of the Committee was to focus on the list of topics in the Friends' outline and that this should be the starting point for further work. Recognising that some members had not had an opportunity to examine thoroughly the Friends' Outline, he submitted that there was nothing in it

that had not already been identified two years ago as matters immediately relating to the Geneva Securities Convention but not covered by it in detail. He noted, however, that the Friends' Outline was not organised in the way that the Secretariat would have structured it, but that it was clear that the document to be produced would reflect the variety of different schemes that exist under domestic law.

59. Regarding the use of principles and rules, he stated that there was no question that there would be a menu type of approach with options and alternatives to be explained, but that it would be impossible to prepare those menus without deriving from the Geneva Securities Convention certain principles. He further stated that these principles would be general and non-contentious, providing for example that "it is important for a country to ensure the integrity of the holding system." He said that quoting articles of the Convention was one possible way to derive principles from it, but acknowledged that this might not be the most useful way.

60. He then described the Friends' Outline, which called for discussion of the nature of the proper interest resulting from a credit and other transfers, and then explanation of the various ways of classifying that interest under domestic law. It would also address, based upon a suggestion made by EuropeanIssuers, systems that did not allow for a direct exercise of the rights arising out of securities and noted again that there were various models for this approach. He stated that the work would also include a discussion of the nature of assets covered by the definition of securities and a presentation of the various holding patterns around the world. He further stated that, if those were the topics included, then an appropriate title could be either "A Guide to the Implementation of the Geneva Securities Convention" or "A Legislative Guide on Intermediated Securities to Implement the Geneva Securities Convention."

61. He noted, however, that if a more expansive scope was envisioned for the Guide, then treatment of the relationship between the Geneva Securities Convention and insolvency law might be another topic to include. He suggested that this portion of the work could be prefaced by the following uncontroversial principle: "it is important for a country to ensure that the rights of the account holders are not jeopardised by the insolvency of the intermediary." The Guide could then address how this was achieved in insolvency law, for example by the German proprietary law approach, by special provisions such as in France and the United States, or by segregation of assets through the holding pattern.

62. Having described the document envisioned by the Secretariat at this stage, the Secretary-General asked whether that description and vision was satisfactory to the Committee. Such proposal having been accepted by consensus, he then solicited any specific comments. He concluded by suggesting that, regarding methodology, the informal Rio working group could build on the sample of issues in the Friends' Outline, which had already been included in the larger Annotated Draft Outline prepared of the Secretariat, and that the Rio working group should take into account the offers of participation that had been expressed earlier in the meeting.

63. The *representative of South Africa* stated that South Africa would very much like to participate in the work of the informal group.

64. The *representative of France* stated that France would also like to volunteer to participate in the work.

65. The *representative of Brazil* enquired about the composition of the informal Rio working group and whether the intent was now to start a new group at this time. She also enquired about the composition of the Friends of the Committee, asking who participated in the authorship of the Friends' Outline.

66. The *Secretary-General* referred to paragraph 47 of the report from the Rio meeting (UNIDROIT 2012 – Study LXXCIII B/CEM/2/Doc. 3), which reflects the composition of the Rio working group as including the Co-Chairs of the Committee, Brazil and China, along with South Africa, the United States, France, Japan, the Russian Federation, and Switzerland. He then noted those additional countries that had expressed an interest in participating in that group, which included Germany and Italy.

67. He then proposed that, to advance the work with this group, smaller sub-groups could be established for each topic or the entire group could direct the drafting process for each topic, both with consultations by email or other processes ahead of the next meeting of the Committee. He stated that, after the meeting, the Secretariat would contact the volunteers to agree on a timetable for precise topics and assign tasks with a view to have a draft that could be seen by the Committee by the next meeting. He acknowledged the intergovernmental and non-governmental organisations in attendance and stated that, if they were willing to provide advice, they could be included on the lists of consultants for this work. He then asked whether this proposal was agreeable to the Committee. Having observed consensus, he then solicited any further comments.

68. The *representative of Brazil* stated that, before considering content, she was unsure whether there had been agreement about the countries to which the Legislative Guide would be addressed. She agreed with the Secretary-General that the final title of the work had to do with its content, but stated that the final purpose of the work would be important guidance for the informal working group.

69. The *Secretary-General* stated that UNIDROIT should produce work that is usable by everyone who wishes to use it. Noting that the label "emerging markets" came from the Diplomatic Conference, he stated that the Committee was just following a denomination used in the past and that the work did not need to be exclusively geared to "emerging markets." He then solicited any further comments from the Committee on the list of issues and the plan to advance work on the Legislative Guide. With no further interventions, the Secretary-General concluded the discussion of the Guide.

Agenda item No. 8: Other business

70. No other questions having been raised, *the Co-Chair of the Committee*, a *representative of China*, closed the meeting.

ANNEXE I

LIST OF PARTICIPANTS IN THE COMMITTEE MEETING/
LISTE DES PARTICIPANTS A LA REUNION DU COMITE

LIST ESTABLISHED BY UNIDROIT ON THE BASIS OF OFFICIAL ANNOUNCEMENTS / *LISTE ETABLIE PAR UNIDROIT SUR LA BASE D'INFORMATIONS OFFICIELLES*

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ANNEXE II

ANNOTATED AGENDA

1. Opening of the meeting

2. Adoption of the Agenda

3. Colloquium on Financial Markets Law

4. Consideration of follow-up and promotional measures to implement the UNIDROIT Convention on Substantive Rules for Intermediated Securities

5. Consideration of State legislative measures to implement the UNIDROIT Convention on Substantive Rules for Intermediated Securities, in particular in emerging countries

6. Consideration of the preparation of a Legislative Guide on Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets

7. Consideration of activities to promote the dissemination and national implementation of the UNIDROIT Principles on the Operation of Close-Out Netting Provisions

8. Other business

Annotations to the Agenda

Item No. 1 – Opening of the meeting

1. The Committee on Emerging Markets Issues, Follow-Up and Implementation (hereinafter "the Committee"), established by the diplomatic Conference to Adopt a Convention on Substantive Rules regarding Intermediated Securities, will hold its third meeting in Istanbul, on 11–13 November 2013. The meeting will be opened on Monday, 11 November 2013, at 9 a.m., and will close on Wednesday, 13 November, 2013, at 6 p.m. The venue of the meeting will be The Marmara Hotel (Taksim) [http://taksim.themarmarahotels.com]. Other practical and logistical information can be accessed on the UNIDROIT website at: http://www.unidroit.org/english/studies/study78b/main.htm.

2. The first two days of the meeting (11 and 12 November 2013) will take the form of an open Colloquium on Financial Markets Law (agenda item 3). The third day of the meeting (13 November 2013) will consider the other items of the provisional Agenda, and will be open to the members of the Committee, delegates of other States, representatives of organisations, and invited observers.

Item No. 3 – Colloquium on Financial Markets Law

3. The Colloquium on Financial Markets Law, to be held on 11-12 November 2013, will consider action taken by emerging markets to create a favourable environment for trading in intermediated securities, with particular emphasis on enhancing financial integrity under national law. The Colloquium will discuss the disparities between national law and the UNIDROIT Convention on Substantive rules for Intermediated Securities (hereinafter "the Geneva Securities Convention" or " the Convention"), the need for national and cross-border insolvency rules, the potential effect of corporate governance systems on securities trading, and the role of specialized investment instruments. The Colloquium will also discuss the impact of the UNIDROIT Principles on the Operation of Close-Out Netting Provisions (hereinafter "The Principles on Close-Out Netting") in reducing systemic and counter-party risk in emerging markets and the manner in which they may be incorporated into national law. A detailed programme will be circulated in due course.

Item No. 4 – Consideration of follow-up and promotional measures to implement the UNIDROIT Convention on Substantive Rules for Intermediated Securities

4. The diplomatic Conference that approved the Geneva Securities Convention, requested UNIDROIT, in its capacity as Depositary of the Convention, to make all appropriate efforts to organise activities with a view to promoting awareness and understanding of the Convention and assessing its continued effectiveness in light of relevant contemporary developments in market circumstances and trends in market regulation, and also with a view to encouraging the Convention's early entry into force and its signature, ratification, and acceptance (UNIDROIT 2009 - CONF. 11/2 – Doc. 41, Resolution No. 3). The Committee and the Secretariat will present the follow-up and promotional measures taken to implement the Convention.

Item No. 5 – Consideration of State legislative measures to implement the UNIDROIT Convention on Substantive Rules for Intermediated Securities, in particular in emerging countries

5. The UNIDROIT Secretariat prepared an Accession Kit intended to advise potential contracting parties on how to best incorporate its provisions into their domestic legal systems, as a first step to assist States in the implementation of the Convention (UNIDROIT 2010 - S78B/CEM/1/Doc. 3). An

initial draft of the Accession Kit was submitted to the Committee at its first session in 2010, which requested dividing the Kit into two separate documents: one, a declarations Memorandum (UNIDROIT 2011 – DC11/DEP/Doc. 1)); and, two, a document on Information for Contracting States in respect of the Convention's references to sources of law outside the Convention (UNIDROIT 2010 - S78B/CEM/2/Doc. 2). The latter document was presented and discussed at the second meeting of the Committee in 2012 and, at the request of the Governing Council, further developed based on comments from experts and other organisations.

6. The Committee will receive State reports on the legislative measures taken to incorporate the provisions of the Convention into State legal systems, with particular emphasis on emerging markets, will discuss the utility of the document on Information for Contracting States in respect of the Convention's references to sources of law outside the Convention (UNIDROIT 2010 - S78B/CEM/2/Doc. 2) in national implementation efforts, will finalize the draft of the document, and will examine the manner in which it may be incorporated into a Legislative Guide (agenda item 6).

Item No. 6 – Preparation of a Legislative Guide on Principles and Rules Capable of Enhancing Trading in Securities in Emerging Markets

7. The UNIDROIT General Assembly, at its 65th session in 2009, following the diplomatic Conference that approved the Geneva Securities Convention, included the drafting of a "legislative guide containing principles and rules capable of enhancing securities trading in emerging markets" (A.G. (65) 10, §§ 18 et 26) in the UNIDROIT Work Programme. The Governing Council, during its 89th session in May 2010, then requested the examination of potential efforts to draft a Legislative Guide, assigning medium/low priority until drafting on the Principles on Close-Out Netting was completed.

8. Upon adoption of the Principles, at its 92nd session in May 2013, the Governing Council took note of the advances achieved at the first and second meetings of the Committee and elevated the priority given to the work on drafting the Legislative Guide. The Council also encouraged the Committee to establish the scope, content and methodology at its third meeting in November 2013. For that purpose, the Committee, at its second meeting, set-up an informal working group to draft a proposal on these issues for consideration by the full Committee at the third meeting.

Item No. 7 – Consideration of activities to promote the dissemination and national implementation of the UNIDROIT Principles on the Operation of Close-Out Netting Provisions

9. The UNIDROIT General Assembly included preparation of principles and rules on netting of financial instruments in the triennial Work Programme of the Organisation as a matter of high priority, at its 67th session, in December 2010. The Secretariat convened a Study Group, which presented draft Principles to a Committee of governmental experts in 2012, which in turn finalised draft Principles on the Operation of Close-out Netting Provisions at it second session in February 2013 and presented them for approval of the Governing Council at its 92nd session in May 2013. The Governing Council commended the Committee of governmental experts for completion of the draft Principles on the Operation of Close-out Netting Provisions and adopted them, together with the accompanying comments. The Governing Council also requested the Secretariat take steps to promote the widespread dissemination and national implementation of the Principles, to be discussed by the Committee.

– END –

ANNEXE III

COLLOQUIUM[9]
11 – 13 November 2013

ENHANCING FINANCIAL INTEGRITY:
THE GENEVA CONVENTION AND THE UNIDROIT PRINCIPLES ON CLOSE-OUT NETTING UNDER NATIONAL LAW

Marmara Hotel Taksim
Istanbul, Turkey

11 November 2013

8:30-9:30am **Registration**

9:30-10:00am **Opening Session**

- Welcome Address: *Vahdettin Ertaş, Chairman, Capital Markets Board, Turkey*
- Opening Remarks: *José Angelo Estrella-Faria, Secretary-General, UNIDROIT*

10:00-1:00pm **SESSION 1: Intermediated Securities in the National Law of Emerging Markets**

(part one) GENERAL APPLICATION OF THE CONVENTION: 10:00-11:15am

- Moderator: *Francisco Javier Garcimartin, Professor, Universidad Autonoma de Madrid, Spain*
- Application and Implementation of the Geneva Securities Convention in Emerging Markets: *Hideki Kanda, Professor, University of Tokyo, Japan*
- Transnational Securities Law, beyond the Geneva Securities Convention: *Thomas Keijser, Senior Researcher, Radboud University, The Netherlands*
- Intermediated Securities Loans and Repurchase Transactions in light of the Geneva Securities Convention: *Thiebald Cremers, Legal Advisor Public Affairs, BNP Paribas, Brussels*

– Comments/Questions by Participants

11:15-11:30am **Coffee break**

[9] The presentations, as far as authorised by the speakers, are to be found on the UNIDROIT website at the following page: <http://www.unidroit.org/english/documents/2012/study78b/s-78b-cem02-programme-e.pdf>.

(part two) NATIONAL APPLICATION OF THE CONVENTION: 11:30-1:00pm

- Implementation of the Geneva Securities Convention's Principles and Concepts in the South African Financial Markets Act and Central Depository Rules: *Jeannine Bednar-Giyose, Director, Fiscal and Intergovernmental Legislation, National Treasury; and, Maria Vermaas, Head, Legal and Regulatory, Strate (South Africa's Central Securities Depository), South Africa*
- Securities in Book Entry Form under Greek Law: Recent Developments in the spirit of the Geneva Securities Convention: *Dimitris Tsibanoulis, Legal Counsel, Bank of Greece and Managing Partner, Tsibanoulis and Partners, Greece*
- Operation of Intermediated Securities in Turkey: Best Practices and Challenges: *Kubilay Dağlı, Chief Expert, Department of Intermediary Activities, Capital Markets Board, Turkey*
- Harmonization of Turkish Law with EU Legislation in the area of Intermediated Securities in light of the new Capital Markets Law: *Aslı Küçükgüngör, Chief Expert, Strategy Development Department, Capital Markets Board, Turkey*

– Comments/Questions by Participants

1:00-2:30pm **Lunch break**

2:30-4:15pm **SESSION 2: Insolvency of Securities Intermediaries in the National Law of Emerging Markets**

- Moderator: *Charles Mooney, Professor, University of Pennsylvania, United States*
- Regulatory and Supervisory Measures to Prevent Intermediary Insolvencies and Shortfalls in Securities: *Charles Mooney, Professor, University of Pennsylvania, United States*
- The Insolvency of Lehman Brothers: *Guy Morton, Freshfields, Bruckhaus Deringer, United Kingdom*
- Insolvency of Securities Intermediaries in the National Law of Emerging Markets: *Elsie Addo Awadzi, Legal Department, International Monetary Fund*
- Insolvency of Securities Intermediaries under Turkish Law: *Nusret Çetin, Senior Legal Expert, Department of Legal Affairs, Capital Markets Board, Turkey*

– Comments/Questions by Participants

4:15-4:30pm **Coffee break**

4:30-6:00pm **SESSION 3: Corporate Governance and Securities in the National Law of Emerging Markets**

- Moderator: *Guy Morton, Freshfields, Bruckhaus Deringer, United Kingdom*
- Corporate Governance and Shareholder Rights in Emerging Markets: *Melsa Ararat, Professor, Sabanci University, International Corporate Governance Network*
- Promoting a Standard Approach via the Corporate Governance Development Framework: *Deborah Eskinazi, International Finance Corporation, World Bank Group*
- Corporate Governance Standards in the European Union: *Susannah Haan, Secretary General, EuropeanIssuers, Brussels*

- Corporate Governance in Turkey: *Ayça Sandıkçıoğlu, Chief Expert, Corporate Finance Department, Capital Markets Board, Turkey*

– Comments/Questions by Participants

12 November 2013

10:00-1:00pm **Session 4: Specialized Investment Instruments in the National Law of Emerging Markets**

(part one) SPECIALIZED INVESTMENT INSTRUMENTS: 10:00 -11:15am

- Moderator: *Klaus Löber, Bank for International Settlements, Switzerland*
- Commercial Trust in Common Law and Civil Law Jurisdictions: *Maria Chiara Malaguti, External Counsel, Ministry of Foreign Affairs, Italy*
- Commercial Trust Uses in Emerging Markets: *Hideki Kanda, Professor, University of Tokyo, Japan*
- Collective Investment Schemes under Turkish Legislation and Practice: *Selin Silahyürekli, Expert, Department of Institutional Investors, Capital Markets Board, Turkey*

– Comments/Questions by Participants

11:15-11:30am **Coffee break**

(part two) SPECIALIZED INVESTMENT INSTRUMENTS: 11:30-1:00pm

- Exchange-Traded Funds (EFTs) in Emerging Markets: *Jose Maria Garrido, Senior Counsel, The World Bank*
- Asset-Backed Securities under Brazilian Legislation and Practice*: Nora Rachman, Securities Expert, Brazil*
- Non-Intermediated Securities in Emerging Markets: *Spyridon Bazinas, Senior Legal Officer, United Nations Commission on International Trade Law*
- Swaps and Derivatives in Emerging Markets: *Peter Werner, Senior Director, International Swaps and Derivatives Association, United Kingdom*

– Comments/Questions by Participants

1:00-2:30pm **Lunch break**

2:30-5:00pm **Session 5: Close-Out Netting in the National Law of Emerging Markets**

(part one) GENERAL APPLICATION OF THE UNIDROIT PRINCIPLES : 2:30-3:45pm

- Moderator: *Rose Mary Abraham Kurisummoottil, Deputy Director, Capital Markets Division, Ministry of Finance, India*
- Close-out Netting Impact on Systemic and Counter-Party Risk: *Klaus Löber, Bank for International Settlements, Switzerland*

- Core Features of the UNIDROIT Principles on Close Out Netting: *Philipp Paech, London School of Economics, United Kingdom*

– Comments/Questions by Participants

3:45-4:00pm **Coffee break**

(part two) NATIONAL APPLICATION OF THE UNIDROIT PRINCIPLES : 4:00-5:00pm

- Enforceability of Close-Out Netting Provisions: What is at Stake and What are the Proposed Principles: *Alban Caillemer du Ferrage, Partner, Jones Day and Professor Associate, University of Paris 2, France*
- Possible Effects of Application of Close-Out Netting Provisions in Turkey: *Ümit Yayla, Managing Partner, Yayla and Guven Law Firm, Turkey*

– Comments/Questions by Participants

5:00-5:30pm **Closing Session**

- Closing Remarks: *José Angelo Estrella-Faria, Secretary-General, UNIDROIT*
- Closing Remarks: *Wenjie Niu, Co-Chair, Committee on Emerging Markets Issues*
- Closing Remarks: *Vahdettin Ertaş, Chairman, Capital Markets Board, Turkey*

ANNEXE IV

ANNOTATED DRAFT OUTLINE

LEGISLATIVE GUIDE ON PRINCIPLES AND RULES CAPABLE OF ENHANCING TRADING IN SECURITIES IN EMERGING MARKETS

Explanatory Note

1. The present document provides an annotated draft outline for a possible legislative guide on principles and rules capable of enhancing trading in securities in emerging markets. The task of elaborating a legislative guide (or other international instrument on the topic) was added to UNIDROIT's Work Programme by the General Assembly at its 65th Session and was assigned to the Committee on Emerging Markets issues (the "Committee). The Committee itself was established by the diplomatic Conference that adopted the UNIDROIT Convention on Substantive Rules for Intermediated Securities in 2009 (the "Convention").

2. The Committee has met on two occasions: the first in Rome in 2010 to discuss the follow-up to the Convention and feasibility of a legislative guide; and the second in Rio in 2012 to discuss possible legislative measures to implement the Convention and incorporate it into domestic law. The Governing Council of UNIDROIT took note, with great interest, of the results of the first two meetings, and elevated the priority given to this work at its 92nd session in May 2013, encouraging the Committee, at its third meeting, to be held 11-13 November in Istanbul, to establish the scope, content and methodology for the legislative guide or other instrument.

3. The present annotated outline was drafted to assist the Committee in that task. It provides a list of topics that are integral to viable securities trading and which can be useful to drafting a legislative guide or principles on securities trading in emerging markets, as well as in the implementation of the Convention. The topics were chosen for the manner in which they associate with the various aspects of a working securities market, including aspects such as the creation of the market, oversight of the exchange process, the securities themselves, operation of the exchange, and other related topics.

4. The legal issues involved in a securities exchange are myriad, such that they involve regulation/public law, private law, and sometimes a hybrid of both. Due to the myriad nature of the issues, the outline has been modified so that each subtopic corresponds to a text-type, intended to mark the nature of the topic (see legend below).

5. The outline is also accompanied by annotations which provide some explanatory information on the topics accordingly to four criteria: whether the issue is regulatory or not, whether it is public or private law, whether UNIDROIT or another international organization has worked (or is currently working) on the issue, and whether the issue could be completed by the Committee within a timeframe established by the Governing Council for drafting of the proposed instrument.

6. Topic Legend: In the text of the draft outline, regulatory and public law items are represented in gray text. Public and private law hybrid items are represented in black text. Private law items are represented in bold text.

-- Topic Legend --	
Regulatory/Public Law:	Gray Text
Hybrid (Public/Private) Law:	Black Text
Private Law Items:	**Bold Text**

I. CREATION

a. Activities of trade organizers in the securities markets
b. Establishment of a stock (or other market) exchange and rights of its members
c. Stock exchange charter
d. Stock exchange rules
e. Requirements of a stock exchange
f. Organization of trading on a stock exchange
g. Regimented markets and non-regimented markets
h. Nature / types of securities
i. Role of intermediaries
j. Stages of issuance of securities in public and private placement
   i. Process for determination of initial price
   ii. Contractual and propriety relationships between issuer, intermediaries & underwriters, and account holders
k. Registration of a securities issue and a securities prospectus
l. Requirements to a securities prospectus
m. Private contracts

II. OVERSIGHT

a. Supervision of intermediaries
b. Regulated markets vs. unregulated markets
c. Issuer regulation
   i. Information disclosure
   ii. Prohibition of insider information
   iii. Parameters of advertising information in the stock market
   iv. Regulation of the securities market
      1. Government agency that oversees regulation of market
      2. Self-Regulatory Organizations
d. Governmental agencies that control market oversight
e. Investor associations
f. Issuance process
g. Independent auditing
h. Framework for disclosure, prevention of insider trading, and other forms of market abuse and conduct of market participants

III. SECURITIES

a. Nature of Securities
   i. Intermediated / non-intermediated securities
   ii. Certificated / non-certificated securities
b. Nature of account holder rights (including proprietary rights) in intermediated securities
c. Types of Securities

i. Equity
1. **Shares**
2. **Collective Investment Schemes**
3. **Mutual funds**
4. **Trusts**
5. **Special Purpose Vehicles**

ii. Debt
1. **Corporate bonds**
2. **Municipal bonds**
3. **Government bonds**
4. **Treasury bills**

iii. Derivatives
1. **Swaps**
2. **Options**
3. **Futures**
4. **Other derivatives**

iv. Investment certificates
v. Savings (deposit) certificates
vi. Promissory notes
vii. Asset-backed securities
viii. Commodities

IV. OPERATIONS

a. Equal access of market participants
b. Holding Infrastructure
   i. Condition of issuing shares/securities
   ii. Central securities depository
   iii. No-look-through
c. Custody of securities
   i. Registration of securities
   ii. Ownership of securities
d. Transfer of securities
   i. Convention
e. Non-convention law
f. Role and significance of collateral
g. Securities settlement systems and securities clearing systems
h. Voting rights / dividends, interest, and other distributions
i. Fungibility and Segregation of securities
   i. Fungibility of securities; interchangeable shares, but with ownership attachment guaranteed in holding;
   ii. Different segregation models.

V. RIGHTS AND OBLIGATIONS OF THE PARTIES

a. Rights
   i. Investors (account holder/shareholder)
      1. Attached rights (shareholder)
         a. Voting rights
         b. Income distribution / dividends
         c. Control over board of directors
         d. Preference in stock subscription
      2. Right to dispose of securities (account holder)

3. Right to use as collateral for a loan (account holder)
4. Right to hold other than with intermediary

ii. Transfer and creation of interests in favor of third parties
1. Intermediated securities
a. Creation – third party effectiveness
b. Transfer – third party effectiveness
c. Non-consensual interests
d. Form of security devices (including title transfer)
e. Priority
f. Innocent acquisition
g. Enforcement
2. Non-intermediated securities
a. Creation – third party effectiveness
b. Transfer – third party effectiveness
c. Non-consensual interests
d. Form of security devices (including title transfer)
e. Priority
f. Innocent acquisition
g. Enforcement

iii. Intermediaries
1. Possible indemnification situations

b. Obligations
i. Intermediaries
1. Holding of sufficient securities
a. Correction methods
b. Loss sharing methods
2. Segregation of securities
3. Allocation of securities
4. Information disclosure
5. Pass through of dividends, interest, and other distributions

ii. Issuer actions
1. Information disclosure requirements
a. Identification of relevant parties
b. Financial reporting
c. Material event reporting

c. Liability
i. Account Holders
1. Fraud
2. Insider trading
3. Prohibited trading practices

ii. Issuers
1. Fraud
2. Publication
3. Prohibited trading practices
4. False, misleading or deceptive statements, promises and forecasts
5. Insider trading
6. Failure to disclose information

iii. Intermediaries
1. Fraud
2. Prohibited trading practices
3. False, misleading or deceptive statements, promises and forecasts
4. Failure to disclose information
5. No-look-through

iv. Companies
1. Fraud
2. Prohibited trading practices
3. Insider trading
4. False, misleading or deceptive statements, promises and forecasts
5. Failure to disclose information

d. Sanctions
i. Administrative sanctions
ii. Criminal sanctions
iii. Administrative/penal liability

e. Insurance and comparable schemes

VI. INSOLVENCY

a. Administration
i. Parties
1. Intermediary
2. Account holder
3. Corporation
ii. Timing of process
iii. Types of proceedings
1. Rehabilitation
2. Liquidation
iv. Insolvency administration

b. Substantive issues
i. Effectiveness of interests in insolvency
1. Intermediary v. account holder
2. Intermediary v. third party
3. Account holder v. third party
ii. Account holder v. other account holders
iii. Loss-sharing in insolvency
iv. Set-off
v. Enforcement, top-up and substitution, avoidance
1. Recognition of title transfer
2. Enforcement of security interest
3. Protection of top-up and substitution
vi. Account holder claims in insolvency of intermediary
1. Segregation
2. Account holder priority
3. Shortfall
4. Avoidance
5. Loss sharing / distribution
6. Asset recovery

c. Cross border insolvency

VII. CONFLICT OF LAWS

a. Issue in cross-border transactions
b. Hague Securities Convention
c. Choice of law rule
d. Fall-back rules
e. Third-party rights
f. Change of the applicable law
g. Insolvency proceeding

ANNOTATIONS

I. CREATION

1. The first step in securities trading is creating a securities exchange. Its creation may develop among private transactions, but eventually it falls under the control of a State, thus making it public law. Not all parts of the creation process are entirely of public concern, however.

2. Topics I (a)-(g) and (k)-(l): The majority of the issues involved in the creation of the securities exchange are non-regulatory in nature, but are dealt with by State authorities, or parties designated by the State. This means that these issues are public law and fall outside UNIDROIT's traditional scope of activities.

- *Non-regulatory, public considerations. Not covered by UNIDROIT and may take over two to three years to complete.*

3. Topics I (h)-(i): The nature/types of securities and the role of intermediaries are private law issues, as they deal with the choice an issuer makes on what security to issue and the contractual activities of the intermediary in a securities exchange. Both issues are dealt with directly in the Geneva Securities Convention. Since there has been prior work done on the issues, it is likely they could be dealt with within the two-year timeframe.

- *Non-regulatory, private law issues. Covered by UNIDROIT.*

4. Topic I (j): The stages of the issuance process is not an issue of regulation, but more an issue involving both public and private law. The State, or State-designated parties, develops the process, and private parties use it in individual cases or transactions. The issue has not readily been handled by another international organization, nor has UNIDROIT dealt with it directly; however, the issue is one vital to a securities exchange and has been successfully implemented by many nations. For that reason.

- *Non-regulatory, hybrid law issue. Not covered by UNIDROIT or other organizations.*

5. Topic I (m): Private contracts can be many things, but in this case, the issue deals with the contract between an exchange and a member. Exchanges are run, day-to-day, by members of the exchange. These members have certain obligations and benefits that are put into place by a contract between the parties. The issue has not been dealt with by other international organizations, though much like the stages of the issuance process, many nations have handled the issue in successful implementations of securities exchanges.

- *Non-regulatory, private law issue. Not covered by UNIDROIT or other organizations.*

6. Topic I (Creation), concerns the general framework of an efficient, modern securities market. Without dealing with the process behind the creation of a securities market, there is no possibility a market can operate in an understandable and acceptable manner. There are issues that the State deals with directly and are outside the scope of a possible legislative guide. However, there are other issues involved with the creation of a securities market that the Committee may consider.

II. OVERSIGHT

7. Oversight deals with the regulation of the securities market, including disclosure, regulation, and process. The aim is to initially set up a system and to continually observe it for inefficiencies or illegal activity on the part of the participants.

8. Topics II (a)-(d) and (g)-(h): The vast majority of issues involving oversight of a securities market are regulatory in nature, thus meaning that they are public law and handled by the State for implementation and for operation. Since these issues are public law, and also other international organizations.

- *Regulatory, public law issues. Not covered by UNIDROIT.*

9. Topic II (e): There are, however, exceptions to all oversight issues being purely the realm of public law and regulation. One of the issues is investor associations. These associations are comprised of private parties that may operate to provide advice, support, and a limited amount of self-regulation for the securities exchange participants. Because an association is an agreement between parties, it does not directly fall under public law considerations. Investor associations are not covered by international organization work.

- *Non-regulatory, private law issue.*

10. Topic II (f): The issue of a securities exchange having a known and protected issuance process is not strictly regulatory in nature, and, since it involves private parties issuing securities to other private parties through the issuance process, it is not strictly a public law consideration. As such, a known and protected issuance process is a hybrid between public and private law. It has not been covered by previous multilateral work; yet, since the issuance process is a known quantity in already existing and functioning securities exchanges, it is likely that the committee could handle the issue within a compressed timeframe.

- *Non-regulatory, hybrid law issue. Not covered by multilateral work.*

11. Topic II (Oversight) generally implies State regulation, traditionally outside the scope of the Committee's work. However, there are sub-issues within oversight that may, instead, have private law implications. These issues have important consequences that may interest the Committee.

III. SECURITIES

12. Securities are the heart of a securities trading. While the State may take interest in creating and overseeing a securities exchange, private parties (investors, intermediaries, and issuers) are focused on the intricacies of the what, the how, and the why of the securities. Individual parties make the choice of securities, whereas the securities' form (or creation of the form's parameters) is set up by the organization/State that has created the system.

13. Topics III (a)-(c): The nature of the securities, the nature of the shareholder's rights in intermediated securities, and the types of securities deal with property and contract law, meaning they fall under traditional private law interests and previous UNIDROIT work, including the Geneva Securities Convention. IOSCO has also addressed securities. This means that much of the groundwork of the issue is completed and well documented, though the more complicated types of securities, such as CIS and derivatives, can prove be challenging and require more time to include in a legislative guide.

- *Non-regulatory, private law issues. Covered by UNIDROIT.*

14. Topic III Securities are the essential tool of a securities market. It is vital, if the market participants are to accept the market, the securities must be clearly defined and with the legal allowances and constraints of the securities known to the participants.

IV. OPERATIONS

15. Securities market operations can be covered by both private and public law. The private law aspect of operations is the property/contract law that applies to the ownership and holding of the securities, either by the intermediary or by the owner of the securities. Public law concerns how the system ensures adequate property protection during transfer/exchange of securities, how the securities exchange handles property rights in terms of the holding process (no-look through, central securities depository, etc.), an efficient and monitored securities settlement system/clearing system, and fungibility/segregation of securities.

16. Topics IV (a)-(b): Equal access to the market and the holding structure within a market are regulatory in nature. The State sets the parameters of access to a securities market through oversight and regulation, while it implements the securities holding structure through legislation. These two issues are public law and outside the traditional scope of a legislative guide on private law issues.

- *Regulatory, public law issues. Not covered by multilateral work.*

17. Topics IV (c)-(e) and (h): Custody of the securities, the transferring of those securities, securities role as collateral in a transaction, and the fungibility and segregation of those securities are all private law matters. These topics are directly involved in the transactions and contracts between parties. Furthermore, these issues are covered extensively in the Geneva Securities Convention, with additional work by other international organizations, such as the EU, FBO, IOSCO, and the G30.

- *Non-regulatory, private law issues. Covered by the Geneva Securities Convention.*

18. Topics IV (f)-(g): Securities settlement and clearing systems, along with the voting rights and interests associated with the securities, are a hybrid of public and private law considerations. The State sets up the settlement and clearing systems, oversees the operations, but leaves the matter to other parties. The voting rights and interests associated with the securities are partially statutorily established by the State, but can be enhanced through contractual negotiations by the parties in the transaction. UNIDROIT has handled the securities settlement and clearing systems issue before, whereas no international organization has directly dealt with the voting rights and other interests associated with the securities. However, there is abundant information available on these issues and several international organizations and associations are covering this work, including the International Finance Corporation of the World Bank and the OECD.

- *Non-regulatory, hybrid law issues.*

19. If the creation of the market is about building the host by which the market operates, then Topic IV – Operations concerns the circulatory system of the market. The issues found under the operation of a securities market range from regulation, to a mix of State and private interests, to finally the interactions between private parties.

V. RIGHTS, OBLIGATIONS, AND LIABILITIES

20. Rights are those benefits and privileges associated with ownership or possession of securities. These rights fall under property and contract law, thus rendering them private law matters. However, there are public law considerations as to how these rights are statutorily created, recognized, and distributed. There are minimum rights associated with ownership and/or possession, but these rights can be enhanced through contractual negotiations. Yet, rights are only part of the package for investors, intermediaries, and third parties. Just as rights are associated with ownership or possession of the securities, obligations and liabilities provide important

additional considerations. All parties may have obligations set by statute, property law, or by contract. These obligations may then lead to liabilities on the part of the party for bad management or wrongdoing, including such things as fraud and failure to disclose information. Finally, there are purely regulation/public law issues of State sanctions and insurance structure. One involves State functions to establish remedies and penalties, while the other is a framework allowing for participants to protect themselves against the actions of another party in a transaction or in the securities exchange.

21. Topic V (a): Rights are a hybrid of public and private law, since they are initially created and recognized by the State. There are the rights associated with investors, due to contract and property law considerations. There are also rights that may be attributed to intermediaries and third parties (such as those future investors who are in the process of negotiating the purchase of the securities). Multilateral organizations have dealt with this issue before.

- *Non-regulatory, hybrid law issue. Covered by UNIDROIT.*

22. Topic V (b): As previously stated, obligations are a hybrid of public and private law. There are statutory obligations on the part of participating parties to a securities transaction, just as there are contractual obligations negotiated by parties involved. Just like rights, obligations are discussed under the Geneva Securities Convention, and by the Hague Convention and CPSS.

- *Non-regulatory, hybrid law issue. Covered by UNIDROIT.*

23. Topic V (c): Liabilities follow in the wake of obligations. Liabilities are a hybrid issue, with certain liabilities being created by the State through legislation and other liabilities being created through a contract. Liability, like rights and obligations, has previously been discussed by UNIDROIT and other international organizations.

- Non-regulatory, hybrid law issue. Covered by UNIDROIT.

24. Topics V (d)-(e): Sanctions and the insurance structure are regulatory in nature and, thus, not within the expected scope of a private law instrument. Furthermore, these issues have not been handled by other international organizations. As there is no prior discussion existing for these issues, it is possible any work on the topic would require lengthy study.

- Non-regulatory, public law issues. Not covered by UNIDROIT.

25. Topic V, Rights, Obligations and Liabilities are interconnected, and fall under both private and public law. The property rights (and associated obligations) are attached to the securities throughout the transaction and ownership process. It is important that these rights and obligations are clearly outlined and known to participants before, during, and after the transaction. Obligations are similar to the rights associated with securities, but focused instead on the obligations of those parties involved. Obligations can be attached to investors, intermediaries, or even third parties. A large part of an efficient securities market is also issuer disclosure requirements. Liabilities are associated with improper behaviour by one of the transaction's participants, such as fraud, failure to disclose information, or contractual liabilities associated with breach of contract

VI. INSOLVENCY

26. Insolvency is a key vital complement to a healthy securities market. There will never be a time where all participants will be financially viable/healthy, and it is important that there be an orderly process to take care of parties in case of insolvency. Otherwise, the complexity of an insolvent intermediary or investor could damage or plague a securities market.

27. Topic VI (a): The administration of the insolvency process is almost entirely a function of the State. As such, it is a public law topic, though it is partially covered by UNIDROIT in the Geneva Securities Convention, and by UNCITRAL.

- Non-regulatory, public law issues. Covered by UNIDROIT.

28. Topics VI (b)-(c): Insolvency involves both private and public law. General parameters are set up by the State, part of the process is operated and overseen by the State, but there are still private law considerations between the various parties involved, such as between the owner of the security and an intermediary, or the investor and a third party. The issue of insolvency has been handled by in the Geneva Securities Convention, and by UNICITRAL.

- *Non-regulatory, hybrid law issues. Covered by UNIDROIT.*

29. Topic VI on Insolvency is a vital component of any instrument which intends to promote securities trading. No matter how successful a securities exchange can be, there must be in place a framework to deal with the eventuality that a party in a transaction will no longer be able to uphold its part of a transaction. As a result, a functional framework must provide for the orderly arrangement of payments under local law.

VII. CONFLICT OF LAWS

30. A conflict of laws system allows the parties to a transaction to determine (or have determined by a third party) relevant jurisdictional and choice of law issues during a conflict between parties, when the transaction involves cross-border movements and foreign law. The Hague Conference on Private International Law has previously examined the issue of applicable law and in 2006 adopted the Convention on the Law Applicable to certain rights in respect of Securities Held with an Intermediary. For further information, please consult the Hague Conference webpage at: http://www.hcch.net/index_en.php?act=conventions.text&cid=72.

ANNEXE V

SAMPLE FINAL OUTLINE

Note on Sample Outline

The sample outline is considerably narrower focused than the draft outline. For the most part, the topics removed from the sample outline are public law or regulatory issues, thus meaning they are not necessarily a primary concern for private law unification. These topics include much of the creation topic, all of oversight, parts of operations, rights and obligations, and insolvency. Other topics were removed from the sample outline because they have been extensively worked on by other international organizations. For instance, UNCITRAL has extensively worked on insolvency, while the Hague Conference has extensively worked on conflict of law issues. Finally, several topics and subtopics could be considered secondary issues towards the overall goal of a legislative guide for establishing a securities exchange in an emerging market, such as the issue of liabilities. Liabilities are the next step after the rights and obligations of the parties have been established. Using these considerations, the draft outline has, as an example, had select topics removed. This is only a sample outline, and by no means implies a preferred final list of topics.

I. CREATION

a. Nature / types of securities
b. Role of intermediaries
c. Stages of issuance of securities in public and private placement
    i. Process for determination of initial price
    ii. Contractual and propriety relationships between issuer, intermediaries & underwriters, and account

II. SECURITIES

a. Nature of Securities
    i. Intermediated / non-intermediated securities
    ii. Certificated / non-certificated securities
b. Nature of account holder rights (including proprietary rights) in intermediated securities
c. Types of Securities
    i. Equity
        1. Shares
        2. Collective Investment Schemes
        3. Mutual funds
        4. Trusts
        5. Special Purpose Vehicles
    ii. Debt
        1. Corporate bonds
        2. Municipal bonds
        3. Government bonds
        4. Treasury bills
    iii. Derivatives
        1. Swaps
        2. Options
        3. Futures
        4. Other derivatives
    iv. Investment certificates and savings (deposit) certificates
    v. Promissory notes

vi. Asset-backed securities
vii. Commodities

III. OPERATIONS

a. Custody of securities
   i. Registration of securities
   ii. Ownership of securities
b. Transfer of securities
   i. Convention
c. Role and significance of collateral
d. Securities settlement systems and securities clearing systems
e. Voting rights / dividends, interest, and other distributions
f. Fungibility and Segregation of securities
   i. Fungibility of securities; interchangeable shares, but with ownership attachment guaranteed in holding;
   ii. Different segregation models.

IV. RIGHTS AND OBLIGATIONS OF THE PARTIES

a. Rights
   i. Investors (account holder/shareholder)
      1. Attached rights (shareholder)
         a. Voting rights
         b. Income distribution / dividends
         c. Control over board of directors
         d. Preference in stock subscription
      2. Right to dispose of securities (account holder)
      3. Right to use as collateral for a loan (account holder)
      4. Right to hold other than with intermediary
   ii. Transfer and creation of interests in favor of third parties
      1. Intermediated securities
         a. Creation – third party effectiveness
         b. Transfer – third party effectiveness
         c. Non-consensual interests
         d. Form of security devices (including title transfer)
         e. Priority
         f. Innocent acquisition
b. Obligations
   i. Intermediaries
      1. Holding of sufficient securities
         a. Correction methods
         b. Loss sharing methods
      2. Segregation of securities
      3. Allocation of securities
      4. Information disclosure
      5. Pass through of dividends, interest, and other distributions
c. Liability
   i. Intermediaries
      1. Fraud
      2. Prohibited trading practices
      3. False, misleading or deceptive statements, promises and forecasts
      4. Failure to disclose information

5. No-look-through

V. INSOLVENCY

a. Substantive issues
   i. Effectiveness of interests in insolvency
      1. Intermediary v. account holder
      2. Intermediary v. third party
      3. Account holder v. third party
   ii. Account holder v. other account holders
   iii. Loss-sharing in insolvency
   iv. Set-off
   v. Enforcement, top-up and substitution, avoidance
      1. Recognition of title transfer
      2. Enforcement of security interest
      3. Protection of top-up and substitution
   vi. Account holder claims in insolvency of intermediary
      1. Segregation
      2. Account holder priority
      3. Shortfall
      4. Avoidance
      5. Loss sharing / distribution
      6. Asset recovery
b. Cross border insolvency

ANNEXE VI

Proposal on the way forward

accepted by consensus by the Committee on Emerging Markets Issues, Follow-Up and Implementation at its 3rd meeting (Istanbul, November 2013)

The initial goal should be to identify the major systemic and structural issues and policy choices involved in (i) establishing an intermediated securities holding system or (ii) evaluating existing systems. The effort should be confined to addressing issues and matters not resolved in the Geneva Securities Convention (GSC) but should be undertaken with the GSC text and Official Commentary firmly in mind. Also early on the insolvency law treatment of intermediated securities should be addressed. See Part VI.b. of the Secretariat's Annotated Draft Outline (see document S78B/CEM/3/Doc. 2).

As the work progresses the Secretariat's Draft Outline now before the Committee will prove to be enormously valuable in identifying details that must be addressed and the relationship of various system structures to the principles established by the GSC. It also provides an excellent checklist for the Committee's consideration of matters that should or should not fall within the scope of the project and for setting priorities for the project.

I. Non-Convention Law (national legal systems)

A Ownership rights

B. Co-ownership rights

C. Trust

D. Securities entitlement

E. Securities regulation and regulatory oversight

F. Other

II. Alternative/Paradigmatic Structures of IM Holding System

A. One IM (CSD) with non-IM managers between AHs and IM (CSD) and AHs identified at IM (CSD) level (China)

B. Multiple IMs with ultimate AH identified at CSD level at end of every settlement cycle (Brazil)

C. Each AH in chain (including IMs) identified only at level of relevant IM (US)

D. B-type system but with periodic (as opposed to real-time) identification of AH at CSD/issuer level (Japan)

E. Multiple IM With the ultimate AH identified at the level of the ultimate IM

F. Etc.

III. Alternative/ Paradigmatic Attributes of IM Holding Systems

A. Types of financial assets covered

B. Nature of IMs

1. Single IM with delegation of certain duties [China; Brazil]
2. Any bank or securities firm
3. Other

C. Level in intermediated holding system at which account holder is identified

1. Issuer
2. CSD
3. Ultimate intermediary
4. Only the relevant intermediary
5. Relation with the issuer in the various systems

D. Nature of property interest resulting from credit (GSC Art. 11) or other transfer (GSC Art. 12)

1. Interest in security to exclusion of any IM (i.e., IMs have no property interest, e.g. Japan)
2. Bundle of rights against relevant IM or other IM (e.g., CSD) and interest in underlying security to extent necessary to satisfy rights against relevant IM and to exclusion of creditors of relevant IM (e.g. U.S.)
3. Enforceability of proprietary rights against third parties
4. Fungibility versus traceability of interests

E. Scheme for providing distributions, voting, information, other corporate actions

1. Pass through from issuer down chain of IMs
2. Distributions from issuer/CSD directly to account holder
3. Right (or not) of AH to prohibit disclosure of identity to CSD, issuer, or person other than relevant IM (or right of issuer to know identity of AHs)
4. Person against which rights are enforceable (e.g., issuer, CSD, relevant IM)