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Working Group on so called Transparent Systems – Intersessional Work

Comments of the delegation of Brazil on the draft Working Paper on Transparent Systems

(submitted by the Government of the Federative Republic of Brazil)

The Brazilian delegation fully recognizes the relevance of the opportunity granted to the countries holding transparent systems for intermediated securities in order to contribute to the Unidroit Convention. The creation of the Transparent System Working Group was an essential initiative for those countries to sustain their positions and to contribute for the reduction of legal uncertainty.

However, along with the work developed by the Group chaired by Finland and Colombia, it became clear that, although the main characteristics of a transparent system were common, the legal interpretations varied importantly and the Group could not reach a desirable consensual solution. In this sense, the Brazilian Delegation tried to address this concern with Finland as one of the Chairs of the Group. The main concern is that submitting a non-consensual Draft Report to the Plenary will weaken more than strengthen the position of the countries with transparent holding systems.

Since it was clarified by the Chair that the method for addressing the transparent systems discussion would be the disclosure of the Report to all the delegations in order to have it discussed during the plenary session, the Brazilian Delegation understood that no conciliatory solution would be pursuit.

The Brazilian Delegation, therefore, would like to request an alternative possible solution to be included in the material provided to the delegations in order to be considered together with the Draft Report forwarded by the Secretariat on May 7. This request aims at assuring that maximum amplitude of the discussion in the plenary session.

Relevant Intermediary

The Draft Report presents as a possible solution the insertion of a new entity in the Convention text (the “account operator”) in order to cope with the fact that although the CSD is considered the relevant intermediary, most of the relevant tasks are indeed executed by a middle entity - CSD participant or account operator - who maintains a direct and contractual relationship with the account holder. The proposal in the Draft Report is to define this entity and establish that their functions and responsibilities are shared with the CSD as the relevant intermediary. The description of the functions and responsibilities would be left to the non-Convention Law of each Contracting State.

The Brazilian delegation considers that this proposal is not satisfactory because it risks creating legal uncertainty, as other delegations have pointed out, and it is also quite opposite to what is established and consolidated in the Brazilian legal system (statutes and judicial precedents).

Thus, the Brazilian delegation formally requests that a new possible solution is included in the text of the Draft Report forwarded by the Secretariat on May 7 for consideration by the delegations during the plenary session.

The alternative possible solution is based on the idea presented in the "view of the Chairs" that each Contracting State will have to decide on the use the rules about the account operator *("The decision whether to make use of such a provision as well as in which manner, would be left to Contracting States."*), which seems to be a proposal for an opt-in solution to be determined by each Contracting State.

The new possible solution that is now presented is to provide that each Contracting State (if included in any category of transparent systems) will have the chance to decide which one of the following systems applies:

1st system) The credits, debits and designated entries are legally binding in the securities accounts held within the CSD, the CSD is the relevant intermediary and there is a middle entity responsible for instructing all the entries in the CSD's system. The responsibilities are shared between the CSD and the middle entity, according to the definitions made in the non-Convention Law.

OR

2nd system) The credits, debits and designated entries should be legally recognized when made at the CSD level, and there is a middle entity who is the relevant intermediary since it the entity that makes directly all entries in the securities accounts under its responsibility within the CSD environment.

We believe that this suggested possible solution has the advantage of creating an environment where both arrangements can coexist and the countries' legal systems are not challenged to fit in an incompatible solution.

Upper-tier Attachment

Regarding the prohibition of the upper-tier attachment, the Brazilian Delegation would also like to propose an exception to transparent systems in the text of the Convention. In the case of such systems, there is no need for such prohibition, once the CSD identifies at all times who the account holders are. The reasons for this proposal have already been presented in the previous document sent by the Brazilian delegation.

The registries in the "middle entity" (relevant intermediary) could be perfectly guaranteed (as suggested in "views of the Chairs", 2nd paragraph) but the attachment would only be legally binding if made at the CSD level.

Therefore, the middle way solution mentioned in the Draft Report cannot be accepted, since it is also quite opposite to what is established and consolidated in the Brazilian legal system.

Further comments

Considering the above, should it be still possible, the Brazilian delegation would ask that the “views of the chairs” should be considered in Doc. 70 strictly as possible solutions and not as a more qualified opinion or a consensual one.