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Settlement of commercial disputes

Comments by the Government of the United States of America

Note by the Secretariat

In preparation for the sixty-seventh session of the Working Group, the Government of the United States of America submitted to the Secretariat comments regarding the preparation of an instrument on enforcement of international settlement agreements resulting from conciliation (see document A/CN.9/WG.II/WP.202 and addendum). The English version of the comments was submitted to the Secretariat on 23 August 2017. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

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Annex

1. The United States would like to thank the Secretariat for its continued excellent work on the conciliation project. The working papers for the October 2017 session of Working Group II will greatly aid the Working Group's deliberations, and they also demonstrate that the project is nearing completion. In particular, the compromise that was reached on five key issues during the February 2017 session has resolved the main substantive issues that had remained open. In July, the Commission endorsed the compromise approach and encouraged the Working Group to proceed on that basis. Thus, the United States believes that very little substantive work remains to be done on the draft text provided in the working papers; in general, most of the remaining points to be considered relate to drafting issues. However, we would like to highlight the following three substantive issues for other delegations' consideration:

Article 3(2)

2. In draft Article 3(2), brackets now appear around the final clause—"in order to conclusively prove that the matter has been already resolved." Document referenced A/CN.9/WG.II/WP.202 notes that the Working Group may wish to consider whether this text could be deleted. We believe that retaining this text is important in order to preserve the compromise on this issue that was developed at the February 2017 session. Based on that compromise, the word "recognition" would not be included in this article, as for some legal systems that term has consequences that are not desired here, such as the implication that a court might be precluded from opening a case at all. Instead of referring to recognition, the compromise resulted in a paragraph that would functionally describe the most relevant aspect of recognition (i.e., the use of a settlement agreement as a defence). If the bracketed phrase were omitted, Article 3(2) might be misunderstood as providing only a procedural opportunity to refer to a settlement agreement or introduce it into evidence, without any guarantee that the settlement agreement would not be ultimately disregarded by a court. By contrast, including the bracketed phrase removes the ambiguity regarding the consequences of invoking the settlement agreement as a defence and clarifies that the settlement agreement conclusively proves that the dispute was resolved (subject to the exceptions in Article 4).

Article 4(1)(b)

3. In draft Article 4(1)(b), we suggest deleting the first clause, "The settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement." Although the rest of Article 4(1)(b) should be retained, this first clause would lead to significant uncertainty regarding the scope of the exception and its relationship to other provisions. This instrument itself determines that a settlement agreement is enforceable (and, a fortiori, binding) as long as the requirements of the first few articles are met and no other Article 4 exception applies. Thus, referring separately in Article 4(1) to whether a settlement agreement is "binding" is at best redundant and at worst could generate significant litigation over what could be misunderstood as a subjective test (e.g., permitting a party to argue that it did not "intend" a settlement agreement to be binding despite its signature on the written document). Moreover, the reference to whether a settlement agreement is "final" is also redundant and unnecessary. The following clause in Article 4(1)(b) already addresses the situation in which the obligations in a settlement agreement have been subsequently modified, and the signature requirement in Article 3 already sufficiently ensures that relief can be denied for settlement agreements that were only drafts.

Article 4(1)(c)

4. As explained in paragraph 43 of document A/CN.9/WG.II/WP.202, the Working Group previously determined that the exception contained in Article 4(1)(c) "should not give the competent authority the ability to interpret the validity defence to impose

requirements in domestic law, and that consideration of the validity of settlement agreements by the competent authority should not extend to form requirements." We believe that this principle is sufficiently important that it should be explicitly stated in the text of the instrument. Otherwise, courts might be tempted to use Article 4(1)(c) to find that a settlement agreement is not valid because it did not comply with pre-existing domestic law requirements regarding the formalities for settlement agreements (e.g., a requirement that a settlement agreement be notarized) or because the parties did not follow domestic procedural requirements beyond those contained in Articles 2 or 3 (e.g., domestic law that would only treat a settlement agreement as valid if the conciliation was conducted under a particular set of conciliation rules or if the conciliator met particular licensing requirements). While this instrument would not affect the ability of States to impose regulatory requirements on conciliation occurring within their territory, courts should not be able to invoke Article 4(1)(c) to deny the validity of international settlement agreements on the basis of domestic requirements that go beyond those established in this instrument.

5. Addressing this issue explicitly would also avoid the risk that Article 3(3)(c) could be interpreted to create the same problem. While Article 3(3)(c) permits a court to require submission of additional documents to demonstrate that the requirements of this instrument are met, it should not be misinterpreted to permit a court to use that authority in ways that would effectively circumvent the instrument's limited rules on formalities or the very broad definition of conciliation. (For example, a court should not be able to use Article 3(3)(c) to require a party to submit a copy of the settlement agreement that was notarized at the time of signature, nor to require a party to submit evidence that a conciliation was conducted under certain rules or conducted by a domestically-licensed conciliator.)

6. We therefore propose adding the following text as a new Article 4(3):

> "For greater certainty, nothing in Articles 3(3)(c) or 4(1)(c) or any other provision of this instrument permits a court to deny relief on the basis of domestic law requirements regarding the formalities, or conduct, of the conciliation process, such as requirements regarding notarization of a settlement agreement or use of a particular type of conciliation process or conciliator."