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**United Nations Commission
on International Trade Law**
Working Group III (Online Dispute Resolution)
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**Online dispute resolution for cross-border electronic
commerce transactions**

Submission by Colombia and the United States of America

Note by the Secretariat

The Governments of Colombia and the United States of America have submitted to the Secretariat the attached “Technical Notes on Online Dispute Resolution”. 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

Technical Notes on Online Dispute Resolution UNCITRAL Working Group III

The delegations of Colombia and the United States submit the following Conference Room Paper (CRP) containing attached Technical Notes on Online Dispute Resolution (ODR). The CRP is in response to the decision of the Commission that WG III (Online Dispute Resolution) draft a non-binding descriptive document reflecting elements and principles of the ODR process. It builds on our proposal for drafting technical notes on ODR that received broad support at the Commission session. It is consistent with the approach taken in other UNCITRAL instruments setting forth technical notes. Consistent with the instruction from the Commission, it does not address the nature of the final stage of the ODR process.

The Technical Notes on ODR closely follow the elements and description of the ODR process as set forth in the Secretariat Note A/CN.9/W.G.III/W.P.137. The Technical Notes on ODR further address the additional questions posed by the Secretariat in A/CN.9/W.G.III/W.P.137 (Section XIV) concerning: (1) the style of the document (we propose including a description of the nature of Technical Notes (see attached Technical Notes paragraphs 1-6)); (2) whether the descriptive paragraphs provided in the Secretariat Note should be prefaced with a general statement of purpose and/or benefits of ODR proceedings (we propose inclusion of an overview of ODR (see paragraphs 7-8)); and (3) how the descriptive paragraphs provided in the Secretariat Note should be phrased (we suggest that the principles and procedures should be prefaced with words such as “it is desirable that” consistent with the nature of technical notes (see paragraphs 9-50)). We have also included additional elements and descriptions of basic principles of ODR as set forth in the submission of the delegation of Israel Submission by Israel, A/CN.9/WG.III/W.P.138 (see attached Technical Notes paragraphs 12-18).

In setting forth a comprehensive proposal for Technical Notes on ODR, we are mindful of the decision of the Commission to give Working Group III a time limit of one year (two Working Group sessions) to complete its work. The Technical Notes on ODR are intended to be considered in conjunction with A/CN.9/W.G.III/W.P.137. The notes in the Technical Notes generally cross-reference the relevant paragraphs in the Secretariat Note from which they are drawn.

Attachment A: Technical Notes on Online Dispute Resolution (ODR)

I. Introduction

Purpose of Technical Notes

1. The purpose of the Technical Notes is to foster the development of ODR as a form of dispute resolution by assisting the participants in an Online Dispute Resolution (ODR) system in the conduct of ODR proceedings.
2. The Technical Notes apply to the online resolution of disputes arising from cross-border low-value sales or service contracts concluded using electronic communications. Given that procedural styles and practices in ODR proceedings vary widely, the Technical Notes are intended to be of assistance regardless of the structure or framework of an ODR system.
3. The Technical Notes are intended to assist the full range of potential participants in an ODR system, including ODR administrators, ODR platforms, neutrals, and the parties to the dispute.
4. The Technical Notes reflect approaches to ODR systems that reflect principles of fairness, due process, transparency and accountability that are essential to any ODR system, but they are not intended to be an exhaustive or exclusive summary of approaches that incorporate such principles. The Technical Notes do not promote any practice of ODR as best practice.

Non-binding Character of the Technical Notes

5. The Technical Notes do not impose any legal requirement binding on the parties or any persons and/or entities administering or facilitating an ODR proceeding.
6. The Technical Notes are not suitable to be used as rules for any ODR proceeding, since they are only of a descriptive nature and do not establish any obligation on the parties or on persons and/or entities administering or facilitating an ODR proceeding to act in a particular manner. Accordingly, the use of the Technical Notes does not imply any modification to any ODR rules that the parties may have selected.¹

Overview of ODR

7. In tandem with the sharp increase of cross-border transactions concluded via the Internet, there has been extensive discussion regarding the use of information and communication technology tools for resolving disputes which arise from such online transactions.
8. One such tools is online dispute resolution (“ODR”), which has emerged as having the potential to provide a simple, fast, flexible and effective option for the resolution of such disputes, in particular when they relate to low-value transactions. ODR encompasses a broad range of approaches, including the potential for hybrid

¹ See UNCITRAL Notes on Organizing Arbitral Proceedings, paras. 2-3 (1996).

processes including both online and offline elements. ODR systems can be designed to facilitate communications in an efficient and user-friendly manner, in order to obtain an outcome without the need for physical presence at a meeting or hearing. ODR can provide a more cost-effective alternative to traditional approaches, the latter of which in some cases may be overly complex, costly and time-consuming in light of the nature and value of the dispute. As such, ODR represents significant opportunities for access to dispute resolution by buyers and sellers concluding cross-border commercial transactions, both in the developed and developing world.

II. Principles

9. Certain principles that should underpin any ODR process include fairness, transparency, due process and accountability.²

10. ODR may assist in addressing a situation arising out of cross-border e-commerce transactions, namely the fact that traditional judicial mechanisms for legal recourse may not offer an adequate solution for cross-border e-commerce disputes.³

11. ODR ought to be simple, fast and efficient, in order to be able to be used in a “real world setting”, including that it should not impose costs, delays and burdens that are disproportionate to the economic value at stake.⁴

Transparency

12. “It is advisable to disclose any contractual relationship between the ODR administrator and a particular vendor, so that users of the service are informed of potential conflicts of interest.”⁵

13. “The ODR administrator may wish to publish anonymized data or statistics on its decisions, in order to enable parties to assess its overall record.”⁶

14. “All relevant information should be available on the ODR administrator’s website in a user-friendly and accessible manner.”⁷

Independence

15. “It would be advisable for the ODR administrator to adopt a code of ethics for its neutrals, in order to guide neutrals as to conflicts of interest and other rules of conduct.”⁸

16. “It would be useful for the ODR administrator to adopt internal policies dealing with identifying and handling conflicts of interest.”⁹

² Note by Secretariat, Online Dispute Resolution, A/CN.9/WG.III/WP. 137, para. 3.

³ Id., A/CN.9/WG.III/WP. 137, para. 4.

⁴ Id., A/CN.9/WG.III/WP. 137, para. 5.

⁵ Submission by Israel, A/CN.9/WG.III/WP.138, para. 1.

⁶ Id., para. 2.

⁷ Id., para. 3.

⁸ Id., para. 4.

⁹ Id., para. 5.

Expertise

17. “The ODR administrator may wish to implement comprehensive policies governing selection and training of neutrals.”¹⁰

18. “An internal oversight/quality assurance process could help the ODR administrator to ensure that neutrals’ decisions conform with the standards it has set for itself.”¹¹

III. Stages of an ODR Process

19. The process of an online dispute resolution proceeding may consist of stages including: negotiation; facilitated settlement; and a third (final) stage.¹²

20. The ODR process may commence when a claimant submits a notice of claim through the ODR platform to the ODR administrator. The ODR administrator informs the respondent of the existence of the claim and the claimant of the response. The first stage of proceedings — a technology-enabled negotiation — commences, in which the claimant and respondent negotiate directly with one another through the ODR platform.¹³

21. If that negotiation process fails (i.e. does not result in a settlement of the claim), the process may move to a second, “facilitated settlement” stage (see, further, paragraphs 40-42 below). In that stage of proceedings, the ODR administrator appoints a neutral adjudicator (a “neutral”), who communicates with the parties in an attempt to reach a settlement.¹⁴

22. If facilitated settlement fails, a third and final stage of proceedings might commence.¹⁵

IV. Scope of ODR Process

23. An ODR process may be particularly useful for disputes arising out of cross-border, low-value e-commerce transactions. An ODR process would apply to disputes arising out of both a business-to-business as well as business-to-consumer transactions.¹⁶

24. An ODR process may apply to disputes arising out of both sales and service contracts.¹⁷

¹⁰ Id., para. 6.

¹¹ Id., para. 7.

¹² Secretariat Note, supra note 2, A/CN.9/WG.III/WP. 137, para. 7.

¹³ Id., A/CN.9/WG.III/WP. 137, para. 8.

¹⁴ Id., A/CN.9/WG.III/WP. 137, para. 9.

¹⁵ Id., A/CN.9/WG.III/WP. 137, para. 10.

¹⁶ Id., A/CN.9/WG.III/WP. 137, para. 11.

¹⁷ Id., A/CN.9/WG.III/WP. 137, para. 12.

V. ODR Definitions, Roles and Responsibilities

25. Online dispute resolution, or “ODR”, is a “mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology”. The process may be implemented differently by different administrators of the process, and may evolve over time.¹⁸

26. As used herein a “claimant” is the party initiating ODR proceedings and the “respondent” the party to whom the notice of proceedings is directed, in line with traditional, offline, alternative dispute resolution nomenclature. The “individual that assists the parties in settling or resolving the dispute” is the “neutral.”¹⁹

27. ODR requires a technology-based intermediary. In other words, unlike offline alternative dispute resolution, an ODR process cannot be conducted on an ad hoc basis involving only the parties to a dispute and a neutral adjudicator (that is, without an administrator). Instead, to enable the use of technology to facilitate a dispute resolution process, an ODR process requires a system for generating, sending, receiving, storing, exchanging or otherwise processing communications. Such a system is referred to herein as an “ODR platform.”²⁰

28. An ODR platform must be administered and coordinated. The entity that carries out such administration and coordination is referred to herein as the “ODR administrator.” The ODR administrator may be separate from or part of the ODR platform.²¹

29. In order to enable ODR communications, it is desirable that both the ODR administrator and the ODR platform should be specified in the dispute resolution clause.²²

30. The communications that may take place during the course of proceedings have been defined as “any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means.”²³

Communications

31. It is desirable that all communications in ODR proceedings take place via the ODR platform. Consequently, both the parties to the dispute, and the ODR platform itself, should have a designated “electronic address”. The term “electronic address” is also defined in other UNCITRAL texts.²⁴

32. To enhance efficiency it is desirable that the ODR administrator promptly:

- (a) Acknowledge receipt of any communication by the ODR platform;

¹⁸ Id., A/CN.9/WG.III/WP. 137, para. 15.

¹⁹ Id., A/CN.9/WG.III/WP. 137, para. 16.

²⁰ Id., A/CN.9/WG.III/WP. 137, para. 17.

²¹ Id., A/CN.9/WG.III/WP. 137, para. 18.

²² Id., A/CN.9/WG.III/WP. 137, para. 19.

²³ Id., A/CN.9/WG.III/WP. 137, para. 20.

²⁴ Id., A/CN.9/WG.III/WP. 137, para. 21.

(b) Notify parties of the availability of any communication received by the ODR platform; and

(c) Keep the parties informed of the commencement and conclusion of different stages of the proceedings.²⁵

33. In order to avoid loss of time, it is desirable that a communication be deemed to be received by a party when the administrator notifies that party of its availability on the platform; deadlines in the proceedings would run from the time the administrator has made that notification. At the same time, the ODR administrator should be empowered to extend deadlines, in order to allow for some flexibility when appropriate.²⁶

VI. Commencement of ODR proceedings

34. ODR proceedings may be deemed to have commenced when, following a claimant's communication of a notice to the ODR administrator, the ODR administrator notifies the respondent and the parties that the notice is available at the ODR platform.²⁷

35. In order to commence an ODR proceeding and to enable it to proceed in an administratively efficient manner, it is desirable that the notice contain:

(a) The name and electronic address of the claimant and of the claimant's representative (if any) authorized to act for the claimant in the ODR proceedings;

(b) The name and electronic address of the respondent and of the respondent's representative (if any) known to the claimant;

(c) The grounds on which the claim is made;

(d) Any solutions proposed to resolve the dispute;

(e) The claimant's preferred language of proceedings;

(f) The signature or other means of identification and authentication of the claimant and/or the claimant's representative; and

(g) The location of the claimant.²⁸

36. In order to enable a response to an ODR proceeding proceed in an administratively efficient manner, it is desirable that the respondent's response to the notice should include:

(a) The name and electronic address of the respondent and the respondent's representative (if any) authorized to act for the respondent in the ODR proceedings;

(b) A response to the grounds on which the claim is made;

(c) Any solutions proposed to resolve the dispute;

²⁵ Id., A/CN.9/WG.III/WP. 137, para. 22.

²⁶ Id., A/CN.9/WG.III/WP. 137, para. 24.

²⁷ Id., A/CN.9/WG.III/WP. 137, para. 25.

²⁸ Id., A/CN.9/WG.III/WP. 137, para. 26.

(d) The signature or other means of identification and authentication of the respondent and/or the respondent's representative;

(e) Notice of any counterclaim containing the grounds on which the counterclaim is made; and

(f) The location of the respondent.²⁹

37. As much as is possible, it is preferable that both the notice of claim and response be accompanied by all documents and other evidence relied upon by each party, or contain references to them. In addition, to the extent that a claimant is pursuing any other legal remedies, it is desirable that such information also be provided with the notice.³⁰

VII. Negotiation

38. The first stage of proceedings may commence following the communication of the respondent's response to the ODR platform and:

(a) Notification thereof to the claimant; or

(b) Failing a response, the lapse of a certain period of time after the notice has been communicated to the respondent.³¹

39. This first stage may be referred to as "negotiation", comprising "negotiation between the parties via the ODR platform."³²

VIII. Facilitated settlement

40. If negotiation via the platform fails for any reason (including non-participation or failure to reach a settlement within a certain time period), or where one or both parties to the dispute request to move directly to the next stage of proceedings, a second, facilitated settlement stage of proceedings may commence whereby a "neutral" individual is appointed and communicates with the parties to try to achieve a settlement.³³

41. Upon commencement of the facilitated settlement stage of proceedings, it is desirable that the ODR administrator appoints a "neutral" individual, and notifies the parties of that appointment, and certain details about the identity of the neutral.³⁴

42. In the "facilitated settlement" stage, it is desirable that the neutral communicates with the parties to try to achieve a settlement.³⁵

²⁹ Id., A/CN.9/WG.III/WP. 137, para. 28.

³⁰ Report of Working Group III, (Vienna, 18-22 November 2013), A/CN.9/795, para. 92.

³¹ Secretariat Note, *supra* note 2, A/CN.9/WG.III/WP. 137, para. 30.

³² Id., A/CN.9/WG.III/WP. 137, para. 31.

³³ Id., A/CN.9/WG.III/WP. 137, para. 32.

³⁴ Id., A/CN.9/WG.III/WP. 137, para. 33.

³⁵ Id., A/CN.9/WG.III/WP. 137, para. 34.

IX. Appointment and powers of the neutral

43. To enhance efficiency and reduce costs, it is preferable that the ODR administrator not appoint a neutral until a neutral is required for a dispute resolution process in accordance with the applicable rules of procedure. At the point in an ODR proceeding at which a neutral is required for the dispute resolution process, it is desirable that the ODR administrator “promptly” appoint the neutral (i.e., generally at the commencement of the facilitated settlement stage of proceedings). Upon appointment, it is desirable that the ODR administrator promptly notify the parties of the name of the neutral and any other relevant or identifying information in relation to that neutral.³⁶

44. It is desirable that neutrals should have the relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question. However, ODR neutrals need not be lawyers.³⁷

45. In respect of the process of appointment of a neutral, it is desirable that:

(a) The neutral by accepting confirms that he or she has the time necessary to devote to the process;

(b) The neutral shall declare his or her impartiality and independence and disclose at any time any facts or circumstances that might give rise to likely doubts as to his or her impartiality or independence;

(c) The parties shall have a method for objecting to the appointment of a neutral;

(d) The ODR administrator shall make a determination as to whether the neutral shall be replaced;

(e) There be only one neutral per dispute appointed at any time for reasons of cost efficiency;

(f) A party may object to the neutral receiving information generated during the negotiation period; and

(g) If the neutral resigns or has to be replaced during the course of the ODR proceedings, the ODR administrator will appoint a replacement subject to the same safeguards as set out during the appointment of the initial neutral.³⁸

46. In respect of the powers of the neutral, it is preferable that:

(a) Subject to any Rules, the neutral may conduct the ODR proceedings in such a manner as he or she considers appropriate;

(b) The neutral shall conduct the proceedings without unnecessary delay or expense, shall provide a fair and efficient process for resolving disputes, and shall remain independent, impartial and treat both parties equally;

(c) The neutral shall conduct proceedings based on the communications made during the proceedings;

³⁶ Id., A/CN.9/WG.III/WP. 137, para. 35.

³⁷ Report of Working Group III, Vienna, 13-17 December 2010, A/CN.9/716, paras. 62-63.

³⁸ Secretariat Note, supra note 3, A/CN.9/WG.III/WP. 137, para. 36.

(d) The neutral may allow the parties to provide additional information in relation to the proceedings; and

(e) The neutral has discretion to extend deadlines set out in any Rules.³⁹

47. While the process for appointment of a neutral for an ODR process is subject to the same due process standards that apply to that process in an offline context, it may be desirable to use streamlined appointment and challenge procedures in order to address the need for ODR to provide a simple, time-, and cost- effective alternative to traditional approaches to dispute resolution.⁴⁰

X. Language

48. Technology tools available in ODR can offer a great deal of flexibility regarding the language used for the proceeding. Even where an ODR agreement or ODR rules specify a language to be used in proceedings, a party to the proceedings should be able to indicate in the notice or response whether it wishes to proceed in a different language so that the ODR administrator can identify other language options.⁴¹

XI. Governance

49. It is desirable for guidelines (and/or minimum requirements) to exist in relation to the conduct of ODR platforms and administrators.⁴²

50. ODR proceedings are subject to the same due process standards that apply to that process in an offline context, in particular independence, neutrality and impartiality.⁴³

³⁹ Id., A/CN.9/WG.III/WP. 137, para. 37.

⁴⁰ Id., A/CN.9/WG.III/WP. 137, para. 38.

⁴¹ Id., A/CN.9/WG.III/WP. 137, para. 39.

⁴² Id., A/CN.9/WG.III/WP. 137, para. 40.

⁴³ Id., A/CN.9/WG.III/WP. 137, para. 41.