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Technology-related dispute resolution and adjudication

Note by the Secretariat

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I. Introduction

1. Upon considering the proposals for future work on technology-related dispute resolution and adjudication, the Commission, at its fifty-fifth session in 2022, entrusted the Working Group to consider the two topics jointly and to consider ways to further accelerate the resolution of disputes by incorporating elements of both proposals (see A/CN.9/WG.II/WP.226, paras. 9–12).[1]

2. There was general support in the Commission to pursue legislative work building on the common elements, mainly that both aimed to provide a legal framework for a simplified mechanism to resolve disputes in a very short time frame involving a third party with the relevant expertise, not necessarily resulting in a final award but the outcome still being enforceable across borders. It was pointed out that the outcome of adjudication, which could be the subject of review in a subsequent arbitration proceeding, was of particularly relevance. It was suggested that such legislative work should build on existing UNCITRAL texts, notably the UNCITRAL Expedited Arbitration Rules (the "Expedited Rules"), which would provide the underlying framework for an expedited procedure.[2]

3. After discussion, the Commission agreed that the work should build on the Expedited Rules and that model provisions, clauses, or other forms of legislative or non-legislative text could be prepared on matters such as shorter time frames, appointment of experts/neutrals, confidentiality and the legal nature of the outcome of the proceedings, all of which would allow disputing parties to tailor the proceeding to their needs to further accelerate the proceedings. It was stressed that such work should be guided by the needs of the users, take into account innovative solutions as well as the use of technology, and further extend the use of the Expedited Rules.[3]

4. The aforementioned decisions by the Commission were based on the discussions at the UNCITRAL Colloquium on Possible Future Work on Dispute Settlement held during the seventy-fifth session of the Working Group.[4] At the Colloquium, the Working Group considered the draft provisions for technology-related dispute resolution submitted by a group of experts (A/CN.9/WG.II/WP.224) and a note by the Secretariat on adjudication, which included a proposal for future work submitted by the Government of Switzerland (A/CN.9/WG.II/WP.225).[5] The round-table discussions held on the last day of the Colloquium may provide guidance as the Working Group makes progress on the topics.[6]

5. At the Colloquium, with regard to technology-related dispute resolution, it was suggested that the work should not aim to develop a new set of rules but rather to prepare model clauses, which disputing parties can easily refer to or include in their dispute resolution clause. It was stated that the development of such model clauses would respond to the needs of the industry, whereby the current frameworks for alternative dispute resolution were being underutilized and might be perceived as not providing an ample solution. On the other hand, it was questioned whether the peculiarities of technology-related disputes were such that they would justify the development of separate model clauses because aspects like the technological

[1] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), para. 225.
[2] Ibid., para. 223.
[3] Ibid., para. 225.
[4] See the Report of the Working Group Report of the Colloquium on Possible Future Work on Dispute Settlement held during the seventy-fifth session of Working Group II (A/CN.9/1091). Additional information about the Colloquium is available at: https://uncitral.un.org/en/disputesettelementcolloquium2022.
[5] For the summary of the discussions on technology-related dispute resolution, see A/CN.9/1091, paras. 48–68. For a summary on adjudication, see A/CN.9/1091, paras. 40–47.
[6] For the summary of the round-table discussions, see A/CN.9/1091, paras. 69–79.

savviness of arbitrators, the role of experts and confidentiality applied to other types of disputes, particularly with the recent developments in technology.[7]

6. With regard to adjudication, it was pointed out that the practice was still developing with a number of jurisdictions having no such practice nor legislation to provide the legal framework. It was also mentioned that the existing practice was mostly limited to domestic disputes mainly in the construction industry and whether the practice could apply to cross-border disputes and disputes in other industries would need to be carefully assessed. Accordingly, some viewed the issues as not being ripe for harmonization. In that context, it was mentioned that work should aim to achieve progressive harmonization rather than harmonization of existing legal standards, and therefore, should take a flexible rather than a prescriptive approach to allow the relevant practice to develop. It was also said that adjudication could provide a suitable solution for resolving technology-related disputes, where developments were fast and parties, such as start-ups, did not have the resources to conduct full-fledged international arbitration.[8]

7. In light of the above, this Note presents ways to further accelerate the resolution of disputes by incorporating elements of both proposals on technology-related dispute resolution and adjudication. Upon review of the elements, the Working Group may wish to consider how to conceptualize and refer to the project

8. While they are presented in the form of model clauses and guidance notes building on the Expedited Rules and the UNCITRAL Notes on Organizing Arbitral Proceedings (the "UNCITRAL Notes"),[9] this is without prejudice to decision on the final form of work, which may take the form of model provisions, clauses, or other forms of legislative or non-legislative text (see para. 55 below).

II. Possible model clauses

9. This section provides possible model clauses for use by parties to further accelerate and tailor to their needs a proceeding governed by the Expedited Rules. As requested by the Commission, they address: (i) shorter time frames linked with the legal nature of the outcome of the proceeding; (ii) appointment and the role of experts and neutrals; and (iii) confidentiality. The model clauses have been prepared to operate independent of each other, allowing parties to choose the rules they deem necessary. The Working Group may wish to consider whether and how the model clauses would operate in a proceeding other than one governed by the Expedited Rules.

1. Timeframes and outcome of the proceedings

10. The Expedited Rules provides a streamlined and simplified procedure with a shortened time frame, making it possible for the parties to reach a final resolution of the dispute in a cost- and time-effective manner. Article 16 of the Expedited Rules provides for a six-month time frame for rendering the award and a mechanism for extending that time frame in certain circumstances. Parties are free to agree on a shorter time frame,[10] which may be the case particularly for technology-related disputes.

11. Unlike arbitration, adjudication does not necessarily result in a final award and its outcome could be the subject of review. It was mentioned that such a characteristic should be of particularly relevance and that the outcome should still be enforceable across borders.

[7] See A/CN.9/1091, para. 76.
[8] Ibid., para. 75.
[9] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf.
[10] Explanatory Note to the UNCITRAL Expedited Arbitration Rules, paras. 84–85.

12. In light of the above, the Working Group may wish to consider the following model clause.

> *Model clause 1*
>
> *1. A preliminary award shall be rendered within [a short period of time to be specified by the parties, for example, 60 days] of the constitution of the arbitral tribunal.*
>
> *2. The preliminary award shall become final and binding on the parties unless a party objects within [a short period of time to be specified by the parties, for example, 30 days] after receipt of the preliminary award.*
>
> *3. A party may object to the preliminary award only after carrying out that award or committing to carry out the award within [a period of time to be specified by the parties].*

13. Paragraph 1 aims to capture the agreement of the parties that the accelerated procedure should result in an outcome within a period of time shorter than six months as provided for in article 16(1) of the Expedited Rules.[11] As it builds on the Expedited Rules, the outcome is characterized as an "award" made by an "arbitral tribunal" and the time frame commences from the "constitution" of the arbitral tribunal. The mechanism in article 16(2) to (4) of the Expedited Rules for extending the time frame would continue to apply.

14. The Working Group may wish to consider other possibilities, for example, where the outcome is rendered not by the arbitral tribunal but by a third-party neutral appointed by the arbitral tribunal or by the parties themselves. If such an approach is taken, the procedure for appointing the third-party neutral as well as the tasks to be performed by the neutral would need to be agreed by the parties, particularly as the outcome could eventually become binding on the parties. The time frame should also commence upon the appointment of the neutral.

15. The Working Group may wish to also consider whether the term "preliminary" award, which refers to the outcome of the accelerated procedure and aims to distinguish it from the "final" award, is appropriate. It may also be possible that the accelerated procedure leads to an interim judgment which is not necessarily an "award", while that judgment could be challenged in an arbitration resulting in an award. This may, however, require the preparation of an entire set of rules to govern the accelerated procedure.[12]

16. Paragraph 2 aims to capture the understanding of the parties that the preliminary award will become a "final" award binding on the parties in accordance with article 34(2) of the UNCITRAL Arbitration Rules, unless a party raises an objection within short period of time after receiving the preliminary award. This ensures two aspects: (a) a preliminary award can be challenged and become the subject of review; and (b) a preliminary award can eventually become enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") after lapse of a short period of time.

17. With regard to the first aspect, the Working Group may wish to consider whether the review mechanism would need to be specified. Alternatively, it could be understood that the Expedited Rules would continue to apply to the proceeding and that the review of the preliminary award will form part of such proceeding, all of which would eventually result in a final award. It may also be possible that an objection by a party would make the Expedited Rules no longer appropriate for the

[11] See A/CN.9/WG.II/WP.224, Section H.

[12] See for example, the ICSID Fact-Finding Rules available at https://icsid.worldbank.org/sites/default/files/ICSID_Fact-Finding_Rules.pdf and the draft provisions proposed by Switzerland in document A/CN.9/WG.II/WP.225.

dispute, and thus not being applied in accordance with article 2 of the Expedited Rules.

18. Paragraph 3 sets out the condition to be met in order for a party to raise an objection and is based on an agreement by the parties to comply with the outcome of the accelerated procedure. This is in addition to the requirement in paragraph 2 that an objection shall be made within a short period of time after receipt of the preliminary award. Paragraph 3 requires the party to either carry out the preliminary award (including any decision or order contained therein) or commit to carrying out the award within a fixed period of time. By including paragraph 3 in their arbitration agreement, parties would be agreeing to comply with the preliminary award even though it is not yet a final award. By raising the threshold for raising objections, it aims to ensure the efficiency of the proceedings and avoid possible delays caused by parties' systemic objections. The Working Group may wish to confirm that it would be up to the arbitral tribunal to determine whether the conditions in paragraph 3 are met by the parties prior to reviewing the preliminary award and continuing the arbitration proceeding.

2. Appointment and the role of experts and neutrals

19. Considering the needs and complexities of the dispute, it may be necessary and useful for experts to be appointed to assist the arbitral tribunal on certain matters, as provided for in articles 27(2) and 29 of the UNCITRAL Arbitration Rules. Note 15 of the UNCITRAL Notes touches upon the types of experts and their selection as well as party- and tribunal-appointed experts.

20. Article 29 provides for the appointment by an arbitral tribunal, after consultation with the parties, of one or more independent experts to report on specific issues to be determined by the arbitral tribunal. It may also be possible that one or more individuals are appointed by the arbitral tribunal to make decisions on specific issues on behalf of the tribunal or to provide an impartial view as to the strength of the parties' evidence (referred to as "neutral" below).

21. It may, therefore, be useful for the parties to agree in advance on the means of appointing experts and neutrals and the role to be undertaken by them. In that context, the Working Group may wish to consider the following model clause.

Model clause 2

1. Expert witnesses will be presented jointly by the parties.

2. An independent expert or neutral appointed by the arbitral tribunal in accordance with article 29 of the UNCITRAL Arbitration Rules shall perform the following duties:

(a) ...

3. The arbitral tribunal shall take due account of statements by an expert witness presented jointly by the parties in accordance with paragraph 1 or reports by an expert or neutral appointed in accordance with paragraph 2.

22. Paragraph 1 aims to reduce the cost and time of each party appointing its own expert witnesses (see para. 98 of the UNCITRAL Notes). It captures the understanding of the parties that they will make efforts to appoint expert witnesses jointly, while not depriving themselves of doing so individually in accordance with article 27(2) of the UNCITRAL Arbitration Rules. A joint appointment would avoid the situation whereby statements by the experts appointed by each of the parties diverge and could facilitate a quicker resolution of the dispute by the arbitral tribunal.

23. In a situation where parties have appointed their respective experts, it should be possible for the arbitral tribunal to order the party-appointed experts who have submitted statements on the same or related issue to meet and confer on such issues,

with the aim of reaching a shared understanding and to narrow down the differences.[13] It may be possible for party-appointed experts to work under the instruction of the arbitral tribunal in order to produce a joint report. The Working Group may wish to consider whether such guidance should be provided (see para. 97 of the UNCITRAL Notes).

24. There may be instances where the parties have the most expertise, particularly on matters relating to emerging technologies. The Working Group may wish to consider whether such instances would need to be elaborated further as that possibility is already envisaged in articles 27(2) of the UNCITRAL Arbitration Rules.

25. Paragraph 2 reiterates the discretion of the arbitral tribunal to appoint experts in accordance with the procedure set out in article 29 of the UNCITRAL Arbitration Rules. It would also reflect the understanding of the parties that the same procedure would apply to neutrals to be appointed by the arbitral tribunal. If the parties foresee the role of experts or neutral being expanded beyond that provided for in article 29 or specified, such roles could be listed in paragraph 2 (for example, binding expert determination or neutral assessment).

26. Paragraph 3 further elaborates on how the arbitral tribunal should treat statements by experts jointly appointed by the parties as well as reports of experts or neutrals appointed by the arbitral tribunal. It could be further elaborated, for example, that reports by an expert or a neutral could be binding on the parties and the arbitral tribunal on specific issues (A/CN.9/1091, para. 59). In this context, the difference between an expert and a neutral may be clarified in relation to the legal effect of their respective findings (A/CN.9/1091, para. 60).

3. Confidentiality

27. Apart from article 28(3) which provides that hearings shall be held in camera, the UNCITRAL Arbitration Rules do not contain provisions on confidentiality. Note 6 of the UNCITRAL Notes leave the desired confidentiality regime up to the agreement of the parties, should confidentiality be a concern or priority and lists the issues that are to be addressed therein. While article 7 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration provides a definition of confidential or protected information,[14] that definition functions in the context of investor-State arbitration and as an exception to the principle of transparency.

28. Many of the current disputes involve technical and scientific information, trade secrets and rights with a high profile in the market that are sensitive to confidentiality and from which a disputing party can derive significant economic value. In such circumstances, parties may wish to agree on different aspects of confidentiality that would apply to the proceeding. In doing so, they should aim to obtain a balance between preserving confidentiality and ensuring sufficient disclosure to facilitate the proceedings.

29. Confidentiality has to facets. One relates to ‘outbound confidentiality’ in the sense of non-disclosure by all those involved in the arbitration of any information relating to the arbitration to anyone not involved in the arbitration proceedings (see paras. 31–32 below). Another relates to ‘inbound confidentiality’ regarding protection of information against opposing parties (see paras. 32–37 below).[15]

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[13] See IBA Rules on Taking of Evidence International Evidence (“IBA Rules”), Article 5(4); and the Swiss Arbitration Rules, Article 27.

[14] Article 7(2) reads: “Confidential or protected information consists of: (a) Confidential business information; (b) Information that is protected against being made available to the public under the treaty; (c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or (d) Information the disclosure of which would impede law enforcement.”

[15] See A/CN.9/WG.II/WP.224, Section F.

30. The Working Group may wish to consider the following model clause.

Model clause 3

1. All aspects of the arbitration shall be confidential except and to the extent that disclosure of the relevant information is required by legal duty, to protect or pursue a legal right, or in relation to legal proceedings before a court or other competent authority.

2. A party invoking the confidentiality of any information it wishes or is required to submit during the proceeding shall request the arbitral tribunal to have the information classified as confidential. Upon receipt of such a request and after inviting the parties to express their views, the arbitral tribunal shall determine whether the information is to be classified as confidential and of such a nature that in the absence of a special protection measure, it would likely cause serious harm to the party making the request.

31. Paragraph 1 addresses outbound confidentiality and defines the scope of the confidentiality obligation. It prohibits disclosure of all awards and orders in the arbitration, together with the existence of the arbitration, all materials produced in and/or generated during the proceedings which are not publicly available, including materials created for the purpose of the arbitration and all other documents or evidence given by a party, witness, or expert.[16] The obligation in paragraph 1 lies not only with the parties but also with their legal representatives, arbitrators, expert witnesses and any person appointed by the arbitral tribunal, including any expert, and any administrative secretary to the arbitral tribunal. The Working Group may wish to consider how to ensure that all those involved in the proceedings are bound by the confidentiality obligations, for example, by requiring a confidentiality undertaking.

32. Paragraph 1 further outlines the circumstances in which the confidentiality obligations can be waived - where disclosure of the relevant information is required by legal duty, necessary to protect or pursue a legal right, or in relation to legal proceedings before a court or other competent authority. The wording is based on that found in article 34(5) of the UNCITRAL Arbitration Rules with regard to awards. The Working Group may wish to consider whether the detailed procedure for disclosure would need to be outlined (for example, who should be informed of the disclosure and whether the details of the disclosure including the reasons thereof should be included in such notification).

33. Paragraph 2 addresses inbound confidentiality to respond to a situation where one of the parties is inclined to not disclose information to the opposing party due to its intrinsic value (such as trade secrets, know-how, algorithms, or any other proprietary information). Such information should generally be in the possession of a party, not accessible to the public, and of commercial and/or technical sensitivity.

34. Paragraph 2 also provides the basic procedure to be followed in order for the information to be classified as confidential by the arbitral tribunal. The Working Group may wish to consider whether a more detailed procedure needs to be agreed upon by the parties. For example, the party invoking confidentiality may be required to stipulate the reasons justifying its request. Similarly, the arbitral tribunal may be required to outline the conditions of the confidentiality, including to whom the confidential information may be disclosed for the purpose of the proceedings. This may be an expert or a neutral appointed by the arbitral tribunal to report on the basis of confidential information, widely used in the context of document production.[17] The expert so appointed (sometime referred to as a confidentiality advisor) should be equipped with the relevant expertise to determine whether the confidentiality concern is genuine, supervise the redaction process, if any, and monitor the disclosure.

[16] IBA Rules, Article 3.13.
[17] IBA Rules, Article 3.8.

35. With respect to paragraph 2, the Working Group may wish to consider the possible impact on due process requirements and potential delays. For example, a party would not be in a position to challenge the evidence of the other party if such evidence is classified as confidential. Engaging an expert or a neutral to manage the confidential information may require additional time and cost.

36. More generally, it would be the task of the arbitral tribunal to maintain confidentiality and to sanction any breach of confidentiality. The discretionary power of the arbitral tribunal to take such actions could be provided as guidance to the arbitral tribunal and the parties.

37. After consulting the parties, the arbitral tribunal may adopt measures to protect any physical and electronic information shared in the arbitration and to ensure any personal data produced or exchanged in the arbitration is processed and/or stored in light of any applicable law. Such measures could be adopted at any stage of the proceedings and possibly in the form of a confidentiality protocol.

38. In case there is a breach of confidentiality, the arbitral tribunal may take appropriate measures and sanction a party through an order or an award. For example, the arbitral tribunal may be able to restrict any further disclosure or award damages for the breach, if the disclosure resulted in serious harm to a party. It should, however, be noted that establishing whether there has been a breach of confidentiality is a difficult one, as it would require the arbitral tribunal to determine that the confidential information was disclosed to an unauthorized person and that the disclosure resulted in harm to the party.

39. Concerns of confidentiality is usually an ongoing consideration and therefore the duty of confidentiality usually survives the termination of the proceedings. The Working Group may wish to consider whether guidance should be provided on how to ensure this continued duty of confidentiality and whether there shall be any exceptions (for example, lapse of a certain time period or changes in circumstances).

III. Possible guidance material

40. Some of the common elements of technology-related dispute resolution and adjudication could be addressed in the form of a guidance document rather than a rule or model clause. The following provides some examples of guidance material for consideration by the Working Group.

41. Considering that the Commission also requested the Working Group to finalize the guidance text on early dismissal and preliminary determination[18], the Working Group may wish to consider how such guidance material should be presented and in what form, as this would impact the content.

42. One option would be to incorporate the guidance material into or as an additional note to the UNCITRAL Notes. The UNCITRAL Notes list and briefly discuss matters relevant to the organization of arbitral proceedings with a focus on international arbitration. However, they are intended to be used in a general and universal manner and not specifically in the context of the UNCITRAL Arbitration Rules. If the purpose of the guidance material is to assist parties and the arbitral tribunal in the application of the Expedited Rules, a different approach may need to be taken, possibly as a supplement to the Explanatory Note to the Expedited Rules. In any case, the guidance material should be easily accessible for potential readers.

1. Case management conference

43. Article 9 of the Expedited Rules puts emphasis on consultations with the parties and mentions a case management conference (CMC) as a possible method of conducting such consultations. Note 1 of the UNCITRAL Notes also highlights the

[18] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), paras. 194 and 224.

need for consultation and advises the arbitral tribunal to consider holding, at the outset of the proceedings, a meeting or a CMC at which it would determine the organization of the arbitral proceedings and a procedural timetable.[19] Note 1 also addresses the modification of decisions taken at a CMC, the recording of the outcome of a procedural meeting as well as the attendance of the parties. In general, CMCs may aid in avoiding unnecessary delay and expenses, and provide a fair and efficient resolution of the dispute.

44. The Working Group may wish to consider providing additional guidance on how to organize CMCs in complex disputes, including those involving technology, as found below in paragraphs 45 to 48.[20]

Guidance material

45. As soon as possible after the constitution of the arbitral tribunal, and before a hearing, the arbitral tribunal shall consider holding an initial CMC to consult with the parties on the manner in which it will conduct the arbitration. To the extent possible, a CMC should be attended by the parties, their representatives and where appropriate, the parties' internal experts.

46. At the initial CMC, the arbitral tribunal should consider discussing, in particular, the following: (a) the nature of the issues in the dispute; (b) the protection of data integrity and data security; (c) confidentiality and disclosures; (d) the identification of contested and uncontested facts; (e) the structuring and the appropriate phasing of the proceedings; (g) the taking of expert evidence as well as the appointment of experts or neutrals; (h) the appointment of a secretary of the tribunal with expertise; (i) the holding of a hearing or whether the proceedings would be based on documents; (j) any other issues in relation to the resolution of the dispute, including the prospects of an early resolution or settlement of the dispute. Where appropriate, the arbitral tribunal should invite the parties to make additional proposals, or to comment on the list of elements ahead of the CMC.

47. The arbitral tribunal may consider holding additional CMC at regular intervals and at any appropriate time to discuss the issues mentioned above as well as others. Regular CMCs are recommended especially where tribunal-appointed experts have to perform operations over an extended period of time.

48. In accordance with article 3(3) of the Expedited Rules, the arbitral tribunal may, after inviting the parties to express their views and taking into account the circumstances of the case, utilize any technological means as it considers appropriate to convene the CMC.

2. Evidence

49. Article 15 of the Expedited Rules address issues relating to evidence, mainly that the arbitral tribunal may decide which documents, exhibits or other evidence the parties should produce. It further provides that statements by witnesses including expert witnesses, shall be in writing and that the arbitral tribunal may decide which witnesses shall testify in a hearing.

50. Note 13 of the UNCITRAL Notes address issues relating to documentary evidence, which should be read in conjunction with Notes 7 (Means of communication) and 10 (Practical details regarding the form and method of submission).

51. With the increased use of technology for producing and presenting evidence and the evidence being in forms other than documents, the Working Group may wish to consider providing additional guidance on evidence, as found below in paragraphs 52 to 54.

[19] UNCITRAL Notes, para. 12.

[20] For reference, see Appendix IV of the 2021 ICC Arbitration Rules (Case Management Techniques).

Guidance material

52. Evidence may involve significant technology and/or digital processes. As such, the arbitral tribunal and the parties may need to adapt the gathering, presentation, and evaluation of evidence to the circumstances of the case, while protecting due process and ensuring efficiency. Accordingly, article 15 of the Expedited Rules as well as article 27(3) of the UNCITRAL Arbitration Rules should be understood so that "data" and "technical information" also fall under the phrase "documents, exhibits or other evidence". This is to clarify and ensure that flexibility is provided with regard to evidence in disputes relating to technology.

53. The arbitral tribunal may wish to consider taking of evidence in the form of experiments and demonstration of a process. In other words, an experiment or a demonstration could be performed or repeated in the presence of the arbitral tribunal, the parties and or tribunal-appointed expert as part of the proceedings.

54. The arbitral tribunal may consider requiring the parties to disclose the use of technology in collecting, processing, and presenting evidence, or complying with an order of the tribunal. Upon disclosure, the arbitral tribunal may seek the views of other parties and determine whether such use would be allowed. The arbitral tribunal should also take into account the possible use of artificial intelligence in taking evidence and guard against potentially adverse impacts.

IV. Way forward

55. In pursuing its work, the Working Group may wish to identify other common elements which could accelerate the resolution of disputes. The Working Group may wish to also consider whether these common elements could be presented as a single legislative project and if so, how they should be characterized (for example, elements of "fast-track" or "accelerated" procedure under the Expedited Rules). In considering the way forward, the Working Group should be mindful that work should add value and respond to the four tests as agreed by the Commission.[21]

[21] The Commission, at its forty-sixth session in 2013, agreed to use four tests to assess whether legislative work on a topic should be referred to a working group: (i) whether it was clear that the topic was likely to be amenable to international harmonization and the consensual development of a legislative text; (ii) whether the scope of a future text and the policy issues for deliberation were sufficiently clear; (iii) whether there existed a sufficient likelihood that a legislative text on the topic would enhance modernization, harmonization or unification of the international trade law; and (iv) whether duplication might arise with work being undertaken by other international organizations. See Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17), paras. 303–304.