THE EARLY WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON CLIMATE CHANGE: A FIRST ANALYSIS

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In 2021, the Member States of the United Nations Commission on International Trade Law (UNCITRAL or the "Commission") initiated a process to determine whether UNCITRAL should undertake some work in the area of climate change and, if so, how this body could contribute to the fight against climate change. These discussions have been ongoing since then and while no formal legislative work programme has been launched yet, there seems to be a wide agreement within the Commission that UNCITRAL could and should engage in climate action. However, considering the mandate of this body – which is to facilitate international trade – its sudden interest for climate change raises questions: can UNCITRAL work on climate change without exceeding its rather narrow and business law-focused mandate? If so, how and to what extent would such a work contribute to the fight against climate change? And is it appropriate for this body to venture into this topic, or could this process hinder progress in climate negotiations in other international forums, thus becoming counterproductive? The following article addresses these questions by offering a first analysis of the discussions on climate change that have been launched at UNCITRAL. It shows that, despite its rather narrow mandate, there are different ways in which the Commission could work on climate change. It also explains that there currently is a debate among the Members of the Commission about which of these ways should be prioritized.

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Introduction

The United Nations Commission on International Trade Law (UNCITRAL or the "Commission") was established by the United Nations General Assembly (UNGA) in 1966 to promote "the progressive harmonization and unification of the law of international trade."[1] This subsidiary body, which today comprises 70 States,[2] was created with the idea that "all peoples" could benefit from the development of international trade and that, therefore, "divergencies arising from the laws of different States in matters relating to international trade" had to be eliminated so the development of this trade could be facilitated.[3]

Unlike the World Trade Organization, UNCITRAL "does not handle state-to-state relationships", but "addresses cross-border transactions (sales, transport, financing investment) and disputes arising from those transactions."[4] As UNCITRAL itself explains it, its role is to develop a "robust cross-border legal framework for the facilitation of international trade and investment",[5] by preparing instruments "dealing with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade."[6]

Over its existence, the work conducted by UNCITRAL has resulted in the adoption of conventions, model laws, legal guides, legislatives guides, rules, and

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[1] United Nations General Assembly, *Establishment of the United Nations Commission on International Trade Law,* UNGA, 21st Sess, Supp No 16, UN Doc A/RES/2205/XXI (1960) 99 at 99 [UNGA 1960].

[2] UNCITRAL was originally composed of 29 Member States, but its membership was expanded in 1973 to 36 States, in 2004 to 60 States and in 2022 to 70 States.

[3] UNGA 1960, *supra* note 1. See also: Edward Allan Farnsworth, "UNCITRAL - Why? What? How? When?" (1972) 20:2 Am J Comp L 314.

[4] Caroline Nicholas, "UNCITRAL's Role in Commercial Law Reform: History and Future Prospects" in Orkun Akseli & Johan Linarelli, eds, *The Future of Commercial Law: Ways Forward for Change and Reform* (Oxford: Hart Publishing, 2020) at 12.

[5] United Nations Commission on International Trade Law, "Homepage", online: *United Nations* <https://uncitral.un.org> [https://perma.cc/YY9X-VV7B] [UNCITRAL Webpage].

[6] United Nations Commission on International Trade Law, "Frequently Asked Questions - Mandate and History", online: *United Nations* <https://uncitral.un.org/en/about/faq/mandate_composition/history> [https://perma.cc/RLQ4-ZQCQ].

practice notes in a number of key areas of commercial law, such as "dispute resolution, international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, procurement and sale of goods."[7] Some of the most well-known UNCITRAL instruments include the *UNCITRAL Arbitration Rules (2021)*,[8] the *UNCITRAL Model Law on International Commercial Arbitration*,[9] and the *United Nations Convention on Contracts for the International Sale of Goods*.[10]

This brief description of UNCITRAL should clarify: environmental protection has never been part of UNCITRAL's DNA. Its mandate does not refer to environmental protection (which is rather normal for a subsidiary body of the UNGA created in 1966) and "[m]ost UNCITRAL texts are not directly relevant to environment concerns."[11] While recognition is given to the need to protect the environment in certain instruments,[12] no such instruments have been adopted by UNCITRAL with the specific aim of helping to solve environmental problems. Thus, the recent decision of the Commission to take an interest in the issue of climate change may come as something of a surprise.

In 2021, the Members of UNCITRAL initiated discussions to determine whether the Commission should undertake some work in the area of climate change and, if so, how the Commission could offer its own contribution to the international community's efforts to combat climate change.[13] These discussions have been ongoing since then and while no formal legislative work programme has been launched yet, there seems to be a wide agreement within the Commission that UNCITRAL could and should play a role in the fight against climate change.[14]

Although many uncertainties remain as to what the outcome of this process will be, it is already tempting to welcome the launch of these discussions on climate

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[7] United Nations Commission on International Trade Law, *A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law* (Vienna: United Nations, 2013) at 1.

[8] United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules (2021)* (Vienna: United Nations, 2021).

[9] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration* (Vienna: United Nations, 2008).

[10] 11 April 1980, 1489 UNTS 59 (entered into force 1 January 1988).

[11] United Nations Commission on International Trade Law, "Frequently Asked Questions - UNCITRAL and Public Law Issues", online: *United Nations* <https://uncitral.un.org/en/about/faq/public_law> [https://perma.cc/4QNA-SZN6].

[12] See: United Nations Commission on International Trade Law, *UNCITRAL Model Legislative Provisions on Public-Private Partnerships* (Vienna: United Nations, 2020) at model provision 5 para 3(a), model provision 10 para (a), model provision 14 para 2(b), model provision 19 para 1(b).

[13] *Report of the United Nations Commission on International Trade Law*, UNGA, 54th Sess, Supp No 17, UN Doc A/76/17 (2021) 1 at 47–48 [*Report of UNCITRAL* 2021].

[14] *Report of the United Nations Commission on International Trade Law*, UNGA, 56th Sess, Supp No 17, UN Doc A/78/17 (2023) 3 at 40 [*Report of UNCITRAL* 2023].

change at UNCITRAL very positively. Indeed, when it comes to climate change, there is a wide consensus around the idea that what is needed is an "all-hands on deck" approach,[15] that action is required everywhere,[16] and that everyone and – importantly – "every area of law"[17] has a role to play. On this specific point, one must acknowledge that climate concerns are now being mainstreamed in a growing number of fields of law, including corporate law[18] and commercial law.[19] The fact that private law may be useful to address climate change is increasingly recognized and UNCITRAL's willingness to work on climate change could be viewed as just another manifestation of this general trend.

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[15] Remi Moncel & Harro van Asselet, "All Hands on Deck! Mobilizing Climate Action Beyond the UNFCCC" (2012) 21:3 Rev Euro Community Intl Envtl L 163.

[16] United Nations, *Paris Agreement*, 12 December 2015, 3156 UNTC 79 at 143 at 144 [*Paris Agreement*] (noting "the importance of the engagements of all levels of government and various actors […] in addressing climate change"). In 1988, in the first UNGA resolution on climate change, "Governments, intergovernmental and non-governmental organizations", "scientific institutions", "industry and other productive sectors" were already all called upon to act to prevent the deterioration of the climatic system. See: *Protection of global climate for present and future generations of mankind*, UNGA, 43rd Sess, Supp No 49, UN Doc A/RES/43/53 (1988) at 134.

[17] Hannah West, "Law in a Changing World: The Climate Crisis" (3 April 2023), online: *Ultra Vires* <https://ultravires.ca/2023/04/law-in-a-changing-world-the-climate-crisis> [https://perma.cc/89YZ-Q76R].

[18] For instance, in California, by virtue of the recently adopted *Climate Corporate Data Accountability Act*, business entities with total annual revenues in excess of $1,000,000,000 and that do business in California will now be required to publicly disclose annually their scope 1, 2 and 3 greenhouse gas emissions (GHGs). See US, SB 253 *Climate Corporate Data Accountability Act*, 2023-2024, Reg Sess, Cal, 2023, Ch 382, approved by the Governor of California on 7 October 2023. See also US, SB 251, *Greenhouse gases: climate-related financial risk*, (2023-2024), Reg Sess, Cal, 2021, Ch 383, which was also approved by the Governor of California on 7 October 2023. In Canada, see Canadian Securities Administrators, *CSA Staff Notice 51-358 Reporting of Climate Change-related Risks*, (1 August 2019) online: *Canadian Securities Administrators* <https://www.osc.ca/sites/default/files/pdfs/irps/csa_20190801_51-358_reporting-of-climate-change-related-risks.pdf> [https://perma.cc/X9H3-MYAE]. The duty to disclose climate-related information tends to be recognized in an increasing number of jurisdictions, notably thanks to the standards established on that matter by the Task Force on Climate-Related Financial Disclosure, see: Task Force on Climate-Related Financial Disclosure, *Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosure* (15 June 2017), online: *Task Force on Climate-Related Financial Disclosure* <https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf> [https://perma.cc/Z82T-PS2P]. On this topic see Roshaan Wasim, "Corporate (non)disclosure of climate change information" (2019) 119:5 Colum L Rev 1311; John Armour, Luca Enriques, & Thom Wetzer, "Mandatory Corporate Climate Disclosures: Now, but How?" (2021) 2021:3 Colum Bus L Rev 1085.

[19] For instance, in France, the law prohibits the use of the claim "carbon neutral" in advertising without this claim being substantiated and justified. See *Code de l'environnement* art. D229-106, which defines the terms and conditions for advertisers to communicate the carbon neutrality of their products or services. Also, on 22 March 2023, the European Commission published a proposal for a directive on substantiation and communication of explicit environmental claims, referred to as the "Green Claims Directive". See: EC, *Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims*, [2023] OJ L 166/1.

In any case, the point could be made that since solving the climate crisis requires "*legal* adaptations"[20] in all fields of the law, the fact that UNCITRAL is now seeking to "adapt" its practices and rules (as well as its institutional culture) to support climate action is good news. Of course, given its rather narrow mandate, one might not expect this institution to deliver the silver bullet that will magically fix the climate problem. But as the United Nations Secretary-General António Gutteres once said, to limit the rise of the global temperatures, "every effort counts."[21]

While this may be the case, this sudden interest of UNCITRAL in climate change also raises some important questions that deserve careful consideration. For instance, can UNCITRAL work on climate change without exceeding its rather narrow and business law-focused mandate? If so, how and to what extent would such work contribute to the fight against climate change? And is it appropriate for this subsidiary body to venture into this topic, or could this process hinder progress in climate negotiations in other international forums, thus becoming counterproductive?

The following article addresses these questions by offering a first analysis of the discussions on climate change that have been launched at UNCITRAL. It shows that, despite its rather narrow mandate, there are different ways in which the Commission could work on climate change. It also explains that there currently is a debate among the Members of the Commission about which of these ways should be prioritized. While some States are of the view that it is by working on the voluntary carbon credits that are traded on voluntary carbon markets that the Commission could make its most useful contribution to the fight against climate change, others consider that it would be more appropriate to examine how existing UNCITRAL instruments could be interpreted and applied to achieve mitigation and adaptation goals.

The article is divided in five parts. Part I retraces how climate change became a topic of discussions at UNCITRAL in 2021, at its 54th session. Parts II and III focus on the key issues that have been at the center of the discussions at the 55th and 56th sessions of the Commission in 2022 and 2023. Part IV explains why the idea of launching a work programme on voluntary carbon credits at UNCITRAL may be deemed controversial. Lastly, Part V discusses whether examining how existing UNCITRAL instruments could be used as tools to achieve climate goals would be a more appropriate way for the Commission to work on climate change.

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[20] J.B. Ruhl & James Salzman, "Climate change Meets the Law of the Horse" (2013) 62:5 Duke LJ 975 at 981. Also see: Jacqueline Peel, "Climate Change Law: The Emergence of a New Legal Discipline" (2008) 32:3 Melb U L Rev 922 at 922 ("devising legal solutions to climate change is likely to involve profound changes to existing governance and regulatory frameworks, with reverberations felt in many other areas of law…").

[21] United Nations, Press Release, SG/SM/19292 "Tacking Inequality, Climate Challenges Critical for Advancing towards 2030 Agenda Goals, Secretary-General Tells Southeast Asia Leaders' Meeting", (11 October 2018) online: *UN Secretary General Statements and Messages* <https://press.un.org/en/2018/sgsm19292.doc.htm> [https://perma.cc/G4VV-437G].

I. How Climate Change Became a Topic at UNCITRAL (54th Session)

UNCITRAL's interest for climate change started in 2021, as a result of an initiative led by a transnational coalition of commercial law firms dubbed the Net Zero Lawyers Alliance (NZLA). Launched in the United Kingdom in 2021, the NZLA presents itself as coalition that supports "the goal of Net Zero greenhouse gas (GHG) emissions by 2050 or sooner, in line with global efforts to limit warming to 1.5°C (Net Zero)."[22] By becoming member of the NZLA, law firms commit, *inter alia*, to develop net zero targets for their activities and to work with their clients to offer legal services that facilitate their decarbonization.

As part of its activities, the NZLA launched the "Net Zero Legislative Project", an initiative aiming at examining "whether or not UNCITRAL's existing rules align with climate change mitigation, adaptation and resilience goals and what more they can do to facilitate them."[23] The premise on which this project was based was that since investment in mitigation, adaptation and resilience are governed by international trade law instruments, UNCITRAL's system of rules could provide "tools through which to achieve climate goals globally, in a just and fair way that benefits all [S]tates equally and all investors, regardless of their nationality and resources."[24]

In that sense, the proposal of the NZLA was for the Commission to take stock of its existing "texts and working documents to identify whether and how these might better facilitate or accelerate the Paris Agreement goals", and to identify areas where "UNCITRAL might innovate to offer new tools either within those existing texts and working documents or in addition."[25]

To be more specific, the NZLA gave three examples of potential work that could be carried out at UNCITRAL. The first example was a stocktaking exercise of UNCITRAL's documents relating to public-private partnerships,[26] to see how they could be used as levers in the fight against climate change. The two other examples were the development of standardized tools for facilitating technology transfer (e.g., licensing terms) and for scaling-up the voluntary carbon markets (e.g., harmonized

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[22] Net Zero Lawyers Alliance, "Our Commitment", online *Net Zero Lawyers Alliance*: <https://www.netzerolawyers.com/ourcommitment> [https://perma.cc/SFE8-BBL7].

[23] Net Zero Lawyers Alliance, "Net Zero Legislative Project: possible work in UNCITRAL" (2021) at 1, online (pdf): *United Nations Commission on International Trade* <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_net_zero_legislative_project_summary.pdf> [[Net Zero Legislative Project].

[24] *Ibid.*

[25] *Ibid.*

[26] United Nations Commission on International Trade Law, *UNCITRAL Model Legislative Provisions on Public-Private Partnerships* (Vienna: United Nations, 2019) [*Model Provisions on Public-Private Partnerships*].

contracts for the trading of carbon credits, dedicated procedures for the resolution of disputes relating to the trading of carbon credits).[27]

Voluntary carbon markets (VCMs) are largely unregulated markets where private actors may buy carbon credits to voluntarily offset the effects of their choices on the climate.[28] Some private entities, usually referred to as "carbon standards" (e.g., Verra, Gold Standard), have established programs that enable the developers of projects that avoid GHGs emissions or that remove GHGs from the atmosphere, in addition to what would have occurred in the absence of their projects, to receive Voluntary Carbon Credits (VCCs) for each tonne of CO2 equivalent not emitted or removed.[29] Each carbon standard issues its own VCCs which are registered in a specific electronic database.

Once created, these Voluntary Carbon Credits (VCCs) may be traded among private actors (whatever their location) and their holders may "retire" them (i.e., remove them from the market) at any moment to claim that they have offset their emissions. Purchasing VCCs is part of the corporate social responsibility strategy of a growing number of companies that have set themselves a carbon neutrality target.[30] Before the NZLA's proposal, the need for standardized tools on the VCMs and, more generally, for greater legal clarity on these markets, had been raised by the Task Force on Scaling Up Voluntary Carbon Markets, another private sector-led initiative also launched in 2021 to support the development of VCMs.[31] On this specific point, the NZLA's proposal was thus conveying some of the expectations already expressed by the private sector.

With the support of the United Kingdom (which at the time was preparing to host the 26th Conference of the Parties to the *United Nations Framework Convention on Climate Change*,[32] in Glasgow), the NZLA approached the secretariat of UNCITRAL with its "Net Zero Legislative Project" and presented it to the Members

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[27] Net Zero Legislative Project, *supra* note 23 at 3.

[28] Vittoria Battocletti, Luca Enriques & Alessandro Romano, "The Voluntary Carbon Market: Market Failures and Policy Implications" (2023) European Corporate Governance Institute Law Working Paper No 688 at 2. Available at: online (pdf) *European Corporate Governance Institute*: <https://www.ecgi.global/sites/default/files/working_papers/documents/thevoluntarycarbonmarket.pdf> [https://perma.cc/US8T-C47L].

[29] Jake Sadikman et al, "The Evolution of Canada's Carbon Markets and Their Role in Energy Transition" (2022) 60:2 Alta L Rev 329 at 342 [Sadikman et al].

[30] Nicolas Kreibich & Lucas Hermwille, "Caught in Between: Credibility and Feasibility of the Voluntary Carbon Market Post-2020" (2021) 21:7 Climate Pol'y 939; Nicole Franki, "Regulation of the Voluntary Carbon Offset Market: Shifting the Burden of Climate Change Mitigation from Individual to Collective Action" (2022) 48:1 Colum J Envtl L 177.

[31] Taskforce on Scaling Voluntary Carbon Markets, *Taskforce on Scaling Voluntary Carbon Markets: Phase II Report* (2021) at 40, online (pdf) *The Institute of International Finance*: <https://icvcm.org/wp-content/uploads/2022/03/TSVCM_Phase_2_Report.pdf> [https://perma.cc/3B2A-9QXH].

[32] 21 March 1994, 1771 UNTS 165 [UNFCCC].

of the Commission at a side event of the 54th session of the Commission, in July 2021.[33] In addition to the topics covered by the NZLA's proposal, another point that emerged during the discussions held at this side event was that "legal uncertainty regarding the legal status of carbon credits traded in the voluntary carbon markets could be a focus for future legislative work" at UNCITRAL.[34] The mention of this issue was the result of the lobbying action of the International Swap and Derivatives Association (ISDA), a global financial trade association, which had also approached the secretariat of the Commission at that time to insist on the need to clarify the legal status of VCCs and to stress the role that UNCITRAL, as a global legal standard setter, could play in that regard.[35]

Ultimately, what came out of the side event was that "Broad support was expressed for the Commission to consider the [NZLA's] proposal further", but that Members also "needed to carry out further internal consultations across different government agencies before a decision on future work could be taken."[36] Another key point was that any UNCITRAL work program on climate change "would need to be undertaken within existing public international law frameworks, such as the Paris Agreement on climate change of 2015."[37]

The 54th session of the Commission marked the first time that climate change was brought to the attention of UNCITRAL, and States were exposed to the idea that UNCITRAL could play a role in the fight against climate change. Although the idea was not dismissed outright, the States adopted a cautious approach. Various factors may have explained this: the newness of the topic in this forum, the limited expertise of the representatives of the Member States on climate change, and perhaps also their general knowledge of the fact that the world of climate governance is highly complex and discussing climate change at the multilateral level is politically sensitive. Thus, in 2021, the Commission only limited itself to requesting "the secretariat to consult with interested States with a view to developing a more detailed proposal on the topic for presentation to the Commission for its consideration at its next session, in 2022."[38]

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[33] *Report of UNCITRAL* 2021, *supra* note 13 at 47.

[34] *Ibid* at 48.

[35] International Swaps and Derivatives Association, *Legal implications of Voluntary Carbon Markets* (1 December 2021), online (pdf): *International Swaps and Derivative Association* <https://www.isda.org/2021/12/01/legal-implications-of-voluntary-carbon-credits> [https://perma.cc/Q4WK-TN9V] [*Legal Implications of Voluntary Carbon Markets*].

[36] *Report of UNCITRAL* 2021, *supra* note 13 at 48.

[37] *Ibid.*

[38] *Ibid*.

II. The First Substantive Discussions on Climate Change and the Emergence of Key Issues (55th Session)

It was therefore only at the 55th session, held in July 2022, that UNCITRAL Members had their first substantive discussion on the role that the Commission could play in the fight against climate change. Prior to the session, the secretariat had commissioned a study from an independent expert on the private law aspects of climate change to assist the Members in considering the desirability and feasibly of undertaking work in this area.

At the demand of the secretariat, this study mainly focused on two issues: the legal aspects of carbon trading (including the legal status of VCCs) and the legal tools capable of promoting a systematic incorporation of climate change considerations into business decisions (such as mandatory disclosure of climate-related information for the private sector and climate lawsuits against corporations for alleged breach of tort law duty of care). The study also contained a brief assessment of how various UNCITRAL instruments could be used or interpreted to support the commitments towards emissions reductions. The findings and recommendations of the study were summarized in a note from the secretariat which was distributed to the Member States prior to the 55th session.[39]

Four important points emerged from the discussions that were held on this topic. The first point is that all States seemed to agree "on the importance of the topic and on the usefulness of exploring how UNCITRAL could offer its own contribution to the international community's efforts to combat climate change and mitigate its effects by updating existing private law instruments and developing new enabling legal mechanisms, if necessary."[40] The second point is that there was also a strong support for the idea – already expressed at the previous session of the Commission – that "any work to be carried out should be consistent with existing international law and treaties on climate change, where relevant."[41]

The third point is that States had divergent views about the issues on which to focus. Some considered that the duty of private actors to disclose climate-related information would be an appropriate topic of work for the Commission. However, given the rise of climate litigation cases revolving around the lack of, or incomplete,

[39] UNGA, United Nations Commission on International Trade Law, *Possible future work on climate change mitigation, adaptation and resilience*, UN Doc A/CN.9/1120 15 May 2022; UNGA, United Nations Commission on International Trade Law, *Possible future work on climate change mitigation, adaptation and resilience*, UN Doc A/CN.9/1120/Add.1, 15 May 2022.

[40] *Report of the United Nations Commission on International Trade Law*, UNGA, 55th Sess, Supp No 17, UN Doc A/77/17 (2022) at 38 [*Report of UNCITRAL* 2022].

[41] *Ibid*.

disclosure of climate-related information by companies,[42] others disagreed on the basis that the role of the Commission was not to develop tools that could "facilitate litigation against corporations for climate change-related damages."[43] Rather, some States suggested that the focus should "be placed on private law issues relating to carbon trading",[44] as this would help stimulate climate-friendly investments.

Fourth, and importantly, concerns were expressed that the work conducted at UNCITRAL on climate change may duplicate the work already carried out in other international fora, especially with respect to carbon trading. This concern emerged the month before the host of the 55th session, as the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) recommended that its General Assembly include "a project to analyse the private law aspects and determine the legal nature of voluntary carbon credits in the 2023-2025 Work Programme, with high priority"[45] – which the General Assembly did in December 2022.

The sudden interest of UNIDROIT in this issue was prompted by the fact that, in addition to speaking to the secretariat of UNCITRAL, the ISDA had also submitted a proposal aiming at clarifying the legal status of VCCs to UNIDROIT. Confronted with this situation, UNCITRAL Members had few options but to agree that "any duplication should be avoided" and to express "confidence that all interested organizations would coordinate their respective activities."[46]

The outcome of these discussions was that the Members of the Commission requested that the secretariat conduct further research on the nexus between climate change and international trade law and to convene a colloquium on the various issues surrounding climate change mitigation, adaptation, and resilience to assist them in better understanding the issues at play.[47]

Although this first substantive discussion on climate change did not end with the launch of a formal work program, it may still be regarded as an important milestone in the involvement of UNCITRAL in the area of climate change in two ways. One, it confirmed that States were interested in "doing something" on climate change, even

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[42] *People of the State of New York v. Exxon Mobil Corporation*, N° 452044/2018 (NY Sup Ct); *Commonwealth of Massachusetts v. Exxon Mobil Corporation*, N° 1984CV03333 (Mass Sup Ct); *Pedro Ramirez Jr. v. Exxon Mobil Corporation et al*., N° 3:16-CV-3111-K (ND Tex Dist Ct); *Guy Abrahams v. Commonwealth Bank of Australia*, VID879/2017 (Aust). See Hana V. Vizcarra, "The Reasonable Investor and Climate-Related Information: Changing Expectations for Financial Disclosures" (2020) 50:2 Envtl L Rep 10106; Lisa Benjamin, "The Road to Paris Runs Through Delaware: Climate Litigation and Directors Duties" (2020) 2020:2 Utah L Rev 313.

[43] *Report of UNCITRAL* 2022, *supra* note 40 at 38.

[44] *Ibid.*

[45] International Institute for the Unification of Private Law, UNIDRIOT Governing Council, *Report (prepared by the Secretariat)*, CD (101) 21 (September 2022) at para 73.

[46] *Report of UNCITRAL* 2022, *supra* note 40 at 38.

[47] *Ibid* at 39.

though there was no clear understanding of what that "something" would be. Two, it is during this discussion that two key issues that would later become central to this process began to take shape.

Briefly put, these issues may be summarized as follows: 1) what would be the most effective way for UNCITRAL to contribute to the fight against climate change, i.e., on what issue(s) should the Commission focus considering its mandate?; 2) how much weight should the Commission give to the "outside world" in its work on climate change, i.e., on the work that is already being carried out elsewhere (including under the Paris Agreement), as well as on the principles that have structured climate governance over the last 30 years? It is precisely around those two questions, which, to some extent, are linked, that discussions at the next UNCITRAL session revolved.

III. Debating how UNCITRAL Should Address Climate Change (56th Session)

The discussions on whether UNCITRAL should undertake work on climate change, and if so how, continued in July 2023 at the 56th session of the Commission. To assist the States in their discussions, the secretariat prepared two additional notes containing further information from experts on the nexus between climate change and international trade law.[48] A two day colloquium on this topic was also organized during the first week of the 56th session to discuss how "international trade law could effectively support the achievement of climate goals set by the international community, the scope and value of legal harmonization in those areas and the need for international guidance for legislators, policymakers, courts and dispute resolution bodies."[49] These discussions included various experts from intergovernmental and non-governmental organizations; the industry and business sector; and academia and private practice.

Although States reiterated their shared vision that "UNICTRAL should consider undertaking work on those aspects of climate change falling within its mandate, and could support the efforts of other United Nations bodies and Secretariat units in that respect",[50] the discussions became more complex as different intertwined issues were raised.

It was first suggested that the work of the Commission could initially be focused on "questions of international trade law, private law and private international

[48] UNGA, United Nations Commission on International Trade Law, *Possible future work on climate change mitigation, adaptation and resilience*, UN Doc A/CN.9/1153 10 May 2023; UNGA, United Nations Commission on International Trade Law, *Possible future work on climate change mitigation, adaptation and resilience*, UN Doc A/CN.9/1153/Add.1, 10 May 2023.

[49] *Report of the United Nations Commission on International Trade Law*, UNGA, 56th Sess, Supp No. 17 UN Doc A/78/17 (2023) 1 at 39 [*Report of UNCITRAL* 2023].

[50] *Ibid* at 40.

law that impact on the implementation and operation of voluntary carbon markets."[51] The idea was to request that the secretariat work in cooperation with other relevant organizations (e.g., UNFCCC, UNIDROIT, legal experts) to develop a taxonomy of relevant legal issues that, at a later stage, would have helped the Commission decide whether future work was needed in that area and if so, how such work should be conducted. This proposal aligned with the remarks made by many participants of the colloquium who highlighted the need to bring more clarity and legal predictability on VCMs (notably regarding the legal status of VCCs).

However, some States (particularly developing countries) objected to this proposal, mainly on the ground that they needed more time to reflect on the implications that working on this topic could have on the ongoing negotiations about the implementation of the market mechanisms of Article 6 of the Paris Agreement.[52] They suggested that the secretariat should only be "mandated to analyse how existing UNCITRAL texts can be used to contribute to international and domestic climate actions" and that any "specific proposal should clearly demonstrate why UNCITRAL would be the appropriate forum to address it", as it "would be particularly unhelpful for the Commission to venture into any area related to ongoing climate negotiations."[53] They also added that "any work by UNCITRAL should remain with the confines of its expertise."[54]

Another point of contention was the importance to give to some aspects of the existing climate treaties. Unsurprisingly, some parties expressed "strong support" for the "view that any work to be carried out [at UNCITRAL] should be consistent with existing international law, including treaties on climate change."[55] But States disagreed on whether the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) was a relevant concept to take into consideration to define how UNCITRAL would contribute to the fight against climate change. In the context of this discussion, some States noted that "UNCITRAL should not be treated as another forum for engaging in political manoeuvring, and that the serious challenges of climate change should not be subordinated to unrelated and unjustified political aggrievances of certain States."[56]

Eventually, the Members of the Commission convened to request the secretariat, "within the mandate of UNCITRAL, to consult with all Member States of the United Nations with a view to developing a more detailed study on the aspects of international trade law related to voluntary carbon credits", in cooperation with

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[51] *Ibid*.

[52] *Ibid*.

[53] *Ibid* at 41.

[54] *Ibid.*

[55] *Ibid*.

[56] *Ibid*.

UNIDROIT, the UNFCCC, the Hague Conference on Private International Law (HCCH) and other organizations with relevant expertise.[57] It was also decided that this study, which would serve as a basis for the discussions at the 57th session, should include consideration of "whether UNCITRAL efforts would be redundant."[58] Another interesting point was that any work carried out by the secretariat at this stage would need to merely "describe and analyse issues rather than to prescribe possible solutions or formulate models so as to avoid interference and duplication with the work of the competent bodies under existing international agreements in the area of climate change."[59]

The main conclusion that came out of the 56th session was probably the existence of a clear dividing line between the States that were ready to move to a more operational phase by focusing on the VCMs and the legal issues relating to the international trading of VCCs, and States that thought it would be more appropriate for the Commission to work only on its existing instruments. The outcome of the discussion is a delicate compromise between those two positions.

On one hand, the secretariat will develop a new study that will focus on the aspects of international trade law related to the VCCs. But on the other, it was made clear that this study would need to address the issue of whether conducting work on that topic could be duplicative of the work already being carried out in other forums (be it UNIDROIT or the UNFCCC). In addition, it was understood that nothing at this stage had to be of a prescriptive nature and that the discussions on climate change would continue at the next session of UNCITRAL in 2024. In other words, while Member States confirmed that VCMs – and more specifically, VCCs – were a topic on which the Commission could potentially conduct some work in the way forward, all options were left open as to what the Commission could do in relation to climate change at its next session.

IV. The Controversies About a Work Programme on Voluntary Carbon Credits

While UNCITRAL's interest for climate change is new and the discussions are still ongoing, a question that seemed highly controversial at the Commission was whether UNCITRAL should initiate some work on the VCMs, and more specifically on the VCCs. During the discussions at the 56th session, an aspect of VCMs that elicited considerable interest among some Members of the Commission was the uncertainty that currently surrounds the legal status of the VCCs that are traded on VCMs. In the words of the ISDA, the problem is that:

[57] *Ibid* at 41–42.

[58] *Ibid* at 42.

[59] *Ibid* at 41.

> The possible legal nature of VCCs currently differs across jurisdictions. In many countries, they can be viewed as some form of intangible property; in others, they could be characterized as a bundle of contractual rights. As with any intangible asset, much depends on the legal treatment: different rules could apply on how VCCs as a fungible instrument can be created, bought, sold and retired, how security is taken, and how they are treated on insolvency (including with regard to netting).[60]

Thus, some Member States suggested that UNCITRAL could launch a work programme to resolve those uncertainties by clarifying the legal status of VCCs, a proposal to which other States objected. The fact is, as the following sections will explain, that while valid arguments can be put forward in defense of this proposal, there are also various reasons for which initiating some work on VCCs at UNCITRAL may raise concerns.

A. By Working on Voluntary Carbon Credits, would UNCITRAL Really Contribute to the Fight Against Climate Change?

A first question to consider is whether by clarifying the legal status of VCCs the Commission would really contribute to the fight against climate change. Some may answer this question positively, by saying that the current lack of legal certainty about what VCCs are prevents money from behind channeled towards mitigation projects. The key argument here is that the transition towards a low-carbon economy requires considerable investments and that the VCMs "represent a non-regulatory means of directing financial resources"[61] to mitigation projects. One must admit that in countries where the regulations are not sufficiently ambitious to create an incentive to stimulate investments for mitigation projects through specific mandatory requirements, the possibility to sell VCCs is often what will make those investments possible.

Yet, uncertainty as to what VCCs are under domestic law produces uncertainty about what can, or cannot, be done with VCCs. Some will argue, then, that this hinders the development of VCMs as the lack of legal predictably may prevent private actors from investing in those markets. In other words, the 'what is being traded' question needs to be resolved as the answer may directly affect the answer to the 'what rules apply to what is being traded' question. As pointed out by one author,

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[60] *Legal Implications of Voluntary Carbon Markets*, *supra* note 35 at 9. The possibility to qualify VCCs as a bundle of contractual rights stems from the fact that the existence of the VCMs rests exclusively on a bundle of private law contracts. For a company to obtain VCCs, several contracts must be concluded: one with a carbon standard to start the certification process of a mitigation project; one with a third-party verifier that will certify that the project meets the rules and requirements of the carbon standard; and one with another third-party that will assess the quantity of GHGs emissions that the project has avoided or sequestered and confirm the number of corresponding VCCs that may be issued. It is only through the existence of these contractual arrangements that VCCs come to life. Therefore, it may be possible to characterize those credits as a contractual right that an entity has to benefit from them by virtue of the different contracts it has concluded with the carbon standard and the verification bodies.

[61] Sadikman et al, *supra* note 29 at 342.

"[i]n economic theory, certainty in the understanding of entitlements is a recognised prerequisite for a viable market, and well-delineated property rights are considered fundamental to market exchange."[62] Thus, the question of the legal nature of VCCs is viewed by some as of deep relevance to business decisions as legal uncertainties on that matter may prevent investment in mitigation projects.[63]

By following this line of reasoning, the point could be made that VCMs are a key tool for achieving the third objective of the Paris Agreement, which is to "[make] finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development",[64] and that by clarifying the legal framework applicable to the trading of VCCs, UNCITRAL will support the achievement of this goal.

Clearly, there is a strong expectation from the private sector to have more legal predictably in the field of VCMs, and it is undisputed that fighting climate change requires more financial resources to be channeled towards mitigation projects. However, when one considers other elements, it may no longer appear evident that by seeking to clarify the legal nature of VCCs and the ways in which they should be treated under domestic law, UNCITRAL would really contribute to the fight against climate change.

A major and persistent issue with VCMs is that carbon standards tend to deliver more VCCs to project developers than the amount of GHGs that their projects contribute to reducing or removing from the atmosphere. In other words, VCCs do not always correspond to emission reductions or removals that are real, additional (i.e., that would not have happened in the absence of the mitigation project), and permanent.[65] To give just one example, in January 2023, an investigation undertaken by a group of journalists alleged that 90% of the credits issued by the carbon standard Verra (the leading carbon standard) for rainforest conservation projects were worthless as they did not represent genuine reductions of GHGs.[66]

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[62] Sabina Manea, *Instrumentalising property: an analysis of rights in the EU emissions trading system*, (PhD Thesis, Department of Law of the London School of Economics, 2013) at 23. Available: online (pdf): *LSE Theses Online* <http://etheses.lse.ac.uk/719/> [https://perma.cc/828M-YQVF].

[63] The importance of clarifying the legal nature of carbon units traded in compliance carbon markets has been widely highlighted in the legal literature. See M.J. Mace, "Legal nature of emission reductions and EU allowances: issues addressed in an international workshop" (2005) 2:2 J Euro Envtl & Plan L 123; Andrew Hedges, "Carbon units as property: guidance from analogous common law cases" (2016) 2016:3 Carbon & Climate L Rev 190.

[64] *Paris Agreement*, *supra* note 16, art 2.1(c).

[65] Alice Valiergue & Véra Ehrenstein, "Quality offsets? A commentary on the voluntary carbon markets" (2023) 26:4 Consumption Markets & Culture 298.

[66] Patrick Greensfield, "Revealed: more than 90% of rainforest carbon offsets by biggest certifier are worthless, analysis shows", *The Guardian* (18 January 2023), online: <https://www.theguardian.com/environment/2023/jan/18/revealed-forest-carbon-offsets-biggest-provider-worthless-verra-aoe> [https://perma.cc/9FMV-B7J6].

Because of this lack of certainty regarding the integrity of the VCCs, VCMs have always been controversial tools and non-governmental environmental organizations (NGEOs) are now challenging the lawfulness of carbon neutrality claims made by companies that rely on VCCs to make such claims. For instance, in 2022, a group of NGEOs launched a lawsuit in the Netherlands against the Dutch company KLM, alleging that it misled the consumers by adverting that, through the purchase of VCCs, KLM could truly compensate, or reduce, the impact of its flights.[67] A key argument of the plaintiffs is that the VCCs used by KLM, which come from reforestation projects, correspond to avoidance or removals of GHGs which would have happened even if those projects had not been implemented.[68]

If companies claim to have offset their emissions by using VCCs which do not correspond to emission reductions or removals that are real, additional, and permanent, then those offsetting claims become worthless. More importantly, in such cases, the use of VCCs might hinder the fight against climate change, instead of helping it. A company that has purchased VCCs may choose to continue to emit GHGs, or increase its emissions, as it will consider that those VCCs enable it to offset its carbon footprint. Thus, by clarifying the legal framework applicable to the trading of VCCs, UNCITRAL would certainly create a more predictable legal environment, which may help to attract more finance in the VCMs; but whether achieving this outcome would help fight climate change remains debatable as some may argue that VCCs do not always correspond to genuine GHGs reductions or removals and that relying on VCCs may hinder the deployment of mitigation measures where they are the most needed (i.e., where the GHGs are emitted).

B. By Working on Voluntary Carbon Credits, Would UNCITRAL Really Contribute to the Fight Against Climate Change?

A second question about which views may differ is whether VCCs are really a suitable topic for UNCITRAL. From a formal standpoint, it seems rather clear that UNCITRAL would remain within the limits of its mandate if it were to undertake some work on VCCs. VCCs are an object of international trade and VCMs operate at a global scale and project developers, sellers, and buyers of VCCs, as well as the carbon standards that issue the VCCs, are often located in different jurisdictions. Thus, the functioning of the VCMs relies on cross-border commercial transactions. By providing more legal certainty about what VCCs are, how they should be treated under domestic law, or the law that applies to commercial disputes involving VCCs, UNCITRAL

[67] Climate Case Chart, "FossielVrij NL v. KLM" (2022), online: *Climate Case Chart* <https://climatecasechart.com/non-us-case/fossielvrij-nl-v-klm/> [https://perma.cc/4SZG-A2D8].

[68] Climate Case Chart, "FossielVrij Netherlands, Writ in English (unofficial translation)" (2022) at para 278, online (pdf): *Climate Case Chart* <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20220707_17244_petition.pdf> [https://perma.cc/WAM3-DQGL].

would contribute to developing a more "robust cross-border legal framework for the facilitation of" the international trading of VCCs.[69] .

Considering the diversity of legal systems, it is doubtful that UNCITRAL would go as far as prescribing the legal status that VCCs should have across all jurisdictions. But instead of seeking uniformity, it could strive for harmonization by producing legislative guidance that would cover a set of private law issues related to VCCs, and that would specify for instance that those "things" can be the subject of propriety rights, how ownership over them may be established and, more generally, the way in which VCCs should be treated under domestic law.

On the opposite side, however, it could be argued that some aspects of VCCs go far beyond the realm of business law and international trade. Surely, VCCs are objects of international trade, and their mere existence raises private law issues. But VCCs cannot only be envisaged that way. They remain "things" that are created by – and are intrinsically linked to – tangible activities to which the law of a specific jurisdiction applies. Yet, there are situations where the content of this law and the way in which VCCs are created may have to be taken into consideration to determine the legal nature of the VCCs or the legal treatment to which they should be subject to.

To illustrate this, one may take the case of VCCs that are created through a reforestation project. If, by virtue of the law of the jurisdiction where the project is carried out, trees (where the carbon which gave birth to the VCCs is stored) belong to the State, one could wonder whether the promoter of this reforestation project could still claim to have ownership over these VCCs. A similar question could arise with a reforestation project carried out on the land of an indigenous community without obtaining its free, prior, and informed consent.[70] The key point here is that the circumstances in which VCCs are created may influence their legal nature as well as the legal security surrounding their commercial transactions and their use for substantiating offsetting claims.

Thus, the point could be made that, by working on VCCs, the Members of the Commission could end up being confronted with domestic legal issues pertaining to public law or indigenous rights, which would fall outside UNCITRAL's mandate and with which the delegates of the Members of the Commission would likely be ill-equipped to deal with. Of course, they could also decide not to delve into those issues. But in that case the usefulness of any UNCITRAL instrument seeking to provide more legal clarity about VCCs would be greatly diminished.

In addition, one may wonder whether VCCs are not a topic on which the law is too evolving to lend itself to the kind of multilateral exercise of legal clarification

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[69] UNCITRAL Webpage, *supra* note 5.

[70] Charlotte Streck, "Who Owns REDD+? Carbon Markets, Carbon Rights and Entitlements to REDD+ Finance" (2020) 11:9 Forest 1 at 9 (noting that "establishing carbon rights can be challenging even where legal clarifications exist; in particular, where land titles are weak, contested or absent").

that could be undertaken at UNCITRAL. Several recent examples have shown that States are starting to pay much more attention to the functioning of VCMs in their own territories than before. For instance, in Indonesia, companies involved in mitigation projects on the VCMs are now required to register in a national registry system and to undergo a verification process.[71] In 2022, several countries (e.g., Papua New Guinea, Honduras) declared a temporary moratorium on all forest-related VCM projects until an adequate domestic regulatory framework to oversee these projects is implemented.[72] What these examples indicate is that it remains difficult to have a precise understanding of the global legal environmental in which VCMs will operate in the near future. Therefore, it could be challenging for UNCITRAL to start working on the private law issues relating to the international trading of VCCs, where further domestic legal developments in the field of VCMs, which could raise new questions and new kinds of legal uncertainties.

Besides, in recent years, both developed and developing States have begun to establish their own mechanisms through which private entities may obtain carbon credits that can be used for substantiating offsetting claims. For instance, in Canada, businesses and individuals may now acquire credits through the scheme established by the *Canadian Greenhouse Gas Offset Credit System Regulations* and use them to meet voluntary targets or simply for the benefit of the environment.[73] In 2018, France launched its *label Bas-Carbone* (low-carbon certificate), which is a form of non-tradable carbon unit that can be obtained by private actors by investing in projects that contribute to reduce or remove GHGs,[74] and the European Union is currently examining a Proposal for a Regulation on a certification for carbon removals.[75] In Asia, voluntary emission reduction programs can be found in several countries, such as China, India and Thailand.[76]

And to add more complexity to this already fragmented landscape, Article 6.2 of the Paris Agreement also established a framework under which units called

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[71] "Indonesia announces readiness for sales of over 577 million tonnes of CO2e from RBP scheme" (25 February 2023), online: *ForestHints. News* <https://foresthints.news/indonesia-announces-readiness-for-sales-of-over-577-million-tonnes-of-co2e-from-rbp-scheme/#:~:text=NEWS)%20%2D%20Indonesia%27s%20Environment%20and%20Forestry,as%20enhancing%20forest%20stock%20carbon> [https://perma.cc/FP93-VY33].

[72] Ken Silverstein, "Rainforest Nations Want To Be Rewarded For Saving Their Trees – Now", *Forbes* (19 June 2022), online: <https://www.forbes.com/sites/kensilverstein/2022/06/19/rainforests-nations-want-to-save-their-trees-but-they-want-to-be-paid---now/?sh=4fd13de345ab>.

[73] *Canadian Greenhouse Gas Offset Credit System Regulations*, SOR/2022-111.

[74] *Décret n°2018-1043 du 28 novembre 2018 créant un label « Bas-Carbone »*, JO, 28 November 2018, no.0276.

[75] EC, *Proposal for a Regulation of the European Parliament and of the Council establishing a Union certification framework for carbon removals*, [2022] OJ C 2022/672.

[76] World Bank Group, *State and Trends of Carbon Pricing 2023* (May 2023) at 68–69, online (pdf): *World Bank* <https://openknowledge.worldbank.org/entities/publication/58f2a409-9bb7-4ee6-899d-be47835c838f> [https://perma.cc/LC3R-EVNW].

"internationally transferred mitigation outcomes" (ITMOs), which are also to be delivered by the States themselves, may be traded among countries. As this shows, in addition to VCCs, other types of "voluntary" carbon credits – delivered by national authorities and not the carbon standards – may now be used by the private sector. Thus, one may ask whether it would still make sense to work exclusively on VCCs, when legal uncertainties might also arise in relation to these others sovereign VCCs that are issued by national authorities.

C. Could UNCITRAL Work on Voluntary Carbon Credits Without Interfering with Ongoing International Processes?

Because climate governance is a highly fragmented and polycentric universe,[77] with a complex of initiatives, regimes, and decision-making centers,[78] a third possible point of contention is whether by working on VCCs, UNCITRAL could interfere, and perhaps hinder, other ongoing international processes. The question first arises in relation to the work that UNIDROIT is currently conducting on the legal nature of VCCs.

As explained above, the UNIDROIT General Assembly decided in 2022 to include, with high priority, a project aiming to analyse the legal nature of VCCs with the view of adopting an international instrument on this topic in its work programme. A working group was established in 2023 to assist UNIDROIT, in which the secretariat of UNCITRAL participates.[79] If it were to conduct some work on VCCs, a possible option for UNCITRAL could then be to jointly work with UNIDROIT on this project. Otherwise, UNCITRAL's work could be redundant and such a situation could create a risk to see these two global legal standard setters saying different things on the exact same topic.

A more delicate question is whether by working on VCCs, UNCITRAL could interfere with the ongoing negotiations on the market mechanisms of Article 6 of the Paris Agreement. This article established two market-based mechanisms: a framework under which parties may engage in cooperative approaches to trade mitigation outcomes by exchanging units called ITMOs (Article 6.2); and a baseline-and-credit mechanism aiming at mitigating GHGs (Article 6.4). The rules detailing the functioning of these two mechanisms were fleshed out by the Conference of the Parties to the Paris Agreement in a set of decisions in 2021 and 2022, but further work remains to be done to make these mechanisms fully operational. Thus, at the 56th session of the

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[77] Harro Van Asselt, *The Fragmentation of Global Climate Governance Consequences and Management of Regime Interactions* (Cheltenham: Edward Elgar, 2014); Daniel H. Cole, "From Global to Polycentric Climate Governance" (2011) 2:3 Climate L 395.

[78] Robert O. Keohane & David G. Victor, "The Regime Complex for Climate Change" (2011) 9:1 Perspectives on Politics 7.

[79] International Institute for the Unification of Private Law, UNDRIOT Working Group on the Legal Nature of Voluntary Carbon Credits, *Study LXXXVI*, W.G.1 – Doc. 2 (October 2023).

Commission, several States expressed concerns that discussing VCCs at UNCITRAL might interfere with this negotiation process.

As the Article 6 negotiations are not directly focused on the VCMs nor on the private law aspects of carbon trading some could see these concerns as rather unjustified. Surely, although VCMs and the markets created by Article 6 "remain independent markets with separate governance structure[s]",[80] Article 6 negotiations do have some implications for the VCMs, as the units delivered under the Article 6 mechanisms may be used by the private sector to achieve voluntary climate targets. In addition, experts "anticipate increased convergence over time" between the markets governed by Article 6 and the VCMs, and "are already seeing this".[81] But the fact that the question of the legal nature that ITMOs or VCCs should have in domestic law is not part of the discussions under the Paris Agreement would seem to suggest that a UNCITRAL work programme on VCCs would not interfere with the ongoing climate negotiations.

Some may think differently and contend that it might not be very helpful to add another level of complexity to the negotiations on Article 6, which are already sufficiently difficult and politically sensitive, by launching discussions on carbon trading at UNCITRAL. Even if those discussions only focus on VCCs and private law issues, one could argue that they will likely require further work from many States internally, as the delegates that negotiate the implementation of Article 6 and those that negotiate at UNCITRAL may feel the need to consult to ensure that there is some consistency between the two processes. It could then slow the pace of the discussions in both forums and add legal confusion and diplomatic complexities in the governance of carbon markets.

In sum, the question of whether UNCITRAL should undertake some work on VCCs remains debatable, as one can point to various arguments to contend that this would, or would not, support the achievement of mitigation goals, fall within UNCITRAL's mandate, and interfere with other ongoing climate negotiations processes. Working on VCCs is, however, not the only way for the Commission to address climate change. Another possibility would be to examine how its existing instruments could be used as levers to achieve climate goals. But here again, as the next part will explain, one may hold divergent views about whether this would be a preferable option than to work on VCCs.

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[80] International Emissions Trading Association, *The Evolving Voluntary Carbon Market* (March 2023) at 10, online (pdf): *International Emissions Trading Association* < https://k5x2e9z8.rocketcdn.me/wp-content/uploads/2023/09/IETA_Paper_TheEvolvingVoluntaryCarbonMarket_2023.pdf> [https://perma.cc/5M9H-D8TF].

[81] *Ibid*.

V. Exploring how UNCITRAL Instruments Could be Used to Combat Climate Change: A More Appropriate Route?

Although no UNCITRAL instrument refers to climate change, it seems rather obvious that several of them could, if interpreted and applied in certain ways, play a constructive role to facilitate the achievement of climate goals. To illustrate this point, one may take the case of the *UNCITRAL Model Law on Public Procurement*,[82] which has served as a basis or has influenced the legislation on public procurement in 26 States (including India, Mexico and Russia).

Public procurement can play a significant role in addressing climate change. When purchasing goods and services, governments have the opportunity to guide public expenditures towards efficient low-carbon choices, or choices that increase adaptation and resilience capacities of human communities. Many observers are of the view that climate-related issues should now be systematically considered in public procurement, and some countries have already taken – or are taking – steps to move towards public procurement practices that include climate-related criteria.[83]

While the current version of *UNCITRAL Model Law on Public Procurement* does not refer to climate change, several of its provisions could be applied in a way that would contribute to achieve climate goals. This is notably the case with Article 9.2, which identifies the criteria against which procuring entities can ascertain that suppliers and contractors are eligible to bid for a specific public procurement contract. To be eligible to bid, the model law provides that suppliers and contractors may have to demonstrate that they have the necessary environmental qualifications, the professional and technical competence, and the equipment to perform the procurement contract,[84] as well as they "meet ethical and other standards applicable"[85] in the State in which the contract is to be performed. Thus, a procuring entity would presumably be allowed to verify that suppliers and contractors have, for instance, access to low-carbon technologies or technologies that are compatible with a warming climate, or that they comply with the domestic climate regulations.

Article 10 is also a provision that enables procuring entities to take climate change into consideration. This article provides that a procuring entity "shall set out in the solicitation documents the detailed description of the subject matter of the

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[82] United Nations Commission on International Trade, *UNCITRAL Model Law on Public Procurement* (New York: United Nations, 2014) [*Model Law on Public Procurement*].

[83] Beatriz Martinez Romera & Roberto Caranta, "EU Public Procurement Law: Purchasing Beyond Price in the Age of Climate Change" (2017) 12:3 Euro Procurement & Public Private Partnership L Rev 281.

[84] *Model Law on Public Procurement*, *supra* note 82, art 9.2(a).

[85] *Ibid*, art 9.2(b). As indicated in: United Nations Commission on International Trade Law, "Guidance on procurement regulations to be promulgated in accordance with Article 4 of the UNCITRAL Model Law on Public Procurement" (2013) at 11, online: *United Nations* <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/guidance-on-procurement-regulations-e.pdf>). Compliance with such standards may involve environmental considerations.

procurement that it will use in the examination of submissions",[86] and that this description may include specifications and requirements,[87] and "shall set out the relevant technical, quality and performance characteristics of that subject matter."[88] These provisions give ample authority to a procuring entity to embed climate-related conditions in the description of the subject matter of the procurement.

Another UNCITRAL instrument that could be particularly helpful to support climate action is the *UNCITRAL Model Legislative Provisions on Public-Private Partnerships*.[89] Public infrastructure (transport, energy, waste management, buildings) are a crucial lever in the fight against climate change, both in terms of mitigation and adaptation.[90] On the mitigation side, building and operating infrastructure are activities that can generate large amounts of GHGs. In addition, because of the extended lifetime of infrastructure, decisions in that area that are not aligned with climate goals can contribute to lock societies into carbon-intensive emissions pathway for decades. As for adaptation, public infrastructure can have a decisive impact on the exposure and vulnerability of human communities to the physical impacts of climate change, such as heatwaves, hurricanes, sea-level rise, and flooding.

Because infrastructure projects are primarily carried out through public-private partnerships (PPPs), it appears essential that the legal frameworks governing PPPs contain provisions expressly aiming at supporting the implementation of low-carbon and climate resilient infrastructure. Here again, while none of the provisions of the *UNCITRAL Model Legislative Provisions on Public-Private Partnerships* refers to climate change, several of them could still be interpreted and applied to promote low-carbon and climate resilient infrastructures.

For instance, Model Provision 5 provides that a contracting authority planning to develop infrastructure through a PPP shall carry out or procure a feasibility study. The provision further specifies that this feasibility study shall identify "how the project meets relevant national or local priorities for the development of public infrastructure".[91] In assessing this element, a contracting authority could be required to take into consideration the nationally determined contribution that the State has communicated to the secretariat of the UNFCCC by virtue of Article 4.2 of the Paris Agreement to verify the extent to which the infrastructure considered is aligned with the domestic climate agenda. Paragraph 3 of Model Provision 5, which specifies that the request for approval of a PPP project shall assess the project's social, economic,

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[86] *Model Law on Public Procurement*, *supra* note 82, art 10.1(b).

[87] *Ibid*, art 10.3.

[88] *Ibid*, art 10.4.

[89] *Model Provisions on Public-Private Partnerships*, *supra* note 26.

[90] S. Thacker et al., *Infrastructure for climate action* (2021) at 9, online (pdf): *United Nations Office for Project Services* <https://content.unops.org/publications/Infrastructure-for-climate-action_EN.pdf?mtime=20211008124956&focal=none>.

[91] *Model Provisions on Public-Private Partnerships*, *supra* note 26 at 3.

and environmental impact, is also of direct relevance in the context of climate change. The authority responsible for approving a proposed PPP could indeed consider that assessing the environmental impact of the project requires assessing its impact in terms of GHGs emissions, as well as its exposure to the expected impacts of climate change.

As these examples show, some UNCITRAL instruments may hold a lot of potential to support the achievement of climate goals. Thus, what the Commission could do to contribute to the fight against climate change is develop, where relevant, explanatory notes that would detail how States could apply some of the provisions of UNCITRAL instruments in ways that would support the achievement of mitigation and adaptation goals. Those explanatory notes could also contain examples of best practices to facilitate a more systemic incorporation of climate consideration in the areas covered by UNCITRAL instruments.

The idea to examine how UNCITRAL instruments could be interpreted and applied in ways that would support the achievement of climate goals was first raised in the "Net Zero Legislative Project" presented by the NZLA. It was later taken up by some developing States at the 56th session of the Commission who suggested that it would be more appropriate to analyse how "UNCITRAL texts can be used to contribute to international and domestic climate actions"[92] than to conduct work on VCCs.

Several elements would tend to support this view. For instance, a work programme on UNCITRAL existing instruments would presumably be easier to carry on for the Members of the Commission than one on VCCs. Delegates could delve into the issue of climate change by starting to work on instruments with which they are already familiar, without having to worry about interfering with other ongoing international processes. It could be argued that is preferable to proceed this way than to focus on VCMs, which are a highly technical and unfamiliar world for Members of the Commission. Another argument that may be put forward is that working on the existing UNCITRAL instruments would enable the Commission to support the achievement of both mitigation and adaptation goals, which could be more difficult to achieve by working only on the aspects of international trade law related to VCCs.

Examining how existing UNCITRAL instruments could be used as tools to combat climate change might also offer a last advantage, which is that such an approach could more likely be seen by many States as being compatible with the constitutional principle of the United Nations negotiations on climate change, namely the Common but Differentiated Responsibilities and Respective Capabilities principle (CBDR–RC principle).[93] This is important as, at the 56th session, some Members emphasized the importance of "having due regard"[94] for this principle. In the context

[92] *Report of UNCITRAL* 2023, *supra* 49 at 41.

[93] UNFCCC, *supra* note 32, art 3.1; *Paris Agreement*, *supra* note 16, art 2.2.

[94] *Report of UNCITRAL* 2023, *supra* note 49 at 40.

of a work programme on VCCs, how to take this principle into consideration is a delicate question. If the Commission seeks to provide more legal clarity about VCCs by setting common standards, it will likely not have "due regard" for the CBDR-RC principle, since the function of this principle is to ensure that developed and developing countries are not entirely governed by the same rules. By contrast, drafting explanatory notes on how to use existing UNCITRAL instruments as tools to combat climate change could offer the Commission more flexibility to make sure that the CBDR-RC principle is reflected in its work.

However, in response to these arguments, the three following points could be raised. First, one may object that working on VCCs would presumably be more in line with UNCITRAL's mandate than exploring how its instruments could be used as tools to combat climate change. As explained earlier in this article, the mandate of the Commission is to facilitate the development of international trade. Yet, while clarifying the legal framework surrounding the cross-border trading of VCCs would certainly contribute to it doing so, encouraging States to apply UNCITRAL instruments in ways that would be beneficial for the climate could lead them to complexify their domestic legal framework which could then hinder international trade.

Second, the point could be made that the tangible benefits for the climate that could result from a stocktaking exercise of UNCITRAL instruments would be highly uncertain and would remain (at the very best) limited. Especially compared to the impacts that clarifying the legal status of VCCs could have for attracting funds towards mitigation projects. The fact is that there is probably only a few UNCITRAL instruments that could truly be applied in ways that would facilitate the achievement of climate goals. For instance, it is doubtful that instruments such as the *United Nations Convention on Contracts for the International Sale of Goods* or the *UNCITRAL Model Law on Enterprise Group Insolvency*[95], as currently drafted, could ever facilitate the achievement of such goals.

Last, one may wonder whether it would really be in the Commission's own interest to focus on its existing instruments instead of working on VCCs. Indeed, it seems that there is a greater expectation from the business legal community and commercial lawyers to see UNCITRAL provide more legal clarity regarding the cross-border trading of VCCs than to see UNCITRAL explain how its instruments could be used to address climate change. Thus, for the reputation of the Commission and its perceived usefulness in the eyes of the legal community, some may argue that it would be more strategic for this body to initiate a work programme on VCCs.

[95] United Nations Commission on International Trade Law, *UNCITRAL Model Law on Enterprise Group Insolvency* (Vienna: United Nations, 2020).

VI. Conclusion

Climate change is a multidimensional and cross-cutting issue that is caused by a great variety of activities. Solving this problem requires a myriad of behavioral and technological shifts and adaptation strategies must be implemented in all aspects of our lives. Thus, when it comes to preserving the integrity of the climatic system, there is little doubt that all institutions of the United Nations have a role to play, including UNCITRAL, whose activities have not been traditionally focused on environmental protection. However, even though UNCITRAL has a very specific mandate, there are still various ways in which this subsidiary body could, without exceeding its functions, work on the topic of climate change. The Commission could initiate some work in the field of VCMs, notably to provide more clarity on the legal nature of VCCs; or the Commission could explore how its existing instruments could be used as tools to combat climate change. Of, course, it could do both. But as of now States hold divergent views about which of these two approaches should be prioritized and valid arguments can be put forward in defense of both options. Thus, the lesson here might be that even for a body with such a narrow mandate such as UNCITRAL, determining how to work on climate change at the multilateral level is never an easy task. Discussions at UNCITRAL are generally more technical and thus less politicized than in other international forums that are more in the spotlight, such as the UNFCCC. But it would appear that, regardless of where it is addressed, climate change remains a highly sensitive topic in the diplomatic arena.