United States Department of State

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Before the
Subcommittee on Administrative Oversight and
the Courts, Senate Committee on the Judiciary

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Mr. Chairman and members of the Committee, the Department of State welcomes the opportunity to present its views to you in connection with the recommendations of the National Bankruptcy Revision Commission with regard to cross-border insolvency.

The Commission, which was established by Congress to provide recommendations for revisions to the United States Bankruptcy Code, reviewed the recently completed United Nations Model Law on Cross-Border Insolvency and unanimously recommended that its provisions be incorporated as amendments to the United States Code. I have served as Co-Chair of the United States delegation to the United Nations Commission on International Trade Law (UNCITRAL) on this matter, and am the Executive Director of the Secretary of State's Advisory Committee on Private International Law.

We are pleased to support the NBRC recommendation, and believe that its adoption will further the interests of fair treatment for investors, lenders and commercial borrowers across all borders, and will thus facilitate investment and trade. The direction taken by this Model Law is fully consistent with the needs of a globalized economy as well as business and corporate interests that now link many countries together.

The provisions of the Model Law were adopted in a process that itself illustrates a new path for cooperation between the private sector, public authorities and international organizations. The process was begun several years ago by two years of meetings organized by private sector associations which involved judges, the private bar, government officials, commercial finance interests and others from over 30 countries. Those meetings developed a working consensus on achievable and practical goals that would facilitate cross-border cooperation and commerce by modernizing national insolvency law regimes.

That consensus was brought before UNCITRAL, a UN General Assembly body in whose work the United States has actively participated since its establishment in 1966. The Commission

began work and in a record two year period completed the Model Law with the support of over 50 countries. The General Assembly endorsed the Model Law last month in New York, and recommended that states review their legislative regimes and incorporate these provisions as necessary, which can establish a global receptivity to cross-border commerce.

The United Nations Model Law in many respects parallels the openess to fair treatment for foreign and domestic interests alike adopted in the 1978 amendments to the U.S. Bankruptcy Code. If the United States takes the step now to incorporate these provisions, to the extent not already reflected in our Code, it will be a strong signal to other countries to actively consider taking the same step. Conversely, if we fail to do so it will send an equally negative signal, which is not in the U.S. interest.

Our support emphasizes four overall factors. First, wide adoption of the Model Law is good economics in an era of global business relationships. Business concerns increasingly develop close linkage with a variety of production, labor, distribution, financing and market access entities across many borders. That has facilitated trade to the benefit of many countries. At the same time, it has given rise to an increasing vulnerability, where any one or more of these linked business entities comes under severe financial pressure. Left to existing national legal systems, this can now more often lead to collapse, loss of jobs, and loss of value in many of the related business entities. This occurs because under many existing legal systems, without waiting for cooperative efforts spanning the several countries involved, local assets are distributed preferentially to local creditors and the economic value, and jobs, of the enterprise are quickly dissipated. The Model Law's provisions would provide a platform on which to avoid those consequences.

Secondly, the type of insolvency law regime of a country seeking commercial finance for its various enterprises has become a "front-line" factor in risk assessment, and therefore the cost of credit that could be extended to that country. This is not only because of the need to calculate the extent of risk, but also now as a gauge of how much a country in fact has sought to align its local system with the needs of global economic relationships. Adoption of the Model Law's provisions would signal such an intent.

Thirdly, the Model Law regime hinges on active cooperation between the courts and administrators of each country involved. While American Courts have become increasingly open to such cooperation, legislative authority is necessary for that to happen in many countries. Encouraging cross-border cooperation between judicial and other authorities should have beneficial spin-off effects in other areas of mutual interest as well.

The fourth and last factor is our view that the United States should support this type of process in which private sector-led economic objectives, and private sector associations both played a large part in the international process. We believe there is a developing role for such market-based projects, especially in the area of commercial and trade law development, while under the umbrella of an international organization.

The Department has consulted throughout this process with major associations and the judiciary in the United States involved in this area of law and practice, to ensure that both private sector and state concerns are addressed. We understand that the Department of Commerce also supports these recommendations. The review of other agencies within the Administration, the Department of Justice for example, is continuing, and we look forward to working with the Congress and other interested parties on this matter.

We would be pleased to provide additional information for the Committee.