ANNEX V

Articles 33-37 of ULIS

Comments and proposals of the representative of the USSR

/Original: Russian/

The following are the main comments and observations prompted by the articles at the present stage; they may subsequently require more precise definition or amplification in the light of possible amendments to other provisions of the Uniform Law:

1. With regard to Article 33, paragraph 1, specifying various types or cases of lack of conformity, there is no objection on grounds of principle to the paragraph as a whole, although such a detailed description might seem superfluous since in all the specific cases cited in the Article the question is essentially the same: whether or not the goods conform to the express or implied requirements of the contract. The only exception in this respect is sub-paragraph (d), which provides for what might be called an extra-contractual or supplementary requirement that the goods should possess "the qualities necessary for their ordinary or commercial use". On the other hand, the detailed enumeration in the Law of the various types of lack of conformity may sometimes in practice give rise to a fairly complicated problem of determining the correlation or "competition" between them, and no solution to the problem is provided in the present text. For example, is it justifiable to regard the goods as non-conforming within the meaning of Article 33 if they conform to the seller's sample (sub-paragraph (c) ) but do not possess the qualities required for some particular purpose contemplated by the contract (sub-paragraph (e)), or vice versa? In other words, is it required that the goods should be free from all the signs of non-conformity enumerated in Article 33, and, if that is not required, then which of two or more mutually exclusive signs must be given priority? With this in mind, it seems advisable to ask the Working Group on Sales to consider the possibility of deleting Article 33, paragraph 1, since its substance is covered by Article 19, paragraph 1, which provides for the handing over of goods "which conform with the contract", or at least the possibility of making some simplifications in the existing text by deleting, in particular, sub-paragraphs (b) and (c), whose provisions are self-evident.

2. As to Article 34, the purpose does not appear to be quite clear. As explained in the Commentary by Mr. André Tunc (p.56), this article is, in particular, intended to preclude the possibility of a buyer relying on a general theory of nullity based on mistake as to the substance of the goods. There appears to be some reason to doubt that the existing text is sufficient in itself to justify such a conclusion or, in any event, to enable the court or arbitral tribunal (not to mention sellers and buyers) to realize clearly that the article concerns one of the exceptions provided for in Article 8, according to which ULIS, "except as otherwise expressly provided therein", is not concerned with questions of the validity of the contract. It is not impossible that this article would, because of its categorical wording, be interpreted, at least by businessmen, as not only and not so much prohibiting any resort to remedies provided by national law but rather forbidding the parties to the contract themselves to agree to some other remedies (as, for example, the exaction of a forfeit, the buyer's right to remedy the defect himself at the seller's expense, etc.) in addition to those for which exhaustive provision is made in ULIS itself (requiring performance of the contract, declaring the contract avoided, reducing the price and claiming damages - Article 41). Therefore, should a majority of the members of the Working Group on Sales consider it expedient to retain in the Uniform Law the principle embodied in this article, it would be necessary, in our opinion, to add at the end the following words: "<u>except those provided for by agreement between the parties or by any usage</u>". Although the suggested amendment is simply a restatement of a general rule laid down in Article 3 of ULIS, we think that such a repetition - which, incidentally, occurs in a number of other articles of the Law as well - would be fully justified in this case.

3. Certain doubts also arise in connexion with Article 37, which deals with a rather special case, namely, the handing over of non-conforming goods before the date fixed for delivery, and provides that the seller may, up to that date, remedy the defect in some manner at his own discretion, "provided that the exercise of this right does not

cause the buyer either unreasonable inconvenience or unreasonable expense". This provision is presumably intended to prevent the buyer from claiming the right, in the event of an early delivery of "non-conforming" goods, to demand that the defect should be remedied in a specific manner and, in any event, to prevent him from declaring the contract avoided, reducing the price or possibly even claiming damages. It is evident that, as a rule, the seller will offer early delivery of goods only when it is advantageous to him. If the buyer agreed to accept early delivery, it is justifiable on these grounds to limit whatever right he might have in respect of non-conformity of the goods? Moreover, the very concept of "unreasonable inconvenience or unreasonable expense" is rather vague. In view of this, it might be more correct to replace the word "unreasonable" by the word"material" (which is used, for example, Article 33, paragraph (2)) and, in general, to provide in the Law that the seller may avail himself of the right provided for in Article 37 only if there is no objection on the part of the buyer; if this amendment is made, the last part of the article might be changed to read as follows:

> "...provided that the exercise of this right does not cause the buyer either material inconvenience or material expense and takes place before the seller has received any different instructions from the buyer. In any event, the exercise of the above right by the seller shall not affect the buyer's right to claim damages in accordance with Article 82."

4. In addition to the above comments, which are chiefly of an editorial nature, it must be noted that the present text of ULIS contains no provisions relating to the guarantees of quality which are provided by the seller to the buyer under the contract and which have by now become widespread in the purchase and sale of all sorts of different commodities. The Law contains only one indirect reference to this matter in Article 39, relating to time-limits for giving notice of claims in the case of contracts containing a guarantee, and from this it might be thought that in all other matters relating

to the granting of a guarantee the general rules concerning non-conformity of goods are to apply unless otherwise agreed between the parties. In particular, the impression may be created that even where the quality of the goods is guaranteed, if a defect in the goods is discovered within the guaranteed period but after the risk has passed to the buyer, the seller will be liable only under the conditions laid down in Article 35 i.e. if the defect "was due to an act of the seller or of a person for whose conduct he is responsible". However, not only in practice but also in the law of a good many countries this question is decided on a different basis, namely: The seller is liable for defects discovered during the guarantee period only if he cannot prove that they were caused by wrongful acts (handling of the goods, etc.) of the buyer himself. In view of this, it seems necessary to include in the Uniform Law some special provisions taking cognizance of the special nature of the cases in which defects are discovered where the quality of the goods has been guaranteed by the seller. In order to make allowance for such special cases, it would probably be necessary to amend a number of articles of the Uniform Law; however, in this memorandum, dealing only with Articles 33-37, only the following amendment to Article 35, paragraph 2, is proposed:

> "The seller shall be liable for the consequences of any lack of conformity occurring after the time fixed in the preceding paragraph if it was due to an act or <u>failure to act</u> for whose conduct he is responsible, <u>or if it is covered by a guarantee granted by the seller, provided that it was not due to an act or failure to act of the buyer or of a person for whose conduct he is responsible.</u>"