

**United Nations
Commission on
International
Trade Law**

YEARBOOK

Volume I: 1968-1970



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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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CONTENTS

INTRODUCTION	Page 1
--------------------	-----------

Part One. History: the creation of the United Nations Commission on International Trade Law (UNCITRAL)

I. BACKGROUND DOCUMENTS	
A. Request for inclusion of an item in the provisional agenda of the nineteenth session of the General Assembly; <i>note verbale</i> from the Permanent Representative of Hungary to the United Nations	5
B. Steps to be taken for progressive development of private international law with a view to promoting international trade: background paper by the delegation of Hungary	5
C. Unification of the law of international trade: note by the Secretariat	13
II. ACTION IN THE GENERAL ASSEMBLY	
A. General Assembly resolution 2102 (XX) of 20 December 1965	18
B. Progressive development of the law of international trade: report of the Secretary-General	18
C. Debate in the Sixth Committee of the General Assembly on agenda item 88 (Progressive development of the law of international trade): excerpts from summary records	45
D. Report of the Sixth Committee on agenda item 88	58
E. The establishment of UNCITRAL: General Assembly resolution 2205 (XXI) of 17 December 1966	65
III. LIST OF RELEVANT DOCUMENTS NOT REPRODUCED IN THE PRESENT VOLUME	67

Part Two. Reports of the Commission on annual sessions; comments and action thereon

I. THE FIRST SESSION (1968)	
A. Report of the Commission	71
B. Comments and action with respect to the report of the Commission	86
1. Extract from the report of the Trade and Development Board, United Nations Conference on Trade and Development, 10 September 1967-23 September 1968 ..	86
2. Report of the Sixth Committee	88
3. General Assembly resolution 2421 (XXIII) of 18 December 1968	92
C. List of relevant documents not reproduced in the present volume	93
II. THE SECOND SESSION (1969)	
A. Report of the Commission	94

	<i>Page</i>
B. Comments and action with respect to the report of the Commission	121
1. Extract from the report of the Trade and Development Board, United Nations Conference on Trade and Development, 24 September 1968-23 September 1969	121
2. Report of the Sixth Committee	121
3. General Assembly resolution 2502 (XXIV) of 12 November 1969	127
C. List of relevant documents not reproduced in the present volume	128
 III. THE THIRD SESSION (1970)	
A. Report of the Commission	129
B. List of relevant documents not reproduced in the present volume	155

Part Three. Studies and reports on specific subjects

I. INTERNATIONAL SALE OF GOODS	
A. Uniform rules on substantive law	
1. Analysis of replies and comments by governments on the Hague Conventions of 1964: report of the Secretary-General	159
2. Report of the Working Group on the international sale of goods, first session, 5-16 January 1970	176
B. Uniform rules on choice of law	
Analysis of replies and comments by governments on the Hague Convention of 1955: report of the Secretary-General	202
C. General conditions of sale and standard contracts, incoterms and other trade terms	
1. Promotion of wider use of existing general conditions of sale and standard contracts: report of the Secretary-General	207
2. Implementation of the Commission's decisions relating to general conditions of sale, standard contracts and incoterms: report of the Secretary-General	216
D. Time-limits and limitations (prescription) in the field of international sale of goods	
Report of the Working Group on time-limits and limitations (prescription), first session, 18-22 August 1969	218
E. List of relevant documents not reproduced in the present volume	232
 II. INTERNATIONAL LEGISLATION ON SHIPPING	
A. A survey of the work in the field of international legislation on shipping undertaken by various international organizations, and co-ordination of future work in this field: report of the Secretary-General	
	233
B. List of relevant documents not reproduced in the present volume	238
 III. INTERNATIONAL PAYMENTS	
A. Negotiable instruments	
1. Unification of the law of bills of exchange and cheques: note by the Secretary General and preliminary report by the International Institute for the Unification of Private Law (UNIDROIT)	239
2. Analysis of replies and comments by governments and banking and trade institutions to the questionnaire on negotiable instruments used for making international payment: report of the Secretary-General	243
B. Bankers' commercial credits	
Note by the Secretary-General transmitting a study by the International Chamber of Commerce on documentary credits and observations thereon	256
C. List of relevant documents not reproduced in the present volume	259

	<i>Page</i>
IV. INTERNATIONAL COMMERCIAL ARBITRATION	
A. Steps to be taken for promoting the harmonization and unification of the law of international commercial arbitration: report of the Secretary-General	260
B. List of relevant documents not reproduced in the present volume	284
V. SUGGESTIONS FOR FUTURE UNIFICATION TECHNIQUES	
A. Progressive codification of the law of international trade: note by the secretariat of the International Institute for the Unification of Private Law (UNIDROIT)..	285
B. Draft basic convention establishing a common body of international trade law: proposal by the French delegation	288
C. List of relevant documents not reproduced in the present volume	292
Check list of UNCITRAL documents	293
Bibliography on UNCITRAL	299

INTRODUCTION

This first volume of the *Yearbook* covers the works of the first three sessions of the United Nations Commission on International Trade Law (UNCITRAL). Before explaining the purpose and scope of the *Yearbook*, it may be helpful to outline briefly the task assigned to the Commission and the functions it performs for the accomplishment of that task.

OBJECT AND FUNCTIONS OF THE COMMISSION

Responding to the need for the United Nations to play a more active role in removing or reducing legal obstacles to the flow of international trade, the General Assembly established the United Nations Commission on International Trade Law (UNCITRAL) on 17 December 1966. Under the pertinent General Assembly resolution, the object of the Commission is "the promotion of the progressive harmonization and unification of the law of international trade". To this end, the Commission was assigned the following functions:

(a) Co-ordinating the work of organizations active in this field [international trade law] and encouraging co-operation among them;

(b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws;

(c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field;

(d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;

(e) Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;

(f) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;

(g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade;

(h) Taking any other action it may seem useful to fulfil its functions.

The Commission consists of twenty-nine States Members of the United Nations representing the various geographic regions and the principal economic and legal systems of the world. It holds one regular session a year alternately at United Nations Headquarters in New York and at the United Nations Office at Geneva; during the year working groups designated by the Commission from among its members meet on specific topics. Reports of these working groups, reports by the Secretary-General and studies by Governments and by governmental and non-governmental international organizations active in the field of international trade law are considered by the Commission at its annual sessions. The report of the Commission on the work of its annual session is submitted to the General Assembly of the United Nations.

PURPOSE OF THE YEARBOOK

The publication of the *Yearbook* is intended to serve the purpose of making the work of the Commission more widely known and more readily available beyond the forum of the United Nations. To aid in the intensive examination and evaluation of the developing measures for the unification and harmonization of international trade law, the *Yearbook* includes, in so far as possible, the studies which provide the basis for the Commission's work.

ORGANIZATION AND SCOPE OF THE YEARBOOK

This volume of the *Yearbook*, which is divided into three main parts, covers the period from the creation of UNCITRAL to the end of the third session of the Commission, in April 1970.

The first part provides the essential background on the creation of UNCITRAL, including the studies presented to the General Assembly on existing measures for the unification of international trade law and the proceedings in the General Assembly that culminated in the establishment of UNCITRAL.

The second part presents the documents reflecting the work of the first three sessions of the Commission, including the reports of the Commission on each of its first three sessions and the comments of the Trade and Development Board of the United Nations Conference on Trade and Development (UNCTAD), the report of the Sixth Committee of the General Assembly and the

resolutions adopted by the General Assembly with respect to the Commission's first two reports.

The third part is concerned primarily with the work done on each of the four priority subjects selected by the Commission. The first of these is the international sale of goods, a topic which includes measures both to unify the applicable legal rules and to assist the parties to an international sales transaction to avoid misunderstanding and dispute through the use of general conditions of sale and uniform trade terms. The second priority subject is international legislation on shipping. The third is international payments, including negotiable instruments, bankers' commercial credits, guarantees and securities. The fourth priority subject is international commercial arbitration.

This volume reproduces most of the documents and material considered by the Commission, including reports of the working groups, analyses of replies and comments by Governments and the relevant reports of the Secretary-General. However, in view of the volume of the materials that have been presented to the Commission, not all the documents on UNCITRAL and its work could be reproduced in this volume. Thus, it was necessary to omit documents which are superseded by or summarized in documents included in this volume, or which give preliminary treatment to topics that can be expected to receive more intensive examination at a later stage of the Commission's work. In the interest of comprehensive coverage, however, reference to these documents is given at the end of each section.

I. BACKGROUND DOCUMENTS

A. Request for inclusion of an item in the provisional agenda of the nineteenth session of the General Assembly: *note verbale* from the Permanent Representative of Hungary to the United Nations*

I. History: Creation of UNCITRAL

The Permanent Representative of the Hungarian People's Republic to the United Nations presents his compliments to the Secretary-General of the United Nations and has the honour to state that the Government of the Hungarian People's Republic, under rule 13 (e) of the rules of procedure of the General Assembly, proposes the inclusion of the following item in the provisional agenda of the nineteenth session of the General Assembly: "Consideration of steps to be taken for progressive development in the field of private international law with a particular view to promoting international trade".

An explanatory memorandum is enclosed in accordance with rule 20 of the rules of procedure.

EXPLANATORY MEMORANDUM

According to Article 13, paragraph 1 a, of the Charter of the United Nations, the General Assembly shall initiate studies and make recommendations for the purpose of promoting international co-operation in the political field and encouraging the progressive development of international law and its codification. The United Nations can be credited with great achievements in the progressive development and codification of international law through the activities of the Sixth Committee of the General Assembly and of the International Law Commission established by General Assembly resolution 174 (II). The results attained by the United Nations so far and the plans it contemplates for the near future in this field belong in the scope of what is commonly termed public international law. That the General Assembly does not interpret narrowly the notion of "international law" is seen from the Statute of the International Law Commission which, in paragraph 2 of article 1, lays down that the Commission is

"not precluded from entering the field of private international law". Such steps have not been taken by the International Law Commission, which concentrates its attention, and rightly so, on public international law.

In this situation the progressive development of private international law is not handled by the United Nations organs systematically. For the present purposes what is meant by the "development of private international law" is not so much an international agreement on the rules of the conflicts of laws as applied by national courts and arbitral tribunals as rather an unification of private law mainly in the field of international trade (e.g. unification of the law on the international sale of goods or on the formation of contracts). Recently the United Nations has undertaken special efforts towards the development of international trade, having regard particularly to the general interest of the community of nations in the advancement of the developing countries. A thorough study of the legal forms of international trade, their possible simplification, harmonization and unification, would be well suited for this purpose. Governments, learned societies and international organizations have thus far done commendable work in this field. This work, however, is done mostly on a regional basis and practically without the participation of representatives of the greatly interested States of Africa and Asia. In these circumstances, the question arises whether the United Nations ought not to make concerted efforts in this respect in its own broad framework. The Government of the Hungarian People's Republic is of the opinion that the detailed consideration of the matter would be desirable, and therefore it makes the proposal that the General Assembly put on the agenda of its nineteenth session an item entitled "Consideration of steps to be taken for progressive development in the field of private international law with a particular view to promoting international trade".

B. Steps to be taken for progressive development of private international law with a view to promoting international trade: background paper by the delegation of Hungary**

1. Technical progress in the past hundred or hundred and fifty years has accelerated the process of change of human society, which in turn creates a need for the

development of law, embodied both in customary rules and in treaties. Social changes promoted the scholarly world to develop the idea of deliberate development

* *Official Records of the General Assembly, Nineteenth Session, Annexes*, annex No. 2, document A/5728.

** *Official Records of the General Assembly, Twentieth Session, Annexes*, agenda item 92, document A/C.6/L.571. The paper which was issued under this symbol was not identical with that originally submitted by the delegation of Hungary. In view of the length of the text, the first fourteen pages were summarized, with the agreement of the delegation of Hungary, in paragraphs 1-5 above; from paragraph 6 onwards the text is given in full.

of international law, and the scientific work done in this field has also had a fructifying influence on the activities of States.

2. The League of Nations first made an effort toward the systematic, deliberate development of international law in a resolution of the League Assembly, adopted on 22 September 1924; in that resolution, and in the work of the Committee of Experts which was convened by it, no distinction was made between codification and development of the law. The fields of work of the Committee of Experts, and of The Hague Codification Conference which followed in 1930, embraced topics both of public and of private international law. A convention and three protocols relating to various nationality questions, drafted at that Conference, obviously belong to the sphere of progressive development. The League also contributed to the development of the law by numerous treaties concluded outside the systematic programme of codification, in response to the political, economic, cultural, humanitarian and other needs of the time.

3. At the United Nations Conference on International Organization, held in San Francisco in 1945, it was almost immediately recognized that it was desirable to make a reference to the codification of international law, but a long debate developed around the use of the word "revision". It was finally decided to refer to "progressive development", which established a balance between stability and change of the law, rather than to "revision", which seemed to lay too much emphasis on change. The result was paragraph 1 a, of Article 13 of the Charter.

4. This provision was interpreted by the General Assembly, in its resolution 94 (I) of 11 December 1946, as laying an obligation on the Assembly to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. The same resolution established a Committee to report on the methods whereby the Assembly could most effectively discharge its obligation and it was this Committee which prepared the draft of the statute of the International Law Commission, later adopted by the General Assembly in resolution 174 (II) of 21 November 1947. The Committee, in its report, drew a line between codification and progressive development, but recognized that the two terms could not be mutually exclusive in practice, as in any work of codification, gaps would have to be filled in and the law amended in the light of new developments. This conclusion was in accord with statements by various scholars who had examined the problem, and with the later experience of the International Law Commission, which found it necessary to abandon the attempt to decide which articles drafted by it fell into the category of "codification" and which into that of "progressive development".

5. In contrast to the interstitial progressive development which is a necessary part of codification, there exists a kind of progressive development which is an

independent, primary activity, which is not connected with codification, and which, in the words of article 15 of the statute of the International Law Commission, consists of the international regulation of fields "which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States". Articles 16 and 17 of the statute, which relate to this kind of progressive development, reserve the right of initiative in this regard to the General Assembly (and indirectly to the States, organs and international organizations which may make proposals to it) since a political decision and a metajuridical consideration of the degree of the economic necessity of such work are required; article 18 assigns the whole process of codification, a more purely scholarly task, to the International Law Commission. It is desirable to give consideration to the results achieved in the United Nations in regard both to codification and to progressive development.

RESULTS OF CODIFICATIONS

6. Article 18 of the statute of the International Law Commission provides that:

"1. The Commission shall survey the whole field of international law with a view to selecting topics for codification.

"2. When the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly."

7. Consequently, in 1949, the International Law Commission, on the basis of a study by the United Nations Secretariat (A/CN.4/1/Rev.1),¹ examined twenty-five topics of international law and selected fourteen of them for codification.² The General Assembly approved the selection by its resolution 373 (IV) of 6 December 1949. The work of codification on four of the selected topics has been successfully completed by the preparation of treaties on topics including the régime of the high seas; the régime of territorial waters; diplomatic relations; and consular relations. The present work programme of the Commission includes the topics of succession of States and Governments; law of treaties; State responsibility; relations between States and intergovernmental organizations; and right of asylum. (This latter subject is related to the draft declaration on the right of asylum, which is now on the agenda of the Sixth Committee.)

8. Work on the topic of arbitral procedure is also concluded for the time being, although no convention has been concluded in this report.

RESULTS OF PROGRESSIVE DEVELOPMENT

9. In the field of progressive development no such plan has been adopted as was made for codification.

¹ United Nations publication, Sales No.: 48.V.1 (1).

² See *Yearbook of the International Law Commission, 1949* (United Nations publication, Sales No.: 57.V.1), p. 281.

The statute does not lay a duty upon the International Law Commission to determine where progressive development is possible, and it does not direct the Commission to select particular topics for that purpose.

10. The General Assembly could have provided for a plan, but it did not do so. As a consequence, the International Law Commission's activities in the sphere of progressive development present a rather varied picture.

11. In what cases has the International Law Commission been invited to perform work related with progressive development?

12. In resolution 177 (II), the General Assembly directed the Commission to "*formulate the principles of international law* [italics added] recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal; and to prepare a draft code of offences against the peace and security of mankind...".

13. In resolution 178 (II), the General Assembly instructed the International Law Commission to prepare a draft declaration on the rights and duties of States.

14. Strictly speaking, the above two subjects fall within the province of the codification of international law. The passage in italics above from the General Assembly resolution on the Nürnberg principles gives some indication that the General Assembly was of the same view.³ The topic entitled "Fundamental rights and duties of States" was included among the twenty-five subjects considered by the Commission for the purpose of codification, but was not added to the fourteen topics selected for the obvious reason that the General Assembly had provided for it separately.

15. In resolution 260 B (III) the General Assembly invited the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide and other crimes.

16. In resolution 478 (V) the General Assembly invited the Commission to study the question of reservations to multilateral conventions.

17. In resolution 378 B (V) the General Assembly referred to the Commission the question of defining aggression.

18. Economic and Social Council resolutions 304 D (XI) and 319 B III (XI) requested the International Law Commission to undertake at the earliest possible date the formulation of a draft international convention or conventions for the elimination of statelessness. The topic of "nationality including statelessness" was also part of the Commission's plan of codification, although the Secretariat, in its preparatory memorandum under the heading "The Law of Nationality", wrote as follows about the abolition of statelessness:

"... it is probable that in this respect the proper sphere of international regulation through the efforts of the International Law Commission will be not through codification but through development aiming

at introducing a departure from the existing practice".⁴

19. It was by virtue of General Assembly resolution 1289 (XIII) that the Commission included in its agenda the item "Relations between States and inter-governmental organizations", just as under resolution 1687 (XVI) it took up the subject of "Special missions", and under resolution 1453 (XIV) the topic of "The juridical régime of historic waters, including historic bays".

20. By virtue of General Assembly resolution 1766 (XVII) the Commission dealt with the "Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations".

21. It is worthy of note that in respect of the subjects listed above only the consideration of the topic of statelessness resulted in a convention, and even that is of moderate importance because of the small number of ratifications.

22. But if it is desired to record the whole truth regarding the results the United Nations has achieved in the progressive development of international law, then account has to be taken of a number of other facts as well.

23. The first is the fact that the Commission's work of codification has also resulted in conventions in which progressive development can be considered as predominating, such as the Convention on the Continental Shelf,⁵ and especially the Convention on Fishing and Conservation of the Living Resources of the High Seas.⁶

24. Second, there is the fact that, without using the services of the International Law Commission, the General Assembly of the United Nations has adopted a number of international treaties which clearly constitute a development of international law, e.g., Convention on the Prevention and Punishment of the Crime of Genocide (resolution 260 A (III)), and Convention on the Political Rights of Women (resolution 640 (VII)). Further work on topics of high importance is also in preparation, such as the framing of draft international covenants on human rights, and the consideration (and possibly eventual formulation) of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.

25. Third, one cannot exclude from the sphere of the progressive development of international law certain important General Assembly resolutions which, as appears from the virtually unanimous votes of Member States, express an understanding among States as to the acceptance of new principles of international law, for example, the Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV) of 14 December 1960), the Declaration on the Elimination of All Forms of Racial Discrimination

⁴ See *Survey of International Law in relation to the work of codification of the International Law Commission* (United Nations publication, Sales No.: 48.V.I (1)), p. 45.

⁵ United Nations Conference on the Law of the Sea, *Official Records*, vol. II, *Annexes* (United Nations publication, Sales No.: 58.V.4, Vol. II), pp. 142 and 143.

⁶ *Ibid.*, pp. 139-141.

³ For the relevant discussion in the International Law Commission see *Yearbook of the International Law Commission*, 1949 (United Nations publication, Sales No.: 57.V.I), pp. 129-133.

(resolution 1904 (XVIII) of 20 November 1963), and the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (resolution 1962 (XVIII) of 13 December 1963).

26. Fourth, the general multilateral treaties in various special fields which have been concluded under the auspices of the United Nations are impressive in numbers and serve as governing rules in many important spheres of international life. A few chapter-titles of the list of treaties of which the Secretary-General acts as depositary indicate the variety of such spheres: opium and other dangerous drugs, traffic in women and children, obscene publications, health, international trade and development, transport and communications, navigation, economic statistics, educational and cultural matters, declaration of death of missing persons, status of women, freedom of information, slavery, commodities, maintenance obligations, and commercial arbitration.

27. Fifth, the significant contribution of the International Court of Justice to the development of international customary law is fully appreciated. That contribution, however, falls beyond the scope of the present analysis.

THE PROSPECTS OF PROGRESSIVE DEVELOPMENT

28. While it can be stated that the United Nations has achieved significant results, not only in the codification of international law but also in its progressive development, a cursory glance at these results raises the question whether a modicum of planning ought not to be applied to the latter as well as to the former. For if the progressive development of international law is, like codification, an obligation of the General Assembly — as was laid down in resolution 94 (I) — then it logically follows that organized, planned measures ought also to be taken for the implementation of this obligation. In regard to progressive development (and what is meant here is not the mere filling of gaps of secondary importance which is an inseparable part of codification), the Statute of the International Law Commission, as has been seen, has only set up executive machinery, but has reserved the right of initiative to the General Assembly (though not excluding from it other organs). This right of initiative, however, has been rather sporadically put to use by the General Assembly and the other qualified organs; nor can the purpose of a planned progressive development of international law be detected in those activities of the General Assembly in the course of which it acted independently of the International Law Commission, adopting either international treaties or other instruments involving development of international law.

29. Is there any chance of making a change in this situation? What should be done in this respect? In what direction could the United Nations proceed systematically to extend the area of "law-governed matters" mainly through the conclusion of international conventions regulating fields of activity in which no agreed rules exist?⁷

⁷ See document A/AC.10/7 and Corr.1 and 2 (mimeographed).

30. Some authors insist that there has been an unparalleled extension of the scope of international law. Philip C. Jessup writes about transnational law.⁸ Wolfgang Friedmann refers to new fields like international constitutional law, international administrative law, international labour law, international criminal law, international commercial law, international economic development, international corporation law, international anti-trust law, international tax law.⁹

"Even if most of these newly developing branches of international law are still in an embryonic stage . . . , they already show clearly the imperative need for a far wider conception of international law . . . than is reflected in traditional attitudes".¹⁰

31. Other authors strike a more sceptical note. According to C. W. Jenks:

" . . . a number of these suggestions and categories rest upon debatable or ill-defined concepts and represent verbal innovations rather than a solid rethinking of the structure of the law; partly for this reason, they have too often appeared to be vehicles for the views of particular writers rather than objectively valid contributions to a more satisfactory organization and exposition of international law as a whole".¹¹

He is obliged to admit, however, that "International aviation law, international maritime law, international labour law, and international sanitary law have secured a wider, though still limited, measure of acceptance as recognized branches of international law, partly because they have been less identified with the views of particular writers but chiefly, no doubt, because they have a more definable scope and, as the result of the existence of a large number of widely ratified conventions and other international instruments, a more precise content".¹²

32. All this leads to the question whether the United Nations General Assembly's activities aimed at the progressive development of international law under Article 13, paragraph 1 a, of the Charter can be extended beyond the traditional area of public international law.

33. This is generally not denied. What is contended is that Article 13, paragraph 1 a, refers *primarily* [italics added] to customary (i.e. public) international law and that this can be inferred from the fact that other provisions of the Charter, notably Article 13, paragraph 1 b, and Chapters IX and X, contain provisions which enable the United Nations to sponsor the creation of new rules of law, particularly though not exclusively, by means of new conventions.¹³

⁸ *Transnational Law* (New Haven, Yale University Press, 1956).

⁹ *The Changing Structure of International Law* (New York, Columbia University Press, 1964), p. 152 *et seq.*

¹⁰ *Ibid.*

¹¹ See "The Scope of International Law", *British Year Book of International Law*, 1954 (Oxford, Oxford University Press, 1956), p. 8.

¹² *Ibid.*

¹³ S. Rosenne, "The International Law Commission, 1949-1959", *British Year Book of International Law*, 1960 (Oxford, Oxford University Press, 1961), p. 112, note 1.

34. By Article 13, paragraph 1 b, the Charter assigns to the General Assembly the duty of initiating studies and making recommendations with a view to "promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

35. According to Article 62 of the Charter:

"1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

"2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

"3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

"4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence."

36. Is there an overlapping between sub-paragraph a and sub-paragraph b of Article 13, paragraph 1, of the Charter, and especially between sub-paragraph a and Article 62? If there is, should this be interpreted to mean that the United Nations organs dealing with the progressive development of international law must refrain from any initiative if it touches upon the spheres of activity enumerated in sub-paragraph b? In this connexion the aspects of form and substance are like two sides of a coin. Here formal requirements of the progressive development of law coincide with material demands of substance which come up in various special fields and demonstrate the necessity of international regulation.

37. To cite examples, the conventions created within the scope of the law of the sea are of a nature to promote international co-operation in the economic field, in addition to carrying forward the codification or progressive development of international law. It is obvious that the progressive development of international law, that is the extension of legally regulated fields, requires extensive collaboration between the specialist in the field concerned and the international lawyer.¹⁴ General Assembly resolution 1105 (XI) on an international conference of plenipotentiaries to examine the law of the sea properly realized that with respect to the law of the sea not only the legal but also the technical, biological, economic and political aspects of the problem had to be examined, and invited Member States to include among their representatives experts competent in the fields to be considered.

38. The foregoing cannot be construed, of course, as meaning that it would be desirable for legal forums to take over the international regulation of all technical fields, but it should mean that legal forums are not ex-

cluded from entering such fields, and that these forums, aware of the interrelationships, could perform useful services for the international community, especially in relation to planning.

39. This is particularly evident where legal elements predominate over technical problems and where the lawyer's work has great traditions. Such a field, for instance, is that of private international law with its aspects related to international trade. It is desirable to examine the question of how far the United Nations General Assembly can contribute to the development of international law in this field and what circumstances would make timely an increase in United Nations activity in this connexion.

THE PROSPECTS OF DEVELOPMENT IN THE FIELD OF PRIVATE INTERNATIONAL LAW

40. The great variety of national laws is a fact. This diversity is determined by the differences in the economic bases of the various national societies, in their traditions and other circumstances which need not be analysed here. Yet it is a common feature of all legal systems — and what is now in view is primarily civil law — that they admit the application of foreign law and even make its application obligatory in certain cases where foreign elements are involved. Variety is again great in the solutions given to the question of when and how to apply foreign law, i.e. in the national rules governing the conflict of law.

41. As cases involving foreign elements are of an international character, it is obvious that the rules adopted by States for the solution of conflicts are of interest for the international community. The diversity of the rules of private international law applied by different States is a disturbing element, which leads to "limping marriages", to mutually contradictory judgments in different countries and makes the establishment of international relations complicated and difficult in the field of economic and commercial activities. True, there are customary rules of international law which affect certain fields of private international law (for example, immunity of sovereign States), but they are few in number and even they are frequently contested.

42. There has therefore long been a tendency to eliminate complications and promote international co-operation through agreements between States.

43. In so far as agreements of this kind are reached between States, there is certainly a contribution to the domain of public international law. In those areas where international contracts are especially frequent the tendency to agreement does not stop with the conflict of laws, but aims at a standardization of substantive rules.

44. As making private international law truly international evidently contributes to the progressive development of public international law, this matter came up at the time the statute of the International Law Commission was being framed.

45. The Committee on the Progressive Development of International Law and its Codification took the view that the International Law Commission's task should

¹⁴ Friedmann, *op. cit.*, p. 187.

extend to the sphere of private international law. According to a foot-note added to the report of the Committee it appeared to be the feeling of the Committee that the Commission should undertake nothing which might detract from the valuable work being done in the sphere of private international law by The Hague Conference on Private International Law. It therefore recommended that the Commission, when dealing with questions in the field of private international law, should consider the appropriateness of consulting the Netherlands Government.¹⁵

46. When this report was under discussion in the Sixth Committee of the General Assembly, the representative of the Netherlands, Mr. François, said that he preferred that the International Law Commission should deal only with public international law, "as studies in private international law were already being covered by The Hague Conferences".¹⁶

47. The Sixth Committee referred the report for further discussion to its second sub-committee, where the question was raised again. According to the report of the latter, some members of the sub-committee felt that the Commission should not concern itself with private international law. Some of them contended that Article 13 of the Charter envisaged the progressive development and codification of public international law only. Above all, practical considerations were cited in support of the view that the Commission's task should be limited. Most of the jurists who had specialized in private international law were little interested, it was held, in public international law. The system already adopted for having representatives on the Commission of the principal legal systems of the world would be seriously compromised if some systems of law were repressed by experts in public international law and others by jurists who had specialized in private international law. It would, in that case, be necessary to double the number of members of the Commission, which seemed out of the question. Some representatives considered that most countries would prefer that the Commission should consist of experts in public law. It would seem inadmissible that a committee which did not include the leading experts in private international law should have the necessary authority to direct work in that domain. Other members of the Committee challenged this view, and pointed out that there was no express stipulation limiting the task of the Assembly, as laid down in Article 13 of the Charter, to public international law. The borderline between public international law and private international law was, moreover, not clear. The number of experts engaged in both these fields was not so small as it was claimed to be. The Commission would always be able to call on experts if there were insufficient specialists in private international law among the members of the Commission.¹⁷

48. A common measure of agreement was found by

the unanimous adoption, with one abstention, of the following stipulation: "The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law."¹⁸ It was this agreed wording that was included in article 1, paragraph 2 of the statute of the International Law Commission.

49. It is worthy to note that the debate in the sub-committee essentially centred on the extent to which the International Law Commission might be burdened by work on private international law. To the question whether the scope of activities defined in Article 13, paragraph 1 a extends also to private international law, the General Assembly gave a positive answer by accepting the statute of the Commission, i.e. article 1, paragraph 2. The positive stand of the General Assembly on this matter had been clear from resolution 94 (I) of 11 December 1946, which stated that in preparation for the execution of the obligation under Article 13, paragraph 1 a the General Assembly realized "... the need for a careful and thorough study of what has already been accomplished in this field [i.e. in the field of the progressive development and codification of international law] as well as of the projects and activities of official and unofficial bodies engaged in efforts to promote the progressive development and formulation of public and private international law..." [italics added].

50. In spite of this, the United Nations prepared no programme of work to deal with private international law. Yet it cannot be said that the United Nations is not at all engaged in activities of this kind.

51. In September 1956 the International Institute for the Unification of Private Law organized in Barcelona a meeting of international bodies dealing with the unification of law. This meeting was attended by a representative of the United Nations, who submitted a report entitled "Some examples of methods followed by the United Nations on subjects relating to private international law and the unification of private law."¹⁹

52. In that report the United Nations representative stated that the role of the United Nations in the matter was marginal, and that the United Nations was not systematically engaged in the work of unification.²⁰ The report reviewed the activities of United Nations bodies in connexion with the following subjects: status of refugees and stateless persons, elimination and reduction of future statelessness, enforcement of foreign arbitral awards, death of missing persons, recovery abroad of maintenance, road traffic, road signs and signals, customs facilities for touring, importation of commercial samples and advertising materials and licensing of motor vehicle drivers.

53. A similar report was submitted to the second meeting held in 1959.

54. The question arises now why the United Nations should not widen this marginal role into a systematic

¹⁵ *Official Records of the General Assembly, Second Session, Sixth Committee, Annexes, document A/331, para. 3, footnote 1.*

¹⁶ *Ibid.*, Sixth Committee, 37th meeting.

¹⁷ *Ibid.*, Sixth Committee, Annexes, document A/C.6/193, para. 16.

¹⁸ *Ibid.*

¹⁹ *Unification of Law: Yearbook, 1956* (Rome, Editions UNIDROIT, 1956), p. 105.

²⁰ *Ibid.*, p. 345.

programme, and what action in the present circumstances would increase the timeliness of dealing with private international law.

THE LAW OF INTERNATIONAL TRADE

55. The United Nations Conference on Trade and Development accepted some general and special principles. General Principle Six reads as follows:

"International trade is one of the most important factors in economic development. It should be governed by such *rules* [italics added] as are consistent with the attainment of economic and social progress and should not be hampered by measures incompatible therewith. All countries should co-operate in creating conditions of international trade conducive, in particular, to the achievement of a rapid increase in the export earnings of developing countries and, in general, to the promotion of an expansion and diversification of trade between all countries, whether at similar levels of development, at different levels of development, or having different economic and social systems."²¹

56. This principle, which was virtually unanimously adopted by that highly important Conference, refers to what rules should govern international trade and what measures should be eliminated from it. At the same time it lays down the obligation of States to co-operate in creating favourable conditions for the development of international trade. It is beyond doubt that creation of such favourable conditions should cover the formulation and development of those relevant national and international rules of law which best promote the attainment of the proposed aim. General Principle Six should act as a stimulus to major development of international commercial law.

57. Is there need in this respect for the United Nations General Assembly to take the initiative in accordance with Article 13, paragraph 1 a, of the Charter? The question is especially justified by the fact that more than one international agency is already dealing with the problem of the development of international commercial law.

58. As has been seen above, already the Committee on the Progressive Development of International Law and its Codification stressed the significance of the work of The Hague Conferences. Since that time the participants of those conferences have formed an international organization, The Hague Conference on Private International Law. According to its statute, which came into force on 15 July 1955, members of this agency are the States which have already participated in one or more sessions of the Conference and which accept the statute.

59. The statute continues with a rather cryptic provision to the effect that any other State may become a member "*the participation of which is from a juridical*

point of view of importance for the work of the Conference" [italics added]. The admission of new members is decided upon by the Governments of the participating States.²²

60. Though the Conference has adopted some international treaties which are open to accession by a large number of States, yet the Conference itself, whose merits are not contested, is a highly exclusive organization.

61. An important part is played in this field by another intergovernmental organization, the International Institute for the Unification of Private Law. This Institute and The Hague Conference on Private International Law co-operate with the Council of Europe and, under agreements concluded in virtue of Economic and Social Council resolution 678 (XXVI), also with the United Nations. Notable accomplishments of the Institute and of The Hague Conference on Private International Law are two Hague Conventions adopted in 1964, one relating to a Uniform Law on the International Sale of Goods and the other to the Formation of Contracts for the International Sale of Goods.

62. The Economic Commission for Europe makes a different kind of contribution towards the standardization of the rules of international trade. The development of uniform conditions of sale is also a very efficient and far-reaching method to promote international trade in various branches of commerce.

63. Of great importance in this respect is the work of the International Chamber of Commerce in connexion with the unification of international commercial terms and the Uniform Customs and Practice for Commercial Documentary Credits.

64. The importance of the standardization of the rules of international trade has been recognized by the European Economic Community (the Common Market). Articles 100 to 102 of the Treaty establishing the European Economic Community, done at Rome on 25 March 1957,²³ bear the title "Approximation of Laws". In article 100 the Council of EEC is directed to "issue directives for the approximation of such legislation and administrative provisions of the Member States as have a direct incidence on the establishment and functioning of the Common Market".

65. Notable results have also been attained in similar respects by the Council for Mutual Economic Aid. The member States of the CMEA in 1958 adopted General Conditions of Delivery of Goods, which solve in a uniform manner the main problems relating to conclusion of contracts, terms of delivery, modes of payment, responsibility in case of frustration, methods of settling disputes, and so on.

66. There are many other regional agreements and tendencies in this field, such as the uniform law of sales of the Scandinavian countries, the co-operation of the Benelux countries, and that of the States of the Arab League.

67. The American continent can be credited with particularly remarkable results in the development of private international law. Article 67 of the Charter of

²¹ *Proceedings of the United Nations Conference on Trade and Development*, vol. I. *Final Act and Report, Annexes*, annex A.1.1 (United Nations publication, Sales No.: 64.II.B.11).

²² Amos J. Peaslee, *International Governmental Organizations*, revised second edition (The Hague, Nijhoff, 1961), vol. I, p. 747.

²³ United Nations, *Treaty Series*, vol. 298 (1958), No. 4300.

²⁴ *Ibid.*, vol. 119 (1952), No. 1609.

the Organization of American States²⁴ makes it a duty of the Inter-American Council of Jurists to promote the development and codification of public and private [italics added] international law. To illustrate the past success of this activity in America, it will suffice to point to the Bustamante Code. It was evidently in the spirit of article 67 of the Bogotá Charter that the Council of Jurists at its 1965 Conference, held in San Salvador, proposed that the Council of the Organization of American States should convene a conference in 1967 for a revision of the Bustamante Code.

68. From the above survey, which is not at all complete, it appears that a great many international agencies have taken and are taking steps in the field of the development of the law of international trade. It would not be right to extol the merits of one of these international agencies at the expense of the others. Their work is productive, whether it takes the form of conventions, model laws, standard conditions uniform customs and practices, definition of trade terms or other forms.

69. Scientific writers have pointed out that this diversified activity, for all its usefulness, is lacking direction, uniform organization and synthesis. The International Association of Legal Science, a non-governmental organization, with the encouragement and support of UNESCO, in 1962 held in London a Colloquium on the New Sources of the Law of International Trade, with Dean Ronald H. Graveson of the University of London presiding.

70. The following passages are quoted from the material of the Colloquium:

"... the main defect which this examination of the sources of the law of international trade has revealed is the lack of purposeful co-operation between the formulating international agencies... the law of international trade, by its nature, is universal and for that reason a progressive liaison and co-operation between the formulating agencies should be the next step in the development of an autonomous law of international trade".²⁵

71. It has been often stated that the co-operation which is now lacking should be brought about, that this activity should be repeatedly stimulated in one place, at the top level, and that this should be the United Nations or one of its specialized agencies.²⁶ It was also claimed that in view of the developing world-

wide market this work should not have a purely regional orientation and that sponsorship of the United Nations could be useful to carry this work forward with the necessary scope and intensity.²⁷

72. Although the capacities of the International Law Commission, which is the agency set up by the General Assembly for the purpose of the progressive development and codification of international law, is at present and will be for many years to come absorbed by a heavy agenda, this should not prevent the General Assembly from dealing with the development of private international law and in particular of the law of international trade, or from discharging its urgent duties in that field.

73. The United Nations has achieved outstanding results in the codification of customary international law and in the kind of progressive development which is inseparable from codification: in filling in the gaps of customary international law and in adapting its rules to contemporary conditions. In the achievement of these results the work of the International Law Commission has played a prominent part.

74. The achievements of the United Nations in progressive development are also notable in the sense that there are a great number of treaties which, in response to the needs of international co-operation, from time to time, have been concluded under its aegis. Some law-making agreements embodied in solemn declarations add to the brilliance of the record.

75. All these achievements support the belief that the General Assembly will be able to find ways and means for systematically handling the problem of progressive development, thereby fully implementing its tasks prescribed in Article 13, paragraph 1 a, of the Charter. In order to do this, there must be a selection of hitherto unregulated fields where by social necessity international agreement is needed for establishing universal legal rules, and where such agreement seems both desirable and feasible. Such necessity manifests itself at present most forcefully in the field of international trade, the promotion of which primarily serves the progress of the developing countries and is thus in the interest of the whole community of nations. The development of the law of international trade on a universal scale does not mean ploughing untilled soil. Arduous spade-work is being done by several organizations and agencies, the results of which call for an ultimate common effort sponsored by a central authority. This demand fits very properly into the framework of the progressive development of international law, entrusted by Article 13, paragraph 1 a of the Charter to the General Assembly of the United Nations.

²⁴ Clive M. Schmitthoff, "The Law of International Trade, its Growth, Formulation and Operation", in *The Sources of the Law of International Trade*, edited by Clive M. Schmitthoff (London, Stevens and Sons, 1964), p. 37.

²⁵ Clive M. Schmitthoff in Ernest Rabel's *Zeitschrift für Ausländisches und Internationales Privatrecht* (Tübingen, Kaiser Wilhelm-Institut für Ausländisches und Internationales Privatrecht, 1964), p. 75.

²⁷ Professor John Honnold in *Unification of Law, Year-Book 1959* (Rome, Editions UNIDROIT), p. 239.

C. Unification of the law of international trade: note by the Secretariat*

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1-4
I. GENERAL COMMENTS ON THE UNIFICATION OF THE LAW OF INTERNATIONAL TRADE.....	5-6
II. METHODS OF UNIFICATION	7-15
A. Uniform and model legislation	8-11
Methods used in preparation of uniform national legislation	9-11
B. International conventions	12
C. Unification of practices in international trade, particularly standard contract provisions and general conditions of sale	13-15
The development of international commercial custom and commercial arbitration	15
III. CONCLUSION	16
 <i>Annexes</i> 	
I. Drafts prepared by the International Institute for the Unification of Private Law.....	<i>Page</i> 17
II. General conditions of sale drawn up under the auspices of the Economic Commission for Europe	17

* *Official Records of the General Assembly, Twentieth Session, Annexes, agenda item 92, document A/C.6/L.572.*

INTRODUCTION

1. At the 872nd meeting of the Sixth Committee on 9 November 1965 the representative of Hungary requested the circulation to the Committee of a preliminary survey by the Secretariat, with respect to agenda item 92. The present note is circulated pursuant to that request.

2. The explanatory memorandum of the Permanent Representative of Hungary relating to item 92 states:

"... For the present purposes what is meant by the 'development of private international law' is not so much international agreement on the rules of the conflicts of laws as applied by national courts and arbitral tribunals as rather a unification of private law mainly in the field of international trade (e.g. unification of the law on the international sale of goods or on the formation of contracts)."¹

This preliminary survey is therefore limited to the "unification of private law mainly in the field of international trade", and does not deal, at this stage, with other aspects of private international law not connected with international trade.

3. Some examples of topics which are related to the problems of international trade and which therefore come within the scope of the item are the following:

- (a) International sale of goods:
 - (i) Formation of contracts;
 - (ii) Agency arrangements;
 - (iii) Exclusive sale arrangements.

- (b) Negotiable instruments and banker's commercial credits.
- (c) Laws relating to conduct of business activities pertaining to international trade.
- (d) Insurance.
- (e) Transportation:
 - (i) Carriage of goods by sea;
 - (ii) Carriage of goods by air;
 - (iii) Carriage of goods by road and rail;
 - (iv) Carriage of goods by inland waterways.
- (f) Industrial property and copyright.
- (g) Commercial arbitration.

4. The present survey, after a few general comments, briefly outlines methods of unification which have been followed in the past, particularly in matters such as those indicated in the previous paragraph. It concludes with a suggestion as to further preliminary work which it might be desirable to undertake before concrete decisions are taken on the item in question.

I. GENERAL COMMENTS ON THE UNIFICATION OF THE LAW OF INTERNATIONAL TRADE

5. The unification of the law of international trade can be defined as the process by which conflicting rules of two or more systems of national laws applicable to the same international legal transaction is replaced by a single rule. This process is part of the general movement for the unification of law, especially private law, which began in Europe during the middle decades of the nineteenth century. With regard to international commercial transactions, efforts were intensified after the First World War under the auspices of the League of

¹ See *Official Records of the General Assembly, Nineteenth Session, Annexes, annex No. 2, document A/5728 (Section A above).*

Nations and other intergovernmental bodies, including The Hague Conference on Private International Law, the International Institute for the Unification of Private Law, and the Sixth International Conference of American States, held at Havana in 1928.

6. The impetus for the unification of law of international trade stems from the difficulties typically faced by those who engage in international commercial transactions as a result of the multiplicity of, and divergencies in national laws. A single transaction involving multiple legal relationships (for example, a contract of sale, payment provisions, insurance, transportation, etc.) may be subject to divergent rules of different national laws, seldom known in all their particulars to all the parties directly involved. On questions of performance, interpretation and applications, the parties require adequate knowledge of the legal conditions governing the performance of the general obligations. In case of litigation, the courts or arbitral tribunals are faced with considerable difficulty in determining the law applicable to the different aspects of an international commercial transaction. Sometimes the parties include in the contract a stipulation concerning the law applicable to the various aspects of the transaction. However where such a clause is absent, the rules of private international law of the forum are held applicable, and the different national laws can give divergent solutions for the same problem.

II. METHODS OF UNIFICATION

7. There methods have been mainly used to accomplish unification in the field of international trade: (a) uniform or "model" national laws, (b) international conventions, (c) unification of practices in international trade, particularly standard contract provisions and general conditions of sale. In addition, the development of trade custom and of international commercial arbitration has also contributed to the elimination of divergencies in national law.

A. Uniform and model legislation

8. Projects for the adoption of uniform or model legislation have been undertaken for more than a century, principally within regional groupings and in some instances on a global basis. In some cases, legislation would apply generally to both domestic and international transactions, and in others would apply only to international transactions. The earliest experience of regional groups was that of the Scandinavian countries, which manifested an interest in unification beginning in the middle of the nineteenth century. Another major regional effort was made by the Inter-American Council of Jurists, which sought to develop uniform rules on various subjects relating to trade and transportation. More recently, the Benelux countries have undertaken some projects of unification. The Treaty establishing the European Economic Community² contains provisions and procedures for the approximation or harmonization of the domestic legislation of its member States which affect the functioning of the Common Market. On a wider geographical scale, the International Insti-

tute for the Unification of Private Law, an intergovernmental body generally known as the Rome Institute, has prepared studies and drafts since 1928 (see annex I). The preparation of uniform laws in special fields has also been a feature of the work of some specialized agencies, notably the Food and Agriculture Organization of the United Nations and the International Labour Organisation, and of the regional economic commissions of the United Nations.

Methods used in preparation of uniform national legislation

9. The procedures followed for the preparation of uniform and model legislation have naturally varied from organization to organization and in accordance with the complexity and technical nature of the subject. In every case, however, three steps may be distinguished. First, there is the selection of a subject deemed appropriate for study and drafting. In some cases selection of subjects has been made by bodies of legal experts which have been requested by the Governments concerned to consider appropriate projects for unification, while in other cases the topics were chosen by organs concerned with economic or technical matters in the light of problems facing these bodies. In the United Nations, for example, the Economic Commission for Africa (ECA) has initiated projects for the harmonization of industrial, commercial, monetary and fiscal legislation, as well as legislation concerned with transportation within the region; the Economic Commission for Asia and the Far East (ECAFE) has suggested model laws for the development of natural resources; and the Economic Commission for Europe (ECE) has proposed uniform rules in certain transportation matters.

10. A second stage following the selection of subjects is the preparation of a study of the problem. Such studies normally include an analysis of various laws and a consideration of the extent to which these laws fulfil certain economic or other practical ends. It has been observed by the Rome Institute that such preparatory research involves what is described as both a "vertical" study and a "horizontal" study. The vertical study refers to the examination of the national laws, country by country. This is essential to assure accuracy and understanding of each State's laws and to ascertain the economic or political reasons for the law. Such studies have to be undertaken with the co-operation of the national Governments, national institutes or designated correspondents who are specialists in the subject. The "vertical" study is then followed by the "horizontal" study for the purpose of comparing the solutions reached under the various systems and laws, analysing the reasons for the differences and possibly reaching conclusions regarding the possibility of unification. There will, of course, be considerable variation in the amount of work required in the various fields; any attempt to unify subjects firmly embedded in local laws or traditions presents much greater difficulties than unification in branches of law which are relatively new and in the process of formation.

11. The third step is that of drafting. This is normally entrusted to a committee or working group

² See United Nations, *Treaty Series*, vol. 298, No. 4300.

rather than to a single jurist. The question of the composition of such groups presents difficulties particularly when unification on a universal scale is sought and when problems of a technical and commercial character are prominent. It is generally desirable that drafting committees should include experts familiar with the major legal systems in the world. Whether such committees should seek to develop a uniform law on the basis of the lowest common denominator of present law or whether they should seek to create legislation more responsive to the needs is, of course, a major problem that must often be faced. Various attempts have been made to lay down principles for the drafting of such uniform laws and in some instances such principles might serve as useful guidelines to the drafting group.

B. *International conventions*

12. International conventions have been used in several ways to contribute to unification of law relating to international trade. One technique has been to provide in an international convention for the adoption of an annexed uniform law. This was done, for example, in the Geneva Conventions providing a Uniform Law for Bills of Exchange and Promissory Notes³ and for a Uniform Law for Cheques.⁴ A more recent example is The Hague Convention of 1964, which provided for the adoption of a uniform law on the international sale of goods.⁵ Another category of multilateral conventions relevant to unification are those which regulate questions of private international law, in particular issues of choice of law in transactions involving foreign elements. Perhaps the best known such convention is the Code of Private International Law of 1928 (the Bustamante Code) to which fifteen American States have acceded. This comprehensive Code includes rules of choice of law in the fields of civil, commercial, penal and procedural law. Other regional international conventions are those adopted by the Scandinavian countries for the settlement of private international law problems in certain intra-Scandinavian relationships.⁶ The Hague Conference on Private International Law, an inter-governmental organization with twenty-three members, has prepared a number of conventions in this field, eleven of which have entered into force.⁷ In still a third category are those international agreements which lay down substantive rules of law for private law

relationships involving nationals of different countries. Notable examples of such conventions are the Brussels conventions in the field of maritime law,⁸ the conventions relating to liability in air law⁹ and the conventions on the transport of goods by rail and road.¹⁰ There are also several conventions relating to copyright and industrial property.¹¹ Conventions have been largely the product of intergovernmental organizations; although in the field of maritime law, they have been prepared by a non-governmental organization, the International Maritime Committee, and later adopted by a diplomatic conference. For the most part, the selection of topics for conventions has been made by organs concerned with substantive questions rather than by bodies of legal experts. Drafts were normally prepared by committees consisting in some cases of experts acting in their individual capacity, and in other cases of governmental representatives. Final adoption of the convention occurred in a governmental body which in some cases was a regional commission, in others a principal organ of the international organization concerned, and in still other instances was a conference of States convened for the purpose.

C. *Unification of practices in international trade, particularly standard contract provisions and general conditions of sale*

13. Apart from model or uniform legislation and international conventions, one may seek to reduce the complications inherent in the application of different national laws to transactions of international trade by the use of standard forms of contract and general conditions of sale. These have been in use in almost every aspect of world trade and particularly in certain lines of commodity trade since they were introduced by the London Commercial Trade Association in the 1880s. They are normally drawn up by trade associations in the various countries and have been extended by contacts between these associations on a national, regional

³ International Convention for the Unification of Certain Rules relating to Bills of Lading, of 25 August 1924; Convention for the Unification of Certain Rules relating to Limitation of Liability of Owners of Sea-going Vessels, of 25 August 1924; Convention for the Unification of Certain Rules relating to Maritime Mortgages and Liens, of 10 April 1926.

⁴ Convention for the Unification of certain Rules regarding International Transport, Warsaw, 12 October 1929; Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, The Hague, 28 September 1955; Convention supplementary to the Warsaw Convention, relating to International Carriage by Air performed by a Person other than a Contracting Carrier, 18 September 1961.

¹⁰ International Convention concerning the Transport of Goods by Rail (CIM), Berne, 25 February 1961; Convention on the Contract for the International Carriage of Goods by Road (CMR), 19 May 1956; Convention for International Rail Transport of Goods (SMGS), 1951 and 1953-1955; Convention relating to the International Forwarding of Goods, Warsaw, 1956.

¹¹ Universal Copyright Convention, Geneva, 6 September 1952 (United Nations, *Treaty Series*, vol. 216 (1955), No. 2937); International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 26 October 1961 (United Nations, *Treaty Series*, vol. 496 (1964), No. 7247).

³ Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, Geneva, 7 June 1930 (League of Nations, *Treaty Series*, vol. CXLIII, 1933-1934, No. 3313).

⁴ Convention providing a Uniform Law for Cheques, Geneva, 19 March 1931 (League of Nations, *Treaty Series*, vol. CXLIII, 1933-1934, No. 3316).

⁵ Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1 July 1964.

⁶ Convention containing Provisions of Private International Law in the Field of Marriage, Adoption and Guardianship, 1931; Convention on the Collection of Maintenance Claims, 1931; Convention on Recognition and Enforcement of Foreign Judgments, 1933; Convention on Bankruptcy, 1934; Convention on Succession and Administration of Estates, 1935.

⁷ Of particular interest are the Convention concerning Civil Procedure, 17 July 1905; the Convention relative to Civil Procedure, 1 March 1954; and the Convention on the Law applicable to International Sales of Goods, 15 June 1955.

or single-line-of-trade basis. In recent years a special effort has been made towards the unification of rules and practices in the field of international trade, especially by such organizations as the United Nations Economic Commission for Europe, the International Chamber of Commerce,¹² the International Law Association,¹³ and the Council for Mutual Economic Aid (Comecon).¹⁴

14. The work of ECE on general conditions of sale and standard forms of contract merits special attention.¹⁵ All projects in this field have been undertaken at the specific request of member Governments, normally prompted by trade associations in their respective countries. If the project is generally supported, an *ad hoc* working party is set up for the subject in question. These working parties are generally composed of members representing interested States from among both importing and exporting countries in respect of the particular commodity or trade. Prior to the first meeting of each working group, the secretariat of ECE prepares a comparative analysis of general conditions and standard forms of contract in use by trade associations in various ECE countries, the information being provided by Governments and business circles. Thereafter the secretariat prepares drafts at the request of the working party and collates the comments of Governments and trade associations. After a series of revisions and modifications necessitated by comments from member Governments and discussions within the working party, agreement is reached on an instrument which is then published by ECE for general distribution. These instruments elaborated by ECE have a purely optional status. Their use has depended upon voluntary acceptance by trade associations, which are of course free to adapt them entirely or in part.¹⁶

¹² Especially its publication of:

(a) *Incoterms* — definitions of commercial terms, 1936, 1952;

(b) Rules of Conciliation and Arbitration (1955);

(c) Uniform Customs and Practices for Commercial Documentary Credits (1962 revision) with the following complementary documents: Standard forms for the opening of documentary credits, uniform rules for the collection of commercial paper, simplification of international payment orders;

(d) Commercial Agency — A Guide for the Drawing Up of Contracts Between Parties Residing in Different Countries.

¹³ For example, York-Antwerp Rules, 1950, on the adjustment of general average.

¹⁴ General Conditions of Delivery of Goods between Foreign Trade Organizations of Member Countries of the Comecon, 1958. Under a multilateral agreement in force since 31 January 1958 among the members of the Council for Mutual Economic Aid, the provisions of the General Conditions of Delivery are binding on all foreign trade enterprises and other organs which include contracts of the sale of goods in foreign trade.

¹⁵ For a list of general conditions of sale and standard forms of contract prepared under the auspices of the ECE, see annex II.

¹⁶ It is reported that over a million copies of the various versions of the General Conditions for the Supply of Plant and Machinery for Export and General Conditions for the Supply and Erection of Plant and Machinery for Import and Export have been sold. P. Benjamin, "The ECE General Conditions of Sale and Standard Forms of Contract", *Journal of Business Law* (London, Stevens and Sons Ltd., 1961), p. 113.

The development of international commercial custom and commercial arbitration

15. International commercial custom has exerted a marked influence on the unification of law, developed as it is from the commercial practices, usages and standards which are widely used by all those engaged in particular sectors of international trade. Most of the general conditions and standard forms of contract existing have developed out of some commercial custom. Commercial custom has also been incorporated in some respects into the commercial legislation of many countries, and it is a common feature of legal systems in the interpretation of international contracts that account should be taken of established commercial practices and usages. The dissemination of custom and practice has been undertaken by national and international trade associations, such as the International Chamber of Commerce, which has published the widely used *Uniform Customs and Practices for Commercial Documentary Credits* (1962 revision) and *Incoterms*. Within recent decades the increased use of international commercial arbitration has contributed towards the unification of law and commercial practices. In resorting to international commercial arbitration, the parties to an international commercial transaction often agree upon the law to govern the arbitration and the substance of the disputes settled by this process. By this process the parties avoid a conflict of jurisdictions and of national laws. In certain cases the parties also stipulate that the transaction should be governed by a complete system of uniform law, the terms of general conditions and standard forms of contract, commercial customs and general principles without any recourse to any supplemental national law. Moreover, the personnel used in international commercial arbitration is drawn from many countries and from lists of experienced arbitrators prepared by non-governmental organizations and national associations. In addition, international commercial arbitration in certain sectors of international trade has been localized in a few principal centres. Such institutional international arbitration serves to standardize business transactions, the quality and specifications of goods and delivery terms. This movement towards uniformity has been assisted by the principal international conventions on the law of arbitration and the enforcement of arbitral awards, namely, the European Convention on International Commercial Arbitration sponsored by ECE,¹⁷ the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,¹⁸ the Treaty

¹⁷ The following States have become parties to the Convention: Austria, Bulgaria, Byelorussian SSR, Czechoslovakia, Federal Republic of Germany, Hungary, Poland, Romania, Ukrainian SSR, Union of Soviet Socialist Republics and Yugoslavia. A provision of the Convention makes it possible for the accession of non-European Members of the United Nations and as of this date Cuba and Upper Volta have become parties.

¹⁸ The following States have become parties to the Convention: Austria, Bulgaria, Byelorussian SSR, Cambodia, Central African Republic, Ceylon, Czechoslovakia, Ecuador, Federal Republic of Germany, Malaysia, Poland, Romania, Switzerland, Syria, Thailand, Ukrainian SSR, Union of Soviet Socialist Republics, United Arab Republic and United Republic of Tanzania.

of International Procedural Law, signed at Montevideo in 1940, and bilateral agreements between interested States. The European Economic Commission has also prepared a handbook of national and international institutions active in international commercial arbitration and a table of bilateral conventions relating to the enforcement of arbitral awards and organization of commercial arbitration procedures and the Arbitration Rules of ECE. The Economic Commission for Asia and the Far East has also been engaged in activities designed to interest Governments and business associations in its region in the development of arbitration facilities and has established a United Nations Centre for the Promotion of Commercial Arbitration within the secretariat of ECAFE working with the assistance of the Office of Legal Affairs.

III. CONCLUSION

16. In the light of the report given above, it would seem useful to have a comprehensive, expert survey on

this subject before decisions are taken by the General Assembly. Such a survey would:

(a) Review the work in the field of unification or harmonization of the law of international trade;

(b) Analyse the methods and approaches suitable for the unification or harmonization of the various topics, including the question whether particular topics are more suitable for regional, interregional or world-wide unification;

(c) Consider the future role of the United Nations and of other agencies in this field.

ANNEXES

I. Drafts prepared by the International Institute for the Unification of Private Law

[Annex not reproduced]

II. General conditions of sale drawn up under the auspices of the Economic Commission for Europe

[Annex not reproduced]

II. ACTION IN THE GENERAL ASSEMBLY

A. General Assembly resolution 2102 (XX) of 20 December 1965

2102 (XX). CONSIDERATION OF STEPS TO BE TAKEN FOR PROGRESSIVE DEVELOPMENT IN THE FIELD OF PRIVATE INTERNATIONAL LAW WITH A PARTICULAR VIEW TO PROMOTING INTERNATIONAL TRADE

The General Assembly,

Recalling that it is one of the purposes of the United Nations to be a centre for harmonizing the actions of nations in the attainment of such common ends as the achievement of international co-operation in solving, *inter alia*, international economic problems,

Mindful of its responsibilities under Article 13 of the Charter of the United Nations,

Considering that conflicts and divergencies arising from the laws of different States in matters relating to international trade constitute an obstacle to the development of world trade,

Believing that the interests of all peoples, and particularly those of developing countries, demand the betterment of conditions favouring the extensive development of international trade,

Recognizing the efforts made by the United Nations and the specialized agencies, and by inter-governmental and non-governmental organizations, towards the progressive unification and harmonization of the law of international trade by promoting the adoption of international conventions, uniform or model legislation, standard contract provisions, general conditions of sale, standard trade terms and other measures,

Convinced that it is desirable to further co-operation among the agencies active in this field and to explore the need for other measures for the progressive unification and harmonization of the law of international trade,

Taking note of the preliminary study prepared by the Secretariat on this subject,¹

1. *Requests* the Secretary-General to submit to the General Assembly at its twenty-first session a comprehensive report including:

(a) A survey of the work in the field of unification and harmonization of the law of international trade;

(b) An analysis of the methods and approaches suitable for the unification and harmonization of the various topics, including the question whether particular topics are suitable for regional, inter-regional or world-wide action;

(c) Consideration of the United Nations organs and other agencies which might be given responsibilities with a view to furthering co-operation in the development of the law of international trade and to promoting its progressive unification and harmonization;

2. *Decides* to include in the provisional agenda of its twenty-first session an item entitled "Progressive development of the law of international trade".

*1404th plenary meeting,
20 December 1965.*

¹ *Official Records of the General Assembly, Twentieth Session, Annexes, agenda item 92, document A/C.6/L.572.*

B. Progressive development of the law of international trade: report of the Secretary-General*

CONTENTS

	Paragraphs
INTRODUCTION	1-9
I. THE LAW OF INTERNATIONAL TRADE	10-25
A. Concept of "law of international trade"	10-13
B. Legal techniques used to reduce conflicts and divergencies	14-19
1. Choice of law rules	16
2. Harmonization and unification of substantive rules	17-19
C. Development of the law of international trade	20-25
1. Similarity	22-23
2. Application	24
3. Formulation	25

* *Official Records of the General Assembly, Twenty-first Session, Annexes, agenda item 88, document A/6396.*

CONTENTS (continued)

	<i>Paragraphs</i>
II. SURVEY OF THE WORK IN THE FIELD OF HARMONIZATION AND UNIFICATION OF THE LAW OF INTERNATIONAL TRADE	26-18
A. Inter-governmental organizations	27-111
1. The International Institute for the Unification of Private Law	27-37
2. The Hague Conference on Private International Law	38-49
3. The League of Nations	50-55
4. The United Nations	56-100
(a) Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958	57-60
(b) Industrial property legislation	61-64
(c) United Nations regional economic commissions	65-93
(d) United Nations Conference on Trade and Development (UNCTAD)	94-96
(e) Centre for Industrial Development	97-100
5. The United Nations specialized agencies	101-107
(a) International Bank for Reconstruction and Development (IBRD)	101-102
(b) Inter-Governmental Maritime Consultative Organization (IMCO)	103-104
(c) International Civil Aviation Organization (ICAO)	105-107
6. United International Bureaux for the Protection of Intellectual Property (BIRPI)	108-111
B. Regional inter-governmental organizations and groupings	112-146
1. The Council for Mutual Economic Assistance (CMEA)	112-120
2. The European Economic Community (EEC)	121-125
3. The European Free Trade Association (EFTA)	126-128
4. The Latin American countries	129-134
5. The Council of Europe	135-139
6. The Benelux countries	140-141
7. The Nordic Council	142-144
8. The Organization of African Unity (OAU)	145
9. The Asian-African Legal Consultative Committee	146
C. Non-governmental organizations	147-183
1. The International Chamber of Commerce (ICC)	147-166
2. The International Maritime Committee (IMC)	167-171
3. The International Association of Legal Science	172-175
4. The International Law Association (ILA)	176-180
5. The Institute of International Law	181-183
D. Summary: main areas of harmonization and unification	184-189
III. METHODS, APPROACHES AND TOPICS SUITABLE FOR THE PROGRESSIVE HARMONIZATION AND UNIFICATION OF THE LAW OF INTERNATIONAL TRADE	190-207
A. Methods	190-195
B. Approaches	196-202
C. Suitable topics	203-207
IV. ROLE OF THE UNITED NATIONS IN THE PROGRESSIVE HARMONIZATION AND UNIFICATION OF THE LAW OF INTERNATIONAL TRADE	208-235
A. Progress and shortcomings of the work in the field of harmonization and unification of the law of international trade	208-210
B. Desirable action to remedy the existing shortcomings	211-212
C. Role of the United Nations	213-224
D. Establishment of a United Nations commission on international trade law	225-234
E. Financial implications of the establishment of a United Nations commission on international trade law	235

Annexes

	<i>Page</i>
I. Additional data on the activities of organizations concerned with the law of international trade	45
II. Additional data on the activities of the International Institute for the Unification of Private Law (UNIDROIT)	45
III. UNIDROIT: Table of legal activities on the programmes of certain international organizations as of 1 January 1966	45

Introduction

1. This report is submitted pursuant to resolution 2102 (XX), adopted by the General Assembly on 20 December 1965.

2. In the discharge of his responsibilities under the terms of operative paragraph 1 of that resolution, the Secretary-General retained the services of Professor Clive M. Schmitthoff of the City of London College, a well-known authority on the law of international trade, who was requested to prepare a preliminary study on the subject.

3. On the basis of Dr. Schmitthoff's study the Secretary-General prepared a draft report which was sent for comments to the following experts: Dra. Margarita Arguas (Argentina), Dr. Taslim O. Elias (Nigeria), Professor Gyula Eörsi (Hungary), Professor Willis L. Reese (United States), and Professor Mustafa Kamil Yasseen (Iraq).

4. The experts consulted expressed agreement with the conclusions reached in the report and with the suggestions made therein. They also contributed valuable comments and proposals, which were taken into account in the preparation of the final version of this report.

5. During the debate on this item in the Sixth Committee it was agreed that "consultations with the International Law Commission, other United Nations organs and autonomous institutions should be conducted informally by the Secretary-General."¹ Accordingly, the views of the Commission were sought as to whether it would be in a position to undertake additional responsibilities in the area of international trade law. The Secretary-General has been advised that, in view of its manifold activities and responsibilities and considering its extensive agenda, the Commission does not believe that it would be appropriate for it to become responsible for work in the field of the progressive development of the law of international trade.

6. In the preparation of this report the Office of Legal Affairs consulted the Secretariat units most directly concerned, namely, the Department of Economic and Social Affairs, the Centre for Industrial Development, the United Nations Conference on Trade and Development (UNCTAD), and the United Nations regional economic commissions. Consultations were also conducted with the following specialized agencies: the Inter-Governmental Maritime Consultative Organization (IMCO), the International Bank for Reconstruction and Development (IBRD), and the International Civil Aviation Organization (ICAO); and with the following other institutions: International Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law, the International Chamber of Commerce (ICC), and the United International Bureaux for the Protection of Intellectual Property (BIRPI).

7. The Secretary-General wishes to record his appreciation for the useful comments and suggestions re-

ceived; some of these suggestions have been incorporated in the report. While it was not feasible to publish all of the comments received in the course of these consultations, in order to provide the General Assembly with as much information as possible, certain observations submitted by The Hague Conference on Private International Law and by the International Institute for the Unification of Private Law, being of a more general nature, are given in an addendum to this report (A/6396/Add.1).

8. This report consists of four chapters. Chapter I describes the scope of the concept of "law of international trade" and the techniques used to reduce conflicts and divergencies arising from the laws of different countries in matters relating to international trade. It also contains a brief historical survey of the different stages through which the law of international trade has developed. Chapter II consists of a broad survey of the work done by inter-governmental organizations and groupings and by non-governmental organizations in the harmonization and unification of the law of international trade as well as on directly related subjects. Chapter III deals with the methods used in the progressive harmonization and unification of the law of international trade and discusses some of the advantages and disadvantages of world-wide, regional and other approaches. It also indicates topics which might be suitable for harmonization and unification. Chapter IV discusses the progress and shortcomings of the work done until now in this field, the desirable action to remedy such shortcomings and the possible role of the United Nations in furthering the progressive development of the law of international trade. Finally, the report discusses the possibility of establishing a United Nations commission on international trade law and suggests the functions and responsibilities of the commission and its secretariat.

9. There are also three annexes to the report containing additional data on the activities of organizations concerned with the subject and other relevant information.

I. The law of international trade

A. Concept of "law of international trade"

10. For the purposes of General Assembly resolution 2102 (XX) and as used in this report, the expression "law of international trade" may be defined as the body of rules governing commercial relationships of a private law nature involving different countries. This definition is consistent with the concept of the law of international trade described in the explanatory memorandum of the Permanent Representative of Hungary² and in the Secretariat note submitted to the twentieth session of the General Assembly, which listed the following as examples of topics falling within the scope of the law of international trade.³

² *Ibid.*, Nineteenth Session, Annexes, annex No. 2, document A/5728.

³ *Ibid.*, Twentieth Session, Annexes, agenda item 92, document A/C.6/L.572, para. 3.

¹ See *Official Records of the General Assembly, Twentieth Session, Annexes*, agenda item 92, document A/6206, para. 18.

- (a) International sale of goods:
 - (i) Formation of contracts;
 - (ii) Agency arrangements;
 - (iii) Exclusive sale arrangements.
- (b) Negotiable instruments and banker's commercial credits.
- (c) Laws relating to conduct of business activities pertaining to international trade.
- (d) Insurance.
- (e) Transportation:
 - (i) Carriage of goods by sea;
 - (ii) Carriage of goods by air;
 - (iii) Carriage of goods by road and rail;
 - (iv) Carriage of goods by inland waterways.
- (f) Industrial property and copyright.
- (g) Commercial arbitration.

11. The scope of this report does not extend to international commercial relations on the level of public law, such as those relating to the attitude and behaviour of States when regulating, in the exercise of their sovereign power, the conduct of trade affecting their territories. Illustrations of commercial relationships of this type are bilateral treaties of commerce or multilateral treaties such as the General Agreement on Tariffs and Trade (GATT) or the Rome Treaty establishing the European Economic Community. International commodity arrangements are also excluded from the scope of this report.

12. On the other hand, international commercial relations on the level of private law entered into by governmental and other public bodies or, particularly in countries of centrally planned economy, by foreign trade corporations, are deemed to be included within the definition of the law of international trade.

13. Another area within the concept of the law of international trade is that of conventions, the object of which is the regulation of a topic of international trade law, such as the Brussels Convention of 1924 for the Unification of Certain Rules relating to Bills of Lading for the Carriage of Goods by Sea, the Hague Convention of 1964 relating to a Uniform Law on the International Sale of Goods (Corporeal Movables), The Hague Convention of 1964 relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (Corporeal Movables), and The Hague Convention on the Law Applicable to International Sales of Corporeal Movables of 15 June 1955.

B. Legal techniques used to reduce conflicts and divergencies

14. As indicated in the preamble to General Assembly resolution 2102 (XX), "conflicts and divergencies arising from the laws of different States in matters relating to international trade constitute an obstacle to the development of world trade".

15. In order to reduce such conflicts and divergencies two basic techniques have been followed, which are different but complementary: the first relates to the choice of law rules within the framework of private international law, and the second relates to the progressive unification and harmonization of substantive rules.

1. CHOICE OF LAW RULES

16. The purpose of the first technique is to establish rules regulating the conflict of laws, i.e., rules relating to the choice of competing substantive laws applicable to a particular transaction, and rules governing the determination of the competence of courts in a particular litigation. This has been described as the "clinical" method of "finding the best possible solution of the acute case at bar".⁴ The Bustamante Code, Book II of which is entitled "International Commercial Law", is the most comprehensive attempt made so far to establish conflict rules in the field of the law of international trade (see paras. 129-130 below). The contribution of The Hague Conference on Private International Law in this area is described in paragraphs 38 to 49 below.

2. HARMONIZATION AND UNIFICATION OF SUBSTANTIVE RULES

17. The second, which has been described as the "preventive" method, has the purpose of avoiding law conflicts.⁵ The contribution of the International Institute for the Unification of Private Law, which is the organization most directly specializing in this subject, is described in paragraphs 27 to 37 below.

18. The most effective method of conflict avoidance is undoubtedly the universally accepted regulation of a particular transaction. There can be no conflict of laws where a common solution is accepted by all municipal laws. Thus, before the Reformation, law conflicts relating to the validity and dissolution of marriage — which are so frequent today — hardly existed in Western Europe because the law of the Roman Catholic Church was universally accepted in that area.

19. Of a similar nature was the mediaeval law merchant. In the structure of mediaeval society the merchants formed a cosmopolitan class which was active at the fairs, markets and ports of all European countries. Commercial custom, universally accepted, developed legal institutions which, to the present day, are the normal instruments of international trade. Amongst them are the bill of exchange, the bill of lading, insurance, the commercial corporation and the customs of the sea.

C. Development of the law of international trade

20. The development of the law of international trade has gone through three stages. In the first phase

⁴ See Hilding Eek, *The Swedish Conflicts of Laws* (The Hague, Nijhoff, 1965), p. 272.

⁵ As the representative of China observed, "... should the various countries succeed in enacting uniform rules of substantive law, the rules of private international law would no longer be relevant since those rules presupposed that municipal laws would remain intact and merely sought to mitigate the disadvantages arising from them." He recalled "Beckett's comment that private international law was in a sense the antithesis of the universal unification of law. Its *raison d'être* was the existence in different systems of law... both the process of codification of private international law and that of unification of private law were designed to promote international trade, provided they advanced by degrees and did not turn out to have aims which were incompatible." (See *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 895th meeting, paras. 13 and 15.)

it appeared in the form of the mediaeval *lex mercatoria*, a body of universally accepted rules.⁶ In the second stage it was incorporated into the municipal law of the various national States which succeeded the feudal stratification on mediaeval society. The culmination of this development was the adoption in France of the *Code de commerce* of 1807,⁷ in Germany the promulgation of the *Allgemeine Handelsgesetzbuch* of 1861,⁸ and in England the incorporation of the custom of merchants into the common law by Lord Mansfield.⁹ The third stage in the development of the law of international trade is contemporary. Commercial custom has again developed widely accepted legal concepts, particularly such trade terms as f.o.b. and c.i.f., and the institution of the bankers' commercial credit, and international conventions have brought a measure of unification in important branches of the law of negotiable instruments, of transport by sea, air and land, of arbitration and other topics.

21. The law of international trade in the third stage of its development shows three characteristics. First, the rules of international trade exhibit a remarkable similarity in all municipal jurisdictions. Secondly, their application in the various municipal jurisdictions is provided for by authority of the national sovereigns. Thirdly, their formulation is brought about by international agencies created by Governments or by non-governmental bodies. These three characteristics require further examination.

1. SIMILARITY

22. The similarity of the law of international trade transcends the division of the world between countries of free enterprise and countries of centrally planned economy, and between the legal families of the civil law of Roman inspiration and the common law of English tradition.¹⁰ As a Polish scholar observed, "the law of external trade of the countries of planned economy does not differ in its fundamental principles from the law of external trade of other countries, such as e.g., Austria or Switzerland. Consequently, international trade law specialists of all countries have found without difficulty that they speak a 'common language'".¹¹

23. The reason for this universal similarity of the law of international trade is that this branch of law is

⁶ See e.g., Gérard de Malynes' *Lex Mercatoria*, first published in 1636.

⁷ Preceded by the *Ordonnance sur le commerce* of Louis XIV of 1673 and Colbert's *Ordonnance de la marine* of 1681.

⁸ Preceded by the *Allgemeine Wechselordnung* of 1848. The *Allgemeine Handelsgesetzbuch* of 1861 is still in operation in Austria; in Germany it was superseded by the *Handelsgesetzbuch* of 1897.

⁹ See T. F. T. Plucknett, *A Concise History of the Common Law*, 4th ed., (London, Butterworth, 1948), p. 332.

¹⁰ See Clive M. Schmitthoff, "The Law of International Trade, Its Growth, Formulation and Operation" in *The Sources of the Law of International Trade with special reference to East-West Trade*, edited by Clive M. Schmitthoff (New York, Praeger, 1964), p. 3.

¹¹ See Henryk Trammer, "The Law of Foreign Trade in the Legal Systems of the Countries of Planned Economy," *ibid.*, p. 42.

based on three fundamental propositions: first, that the parties are free, subject to limitations imposed by the national laws, to contract on whatever terms they are able to agree (principle of the autonomy of the parties' will); secondly, that once the parties have entered into a contract, that contract must be faithfully fulfilled (*pacta sunt servanda*) and only in very exceptional circumstances does the law excuse a party from performing his obligations, viz., if *force majeure* or frustration can be established; and, thirdly, that arbitration is widely used in international trade for the settlement of disputes, and the awards of arbitration tribunals command far-reaching international recognition and are often capable of enforcement abroad.

2. APPLICATION

24. It is generally recognized that the modern law of international trade is not imposed by an international legislator or applied in the municipal jurisdictions *proprio vigore* as part of the *jus gentium*. The law of international trade is applied in the municipal jurisdictions by leave and licence of the national sovereigns.¹² It follows that national public policy or *ordre public* of a particular State will, in principle, override or qualify a rule of international trade law. It has been observed that "in the application of the rules of international trade internal order is sufficiently protected by *ordre public*, and there is, therefore, no need for restriction of the scope of their application by postulating the requirement of bilateral application".¹³

3. FORMULATION

25. The formulation of the rules of international trade by international "formulating agencies" is the outstanding characteristic of the modern development of international trade law. Some of these agencies are United Nations organs, as for example, the Economic Commissions for Europe, Asia and the Far East, Latin America and Africa. Others are inter-governmental organizations, as for example, the International Institute for the Unification of Private Law, the Hague Conference on Private International Law, the Council for Mutual Economic Assistance. Some agencies are formed by merchants, for example, the International Chamber of Commerce and the International Maritime Committee and others by international jurists, such as the International Law Association. The work of the aforementioned, as well as of other "formulating agencies" is described in chapter II of the present report.

II. Survey of the work in the field of harmonization and unification of the law of international trade

26. This chapter contains a brief description of the inter-governmental organizations and groupings and the non-governmental organizations which have been active in this field, together with a survey of their work in the

¹² See Clive M. Schmitthoff, "The Law of International Trade, Its Growth, Formulation and Operation," *ibid.*, p. 4.

¹³ See Aleksandar Goldstajn, "International Conventions and Standard Contracts as Means of Escaping from the Application of Municipal Law," *ibid.*, p. 109.

progressive harmonization and unification of the law of international trade. In order to provide the General Assembly with a broad picture of the subject, the survey has in some cases been extended to activities which, although they might not fall strictly within the purview of international trade law, are directly related thereto.

A. Inter-governmental organizations

1. THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

27. The Institute, which is generally referred to as UNIDROIT or the Rome Institute, has its seat at Rome and was established by a multilateral treaty in 1926 under the aegis of the League of Nations. Its present constitution is contained in the Statute of the Institute of 15 March 1940, as amended in June 1957, July 1958 and December 1963. Article 2 of the Statute provides that the Institute "is an international body responsible to the participating Governments", and according to Article 5 the General Assembly of the Institute "shall consist of one representative from each of the participating Governments". Governments other than the Italian Government are represented by their diplomatic representatives accredited to the Italian Government, or by their deputies.

28. At present, the Governments of forty-three countries¹⁴ are members of UNIDROIT. Geographically twenty-four of the member countries are European, eleven are Latin American, five are Asian, two are African and one is North American. The majority of the member countries consist of countries of free enterprise economy. Although at the present time most of the member countries are European, the Institute is engaged in efforts to expand its membership.

29. The work of the Rome Institute in the preparation of draft conventions is widely recognized as being of great value. A list of the items currently on the working programme of the Institute and a list of items on which the Institute has been working in the past will be found in annex II.

30. The drafts prepared by the Institute formed the basis of conventions which have been adopted by diplomatic conferences, notably the Convention relating to a Uniform Law on the International Sale of Goods (Corporeal Movables) and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (Corporeal Movables) which were concluded at the Diplomatic Conference on the Unification of Law governing the International Sale of Goods convened by the Government of the Netherlands and held at The Hague in April 1964. The Conventions were opened for signature on 1 July 1964. Of the

twenty-seven States which signed the Final Act of the Conference, all but three (Bulgaria, Hungary and Yugoslavia) are countries of free enterprise economy and geographically twenty-two are located in Europe, three in Latin America and North America and two in Asia. Any State Member of the United Nations or any of the specialized agencies may become a party to these Conventions.¹⁵

31. The work of the Rome Institute on the international codification of the law relating to the sale of goods and connected topics includes also four uniform laws in preparation, viz., on the conditions of validity of the contract of sale; on the protection of the bona fide purchaser of goods (corporeal movables); on the contract of commission on the international sale or purchase of goods (draft convention); and on credit sale and hire-purchase.

32. Draft conventions of the Rome Institute relating to topics other than the sale of goods likely to be considered by diplomatic conferences in 1967 are the following: the draft convention on the contract for the international carriage of passengers and luggage by road; the draft convention on the contract of international combined carriage of goods; and the draft convention on the contract of forwarding agency in the international carriage of goods.

33. Some of the drafts of the Rome Institute were not submitted directly to diplomatic conferences but formed the basis for measures promoted by other international agencies. Thus, the Draft Convention on the Contract for the International Transport of Goods by Roads formed the basis of the Convention on the Contract for the International Carriage of Goods by Road (CMR), concluded under the auspices of the United Nations Economic Commission for Europe in 1956; and the Draft Uniform Law on Compulsory Insurance of Motorists formed the basis of the Benelux Treaty of 1955 on the Compulsory Insurance against Civil Liability in respect of Motor Vehicles, and the European Convention on Compulsory Insurance of Motorists, concluded under the auspices of the Council of Europe.

34. Apart from these proposals for the unification of particular topics of private law, the Rome Institute is engaged in research into ways and means of ad-

¹⁵ For analyses and comments on The Hague Conventions, see e.g. Philippe Kahn, "La Convention de la Haye du 1^{er} juillet 1964 portant loi uniforme sur la vente internationale des objets mobiliers corporels" in *Revue trimestrielle de droit commercial* (Paris), vol. 17, 1964, p. 45; John Honnold, "The Uniform Law for the International Sale of Goods: The Hague Convention of 1964" in *Law and Contemporary Problems* (Durham, North Carolina), vol. 30, 1965, p. 326; Harold Berman, "The Uniform Law on International Sale of Goods: A Constructive Critique," *ibid.*, p. 354; Gunnar Lagergren, "The Uniform Law on Formation of Contracts for the International Sale of Goods" in *Journal of Business Law* (London, 1966), p. 22; Ernst von Caemmerer, "Internationales Kaufrecht" in *Festschrift für Hans Carl Nipperdey*... (Munich, Beck, 1955), p. 211; André Tunc, *Commentary of The Hague Convention of 1 July 1964 on the International Sale of Goods and on the Formation of Contracts of Sale* (The Hague, Ministry of Justice 1966); Jorge Barrera Graf, *La Reglamentación uniforme de las compraventas internacionales de mercaderías* (México, D.F., Universidad Nacional Autónoma, 1965).

¹⁴ Austria, Belgium, Bolivia, Brazil, Bulgaria, Chile, Colombia, Cuba, Denmark, Ecuador, Federal Republic of Germany, Finland, France, Greece, Holy See, Hungary, India, Iran, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Paraguay, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela and Yugoslavia.

vancing the task of unification.¹⁶ It is, in particular preparing two studies: one on methods of unification and harmonization of law, and the other on measures designed to ensure uniformity of interpretation of uniform laws.

35. The Rome Institute has issued a number of valuable publications, the most important of which are:

(a) The yearbook, *Unification of Law*, which presents a general survey of the work on the unification of private law with specific reference to conventions and draft conventions.

(b) The quarterly, *Uniform Law Cases*, which contains decisions of national courts on conventions and uniform laws. In particular, leading cases on the following are included: the Brussels Convention of 1924 on Bills of Lading; the Warsaw Convention of 1929 on International Carriage by Air; the Geneva Convention on Negotiable Instruments of 1930 and 1931.

(c) Tables of legal activities on the programmes of certain international organizations, which are prepared by the secretariat of the Institute in connexion with meetings of the organizations concerned with the unification of law, arranged by the Rome Institute. So far three meetings have been held, the first in 1956, the second in 1959, and the last in 1963.¹⁷ A list of inter-governmental and non-governmental organizations which took part in the third meeting is given in annex II.

36. The latest table has been brought up to date to 1 January 1966 by the Institute and may be found in annex III.

37. It should further be noted that in 1959 the Rome Institute concluded an arrangement with the United Nations on the reciprocal exchange of information and documentation, in order to promote co-operation and co-ordination between the United Nations and the Institute. This arrangement was made pursuant to resolution 678 (XXVI) of 3 July 1958 of the Economic and Social Council.

2. THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

38. The origin of the Hague Conference can be traced to the influence of the renowned Italian jurist Pasquale Mancini. He submitted a report¹⁸ to the second session of the Institute of International Law in Geneva in 1874 in which he advocated the unification of the rules of the conflict of laws in the various national jurisdictions. The first Hague Conference on Private

International Law was convened by the Government of the Netherlands and held in 1893.¹⁹ The Conference originally held its sessions on an *ad hoc* basis, but subsequent meetings took place with a certain regularity though at long intervals. At its seventh session in 1951, the Conference adopted its present Statute which entered into force on 15 July 1955 as a multilateral international treaty.²⁰

39. According to article 1 of the Statute, it is the objective of the Conference to work for the progressive unification of the rules of private international law. These objectives are thus quite different from those of the Rome Institute, which attempts to unify specified branches of substantive law of different countries. The Statute provides in article 2 that countries which have taken part in one or several sessions of the Conference and accept the Statute shall be members of the Conference. Other States may be admitted as members by decision of the majority of votes cast by the participating members. In addition to the sixteen States which were represented at the adoption of the Statute,²¹ eight have become members of the Hague Conference: Czechoslovakia, Greece, Ireland, Israel, Turkey, the United Arab Republic, the United States of America, and Yugoslavia. Hungary, Liechtenstein and Poland have signed or adhered to Conventions sponsored by the Conference but have not become members. Of the twenty-four member States, only two — Czechoslovakia and Yugoslavia — have centrally planned economies. Twenty States are European, two are Asian, one is African (United Arab Republic), and one is North American (United States of America). None of the Latin American countries participated, perhaps because they have their own arrangements for the unification of conflict of laws rules, which are to be found in the Treaties of Montevideo and the Bustamante Code (see paras. 129-134 below).

40. The method of operation of the Conference is to prepare draft conventions for adoption by member States at the sessions of the Conference. The Conference also promotes the signature and ratification of conventions prepared by it and, where appropriate, the incorporation by States of the terms of these instruments into their national legislation. These activities distinguish the Conference from the Rome Institute and from certain other formulating agencies.

41. While the earlier conventions deal mainly with family law, some of the conventions adopted by the seventh to tenth sessions attempt to unify conflict rules to international trade law.

42. The most successful Hague Convention pertaining to international trade law is the Convention on the

¹⁶ See Antonio Malintoppi, "The Uniformity of Interpretation of International Conventions on Uniform Laws and of Standard Contracts," in Schmitthoff, *op. cit.*, pp. 127-137.

¹⁷ The record of the IIIrd Meeting may be found in *Unification of Law: Yearbook, 1963* (Rome, Editions Unidroit, 1964).

¹⁸ See "Utilité de rendre obligatoires pour tous les Etats, sous la forme d'un ou de plusieurs traités internationaux, un certain nombre de règles générales du droit international privé, pour assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles" in *Revue de droit international*, (Paris), vol. 7, 1931, p. 329.

¹⁹ The decision to convene this first Conference owed much to the initiative of Tobias Asser, who subsequently served as President of the first four Hague Conferences (1893, 1894, 1900, 1904).

²⁰ United Nations, *Treaty Series*, vol. 220 (1955), No. 2997, p. 121.

²¹ Austria, Belgium, Denmark, Federal Republic of Germany, Finland, France, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom of Great Britain and Northern Ireland.

Law Applicable to International Sales of Goods of 15 June 1955.²² This Convention is in force with respect to Belgium, Denmark, Finland, France, Italy and Norway as of 1 September 1964 and with respect to Sweden as of 6 September 1964. The main provisions of this Convention have been summed up by an English writer as follows:

"A contract for the sale of goods is regulated by the domestic law of the country designated by the parties. Failing such a designation, the contract is regulated by the domestic law of the country where the seller has his habitual residence at the time when he receives the order. If the order is received by a branch office of the seller the contract is regulated by the domestic law of the country where such branch is located. Nevertheless the contract is regulated by the domestic law of the country where the buyer has his habitual residence if the order has been received in that country by the seller or his agent."²³

43. The conflict regulation is favour of the substantive law of seller's country has also been used in paragraph 74 of the General Conditions of Delivery of Goods, 1958, of the Council for Mutual Economic Assistance (see paras. 115-120 below), and in the arbitration clauses of the General Conditions of Sales, Nos. 188, 574 and 730 of the United Nations Economic Commission for Europe (see paras. 67-74 below).

44. Mention should also be made of Convention Relating to Civil Procedure signed at The Hague on 1 March 1954,²⁴ which is important for international commerce in that it deals with the enforcement of obligations sought in the national courts of the parties concerned. The States Parties to the Convention are Austria, Belgium, Czechoslovakia, Denmark, the Federal Republic of Germany, Finland, France, Hungary, Italy, Luxembourg, the Netherlands, Norway, Poland, Spain, Sweden, Switzerland and Yugoslavia.

45. Another Convention promoted by the Hague Conference which has come into operation is the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.²⁵ This Convention was concluded on 5 October 1961; it came into operation for France, the United Kingdom of Great Britain and Northern Ireland and Yugoslavia on 24 January 1965, for the Netherlands on 8 October 1965, and for the Federal Republic of Germany on 13 February 1966.

46. Other conventions in the field of international commercial law promoted by the Hague Conference which have not yet entered into force are: the Convention on the Law Applicable for the Transfer of Property in International Sales of Corporeal Movables of 15 April 1958; the Convention on the Jurisdiction of an Agreed Court in International Sales of Corporeal Movables of 15 April 1958; the Convention on the

Recognition of the Legal Personality of Companies, Associations and Foreign Foundations of 1 June 1956; the Convention on the Choice of Court of 25 November 1965; and the Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters of 26 April 1966.

47. The Conference concluded an Agreement with the Council of Europe under which the latter will not deal with the unification of private international law and will refer to the Hague Conference all proposals on that subject which are made at its meetings. The Council may invite the Conference to elaborate a convention on a specific matter. Both the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, of 5 October 1961, and the draft Convention on the Recognition and Enforcement of Foreign Judgements (Final Act of 26 April 1966) were drafted as a direct result of such requests.

48. All of the proceedings of the Conference and many of the documents submitted by Governments or drafted by the secretariat are published in volumes bearing the title *Actes et documents de la Conférence de La Haye de droit international privé, . . . session*.

49. In 1958 the Hague Conference concluded an arrangement with the United Nations similar to that which exists between the Rome Institute and the United Nations, providing for co-operation, co-ordination and exchange of information and documentation. As in the case of the Rome Institute, this arrangement was made pursuant to resolution 678 (XXVI) of 3 July 1958 of the Economic and Social Council.

3. THE LEAGUE OF NATIONS

50. The activities of the League of Nations with respect to the unification of the law of international trade related mainly to negotiable instruments and to international commercial arbitration. Reference is made below to several of the more important instruments which were formulated under the auspices of the League.

(a) *The Geneva Conventions on the unification of the law relating to bills of exchange (1930) and to cheques (1931)*

51. On 7 June 1930, three conventions on the unification of the law relating to bills of exchange²⁶ were signed at Geneva, and on 19 March 1931 three further convention on the unification of the law relating to cheques²⁷ were signed at Geneva. The most important of these conventions are the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes and the Convention providing a Uniform Law for Cheques. The others deal with conflict of law rules and provisions of national stamp legislation relating to these types of negotiable instruments.

52. The Geneva Conventions have achieved a significant unification of the law of negotiable instruments.

²² United Nations, *Treaty Series*, vol. 510 (1964), No. 7411, p. 147.

²³ See G. C. Cheshire, "International Contracts for the Sale of Goods," in *Journal of Business Law* (London, 1960), p. 285.

²⁴ United Nations, *Treaty Series*, vol. 286 (1958), No. 4173, p. 265.

²⁵ *Ibid.*, vol. 527 (1965), No. 7625, p. 189.

²⁶ League of Nations, *Treaty Series*, vol. CXLIII (1933-1934), No. 3313, p. 257; No. 3314, p. 317; No. 3315, p. 337.

²⁷ *Ibid.*, vol. CXLIII (1933-1934), No. 3301, p. 7; No. 3316, p. 355; No. 3317, p. 407.

The uniform law relating to both types of negotiable instruments has been introduced into the municipal legislation by sixteen countries, viz., Brazil, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Japan, Monaco, the Netherlands, Norway, Poland, Portugal, Sweden and Switzerland. In addition, Austria, Belgium and the USSR have accepted the Uniform Law on Bills of Exchange only, and Nicaragua has introduced the Uniform Law on Cheques only.

53. The countries belonging to the common law system did not take part in this unification of the law of negotiable instruments, nor have any of these countries given effect to these uniform laws in its territory.

(b) *The Geneva Protocol on Arbitration Clauses of 1923²⁸ and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927²⁹*

54. The Protocol deals with the recognition of arbitration agreements; each of the Contracting States undertakes to recognize the validity of such agreements between parties subject to the jurisdiction of different Contracting States. The Convention provides that an arbitral award made pursuant to an arbitration agreement covered by the Protocol shall be recognized as binding and shall be enforceable in the territories of the Contracting States, subject to certain conditions, among them the condition of reciprocity.

55. The Protocol has been ratified by fifty-three countries and the Convention by forty-four countries. These two arrangements have been the foundation for the acceptance of international commercial arbitration as the most practical method of settling disputes arising from transactions of international trade.

4. THE UNITED NATIONS

56. The United Nations has been engaged in activities in this field on a world-wide as well as on a regional scale. The most important world-wide activities have been on the subject of international commercial arbitration, industrial property legislation and transit trade of land-locked countries. Activities on a regional scale have been performed by the United Nations regional economic commissions, notably in the areas of standardization of trade documents, international contracts and commercial arbitration.

(a) *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958³⁰*

57. The growing intensity of modern international trade and the concomitant need to develop facilities for arbitration caused the international business community to consider the Geneva arrangements as inadequate. In response to this situation, the Economic and Social Council, on the initiative of the International Chamber of Commerce, decided to convene a diplomatic conference in New York to conclude a new Convention.

58. The Convention there adopted on 10 June 1958 is designed to supersede the Geneva arrangements and,

at the same time, to make more effective the international recognition of arbitration agreements and the recognition and enforcement of foreign arbitral awards.³¹

59. The United Nations Convention represents a definite advance over the Geneva arrangements in that it facilitates to a considerable degree the enforcement of foreign arbitral awards. First, it abolishes, in principle, the requirement of reciprocity, although a State may declare that it will apply the Convention to awards made only in the territory of other Contracting States (article I (3)). Secondly, it abolishes the requirement of double *exequatur* which in many countries is a serious obstacle to the enforcement of foreign arbitral awards (article V (1) (e)). Thirdly, it is no longer necessary for the recognition of an arbitration agreement or for the enforcement of an arbitral award that the parties should be subject to the jurisdiction of different contracting States (articles I (1) and II (1)).

60. The United Nations Convention came into force on 7 June 1959. Thirty-one States have become parties to it (see annex I).

(b) *Industrial property legislation*

61. Since 1961 the United Nations General Assembly has had before it the problem of the role of industrial property legislation in facilitating the transfer of patented and unpatented technological and managerial know-how to developing countries. At its sixteenth session, the General Assembly adopted resolution 1713 (XVI) on the role of patents in the transfer of technology to under-developed countries, in which it requested the Secretary-General to study the issues involved, including specifically, the effects of patents on the economy of developing countries; patent legislation in selected developed and developing countries; and the characteristics of the patent legislation of developing countries in the light of economic development objectives.

62. The study, which was prepared in the Fiscal and Financial Branch of the Department of Economic and Social Affairs in response to that resolution,³² provided a comprehensive review of the major characteristics of national patent laws and the international patent system as well as a thorough analysis of the economic implications of the introduction of patent legislation in developing countries. The study emphasized, *inter alia*, that properly adapted patent legislation was essential if the patent system was to be beneficial to economic development and advancement of industry in developing countries.

63. The United Nations Conference on Trade and Development in recommendation A.IV.26 of 15 June 1964 specifically recommended that "competent inter-

²⁸ *Ibid.*, vol. XXVII (1924), No. 678, p. 157.

²⁹ *Ibid.*, vol. XCH (1929-1930), No. 2096, p. 301.

³⁰ United Nations, *Treaty Series*, vol. 330 (1959), No. 4739, p. 3.

³¹ For analysis and comments on the Convention, see e.g. Paolo Contini, "International Commercial Arbitration—The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" in *American Journal of Comparative Law* (Ann Arbor), vol. 8, 1959, p. 283; Samuel Pizar, "The United Nations Convention on Foreign Arbitral Awards" in *Journal of Business Law* (London, 1959), p. 219.

³² *The Role of Patents in the Transfer of Technology to Developing Countries* (United Nations publication, Sales No.: 65.II.B.1).

national bodies, including United Nations bodies and the Bureau of the International Union for the Protection of Industrial Property, should explore possibilities for adaptation of legislation concerning the transfer of industrial technology to developing countries...". A similar position was taken by the Economic and Social Council in resolution 1013 (XXXVII), which requested "the Secretary-General to explore possibilities for adaptation of legislation concerning the transfer of industrial technology to developing countries, generally and in co-operation with the competent international bodies, including United Nations bodies and the Bureau of the International Union for the Protection of Industrial Property".

64. On this basis representatives of the Secretary-General co-operate with the United International Bureaux for the Protection of Intellectual Property (BIRPI) in the preparation of the Bureaux' Draft Model Laws in this field (see paras. 108-111 below). The first of these, the Model Law for Developing Countries on Inventions,³³ incorporates most of the Secretary-General's substantive recommendations regarding the major problem areas of compulsory licencing and working of patents, government review of international licence agreements, and the administration of industrial property legislation.³⁴

(c) *United Nations regional economic commissions*

65. The functions of the United Nations regional economic commissions, which have been established in accordance with resolutions of the Economic and Social Council, are to assist in raising the level of economic activity in their respective regions and to strengthen economic relations on both an intraregional and an interregional level.

(i) *Economic Commission for Europe (ECE)*

66. The activities of the Economic Commission for Europe (ECE) in the development of the law of international trade have been primarily in the field of international contracts and commercial arbitration. These activities have been initiated in most cases by the Committee for the Development of Trade. In addition to its activities with respect to international contracts and commercial arbitration, ECE through its Inland Transport Committee, has engaged in efforts toward the simplification and standardization of export documents and has concerned itself with the problems of insurance and re-insurance, of trade in machinery and equipment, the improvement of payments arrangements and other items. It also sponsors periodic consultations of experts in intra-European, and especially East-West, trade.

a. *The ECE General Conditions of Sale and Standard Forms of Contract*

67. Since the end of the nineteenth century, trade associations have come into existence in many European trade centres and have concerned themselves especially with the international commodity trade. This development has been particularly prominent in the

United Kingdom, where influential organizations operate, such as the Timber Trade Federation of the United Kingdom, the London Corn Trade Association, the Incorporated Oil Seed Association (London), and many others. Most of these trade associations have devised their own contract forms. There is "a surprisingly large number of these forms of contract on the market that not only differ from trade to trade but also from country to country. The would-be user is very often confronted with an embarrassingly large choice of forms of contract which he could use. He is also confronted with the fact that nearly all these instruments refer to one legal system alone, and have been drawn solely with that system in view, namely, that of the country of the trade association or organization that drafted them."³⁵ In an effort to meet these conditions, ECE has formulated and disseminated the General Conditions of Sale and Standard Forms of Contract. It is to be hoped that in the course of time these will replace the numerous contract forms issued by trade associations. A list of the forms issued by ECE is found in annex I. Among the most important of these are: General Conditions for the Supply of Plant and Machinery for Export (Form No. 188) (March 1953); General Conditions for the Supply and Erection of Plant and Machinery for Import and Export (Form No. 188A) (March 1957); General Conditions for the Supply of Plant and Machinery for Export (Form No. 574) (December 1955); General Conditions for the Supply and Erection of Plant and Machinery for Import and Export (Form 574A) (March 1957); General Conditions of Sale for the Import and Export of Durable Consumer Goods and of Other Engineering Stock Articles (Form No. 730) (March 1961).

68. It is to be noted that Forms 574 and 574A are alternatives to Forms 188 and 188A. The latter are used when both parties reside in countries of free enterprise economy and the former are used when one party or both parties are foreign trade organizations having centrally planned economies.³⁶ Form 730, on the other hand, is adapted for use in all transactions irrespective of the economic order of the country in which the contracting parties reside.

69. The ECE General Conditions of Sale have been drafted by working parties composed of businessmen. Representatives from almost every European country, including countries having free-enterprise economies as well as those having centrally planned economies, have served on the working parties since 1951. Many national trade associations have lent their support and assistance in this work. Thus when the forms of contract for the sale of cereals by sea were prepared, more than eighty national forms of contract were sent in, of which some fifty were the forms of contract drawn up by the London Corn Trade Association.³⁷

³⁵ See Peter Benjamin, "The ECE General Conditions of Sale and Standard Forms of Contract" in *Journal of Business Law* (London, 1961), p. 119.

³⁶ On the difference between these two sets, see "East-West Trade and UN ECE Conditions" in *Journal of Business Law* (London, 1965), p. 100.

³⁷ See Peter Benjamin, *op. cit.*, p. 123.

³³ BIRPI publication 801 (E), Geneva, 1965.

³⁴ See note by the Secretary-General of the United Nations (E/4078, annex A).

70. The use of the General Conditions of Sale and Standard Forms of Contract sponsored by ECE is optional. This is a characteristic which they share with the formulations of the International Chamber of Commerce (see paras. 147-166 below).

71. Two features of this work of ECE should be noted. First, the General Conditions represent a projection on the international level of work begun by the trade associations on the national level. Secondly, some of the trade association contracts undoubtedly favoured the sellers or buyers, according to the balance of interests in the trade associations. This factor was removed when the forms were studied by a working party composed of suppliers and consumers and eventually approved by ECE.

72. From the viewpoint of the progressive development of the law of international trade, the most important feature of the General Conditions is that, as one writer has indicated they "render it somewhat redundant to refer to a national legal system".³⁸ In brief, the General Conditions attempt to provide such a complete regulation of the rights and duties of the contracting parties that a need to refer to a national legal system will arise only in exceptional circumstances. While it may not be possible to make a contract completely self-regulatory, it is noteworthy that at least an attempt is made by means of the ECE forms to achieve that aim.

73. It is too soon to assess whether the standard conditions sponsored by ECE will be as widely accepted by the international commercial community as are the formulations published by the International Chamber of Commerce although so far the result appears to be encouraging. Over a million copies have been sold of the various ECE Conditions for the Supply of Plant and Machinery. National trade associations have utilized them for their own standard contract forms, and they have been translated into various unofficial languages, including German, Italian, Portuguese, Spanish, Turkish and various Scandinavian languages. (The official languages are English and French and, for some forms, Russian.)

74. Detailed explanations are to the practical application of the General Conditions of Sale and Standard Forms will be published by the ECE in near future on the "Preface to the General Conditions of Sale and Standard Forms of Contract".

b. *European Convention on International Commercial Arbitration*

75. The Commission was responsible for the preparation of this Convention which was signed on 21 April 1961 and came into force on 7 January 1964.³⁹ Of the eighteen signatory States, eleven have ratified this Convention, namely Austria, Bulgaria, the Byelorussian SSR, Czechoslovakia, the Federal Republic of Germany, Hungary, Poland, Romania, the Ukrainian SSR, the USSR and Yugoslavia. Of these eleven countries, nine are countries of centrally planned, and two of free enterprise, economy. In addition, Cuba and

Upper Volta have adhered to the Convention. The seven outstanding ratifications are those of countries of free enterprise economy. In addition to the eighteen signatory States, the following States have nominated "Appointing Authorities" for the purposes of the Arbitration Rules of January 1966 made under the Convention: Ireland, the Netherlands, Sweden, Switzerland and the United Kingdom.

76. The Convention pursues purposes different from those of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (see paras. 57-60 above). The European Convention on International Commercial Arbitration has a twofold purpose: first, to overcome the problem of appointing arbitrators in cases where the parties to an arbitration agreement fail to agree, a particularly difficult problem if the parties reside in countries having a different economic structure, and secondly, to facilitate recourse to commercial arbitration irrespective of the economic structure of the countries in which the parties reside.⁴⁰

77. The Convention, like the General Conditions of Sale sponsored by ECE, thus aims, *inter alia*, at reducing some of the obstacles to the flow of trade between countries of free enterprise economy and countries of centrally planned economy.

78. A valuable innovation created by the Convention is the establishment, provided for in article IV, of a Special Committee to which the claimant may apply if the respondent does not co-operate in the appointment of the arbitrator. The Special Committee consists of three members elected for four years. One member is elected by the Chambers of Commerce of countries in which National Committees of the International Chamber of Commerce exist, and one by the Chambers of Commerce of countries in which no such National Committees exist. The third member, who acts as chairman, is elected for two years by the Chambers of Commerce of the first group of countries and for the next two years by the Chambers of Commerce of the second group. This is the only arbitral institution common to the countries of free enterprise and centrally planned economy.

79. The Convention is supplemented by the ECE Arbitration Rules of January 1966.⁴¹

(ii) *Economic Commission for Asia and the Far East (ECAFE)*

80. The Economic Commission for Asia and the Far East (ECAFE) has been active in the field of international commercial arbitration for several years. A study on arbitral legislation and facilities in certain countries of the ECAFE region was, for example, completed in 1958 by the ECAFE secretariat and the Office of Legal Affairs of the United Nations.

81. In 1962 a Centre for Commercial Arbitration was established within the ECAFE secretariat at Bangkok. The Centre, which co-operates with the Office of Legal Affairs and with commercial experts and national

³⁸ *Ibid.*, p. 116.

³⁹ United Nations, *Treaty Series*, vol. 484 (1963-1964), No. 7041, p. 349.

⁴⁰ See David A. Godwin Sarre, "European Commercial Arbitration" in *Journal of Business Law* (London, 1961), p. 352.

⁴¹ United Nations publication, Sales No.: 66.II.E/Mim.4.

correspondents designated by the member countries, promotes the wider use of commercial arbitration and the creation and improvement of arbitral institutions and facilities in the region.

82. Mention should be made of the ECAFE Conference on International Commercial Arbitration which met at Bangkok in January 1966. The Conference recommended the preparation of a set of ECAFE Rules for International Commercial Arbitration to be brought to the attention of chambers of commerce, legal and business associations, universities and other appropriate bodies throughout the ECAFE region. These rules have now been prepared on the basis of standards adopted by the Conference, and will be published shortly.

83. The Conference also considered it advisable that separate lists of arbitrators and appointing authorities (authorities entrusted with the function of appointing arbitrators) be prepared and maintained by the ECAFE Centre in consultation with Governments, national correspondents of the Centre and other appropriate institutions. In another recommendation the Conference dealt with the dissemination of model arbitration clauses. The Conference also agreed on certain standards for conciliation which would be appropriate as a guide to parties who wish to have recourse to conciliation for the settlement of their disputes. The Conference recommended that the standards should be adopted by the ECAFE Centre and disseminated throughout the region, in the same manner as the rules for arbitration. The Conference also proposed that the ECAFE Centre should invite each of the main chambers of commerce of the region, through their respective Governments, to constitute panels of businessmen who would be prepared to sit on conciliation committees whenever so requested by parties.

84. The recommendations of the Conference were approved by ECAFE's Committee on Trade and, thereafter, by ECAFE itself at its twenty-second annual session in New Delhi.

85. The Committee on Trade has received suggestions that ECAFE should initiate projects for the standardization of general conditions of sale for selected commodities and simplification of export documents,⁴² similar to those sponsored by ECE. The Commission has also engaged in studies of the laws and regulations concerning customs administration in the countries of the region with a view to promoting uniform concepts and efficient procedures and has established the ECAFE Code of Recommended Customs Procedures.

(iii) *Economic Commission for Latin America (ECLA)*

86. The activities of the Economic Commission for Latin America (ECLA) in the field of trade have been directly related to long-term efforts toward increased economic integration within the region. In this connexion, the secretariat of ECLA provides advisory services to the member countries of the Latin American Free Trade Association established on 2 June 1961 under the terms of the Montevideo Treaty of 18 February

1960. Studies carried out by the secretariat include research into the simplification and standardization of customs procedures, documentation and nomenclature.

87. The Central American Economic Co-operation Committee of ECLA has engaged in efforts toward wider ratification and implementation of the General Treaty on Central American Economic Integration, concluded on 13 December 1960,⁴³ establishing the Central American Common Market. In this connexion, the Committee has engaged in studying standard customs codes and common tariff regulations.

88. Furthermore, ECLA has produced studies on the legal aspects of the utilization of international rivers and lakes, and on the terms of trade and their influence on the rate of economic development in the region, as well as on the establishment of a common customs code, and has sponsored seminars on co-ordination of customs administration.

89. With respect to maritime transport, research has been carried out by ECLA on the possibilities of standardization of bills of lading and other documentation.

(iv) *Economic Commission for Africa (ECA)*

90. The Economic Commission for Africa (ECA) has as its function to promote action among the African States toward the economic and social development of the region and to strengthen the economic relations of the countries concerned among themselves and in relation to other States. To this end, it undertakes studies of and disseminates information on economic problems and development in the area and assists in the formulation of policies to intensify economic development, *inter alia*, with respect to trade.

91. The secretariat of ECA has compiled surveys of intra-African trade and of its potentialities and of respective measures to stimulate trade. Studies have also been carried out on regional trade arrangements, particularly the trade grouping of Western Europe, and their impact on trade in Africa and on the trade of African countries with States having centrally planned economies. The ECA also publishes a survey of current trends in African trade and development in the *Economic Bulletin for Africa*. Included in ECA's current programme of work are studies of national legislation dealing with trade and such related fields as insurance law and investment codes whose purpose is to enable conclusions to be drawn regarding measures for the harmonization of such legislation, especially on a sub-regional basis. In connexion with the foregoing project, ECA promotes the adoption of the Brussels Tariff Nomenclature,⁴⁴ among the member countries of ECA.

92. In connexion with its resolution 140 (VII) dealing with the co-ordination of industrial incentives and legislation, ECA reviews legislation and practices

⁴³ United Nations, *Treaty Series*, vol. 455, (1963), No. 6543, p. 3.

⁴⁴ The Nomenclature for the Classification of Goods in Customs Tariffs was elaborated by the Customs Co-operation Council, which was established as an inter-governmental organization on 15 December 1950, in Brussels. The Brussels Nomenclature has been introduced in seventy-five countries.

⁴² See document E/CN.11/721, para. 54.

with respect to investment incentives and industrial development and has studied the question of harmonization of these matters among the member States. In addition, studies have been initiated on the harmonization of legislation concerning maritime transport and on the constitutional and legal basis of public autonomous institutions and corporations. Arrangements have also been made between ECA and ECE for providing assistance to African States concerning the simplification and standardization of expert documents.

93. In co-operation with GATT, ECA sponsors annual courses in commercial policy for both French and English-speaking Africans. It also provides advisory services and organizes *ad hoc* courses and seminars in customs administration. The establishment, with ECA assistance, of inter-governmental machinery for economic co-operation at the sub-regional level, and the intensive sub-regional studies being carried out by ECA, particularly in industry, agriculture and transport, will no doubt serve as a useful adjunct to possible future participation by African countries in efforts toward the development of international trade law.

(d) *United Nations Conference on Trade and Development (UNCTAD)*

94. The United Nations Conference on Trade and Development was established as an organ of the General Assembly in 1964 by General Assembly resolution 1995 (XIX). The membership of the Conference consists of the States which are Members of the United Nations or members of the specialized agencies or of the International Atomic Energy Agency. The resolution provides that the Conference is to be convened every three years and that, when the Conference is not in session, the Trade and Development Board, as the permanent organ of the Conference, will carry out its functions.

95. A number of particular problems in the area of trade have been dealt with by UNCTAD. The Convention on Transit Trade of Land-Locked Countries⁴⁵ was adopted at New York on 8 July 1965 by the Conference of Plenipotentiaries on Transit Trade of Land-Locked Countries, which had been convened by the General Assembly of the United Nations in pursuance of a recommendation by UNCTAD. The Convention includes in the preamble a reaffirmation of the eight principles adopted by the United Nations Conference on Trade and Development. The substantive provisions of the Convention deal with *inter alia* freedom of transit to traffic in transit; means of transport; the facilitation of traffic in transit by mutually acceptable routes, and non-discrimination in regard to traffic in transit, customs duties and special transit dues; free zones or other customs facilities, storage of goods in transit; and settlement of disputes. The Convention, which has not yet entered into force, has been acceded to by Malawi, Mongolia, Niger and Nigeria.

96. The Conference also adopted two resolutions. In the first of these resolutions, the Conference requested the Inter-Governmental Maritime Consultative Organization to facilitate the transit trade of land-locked

countries in accordance with the provisions of the Convention on the Facilitation of Maritime Travel and Transport concluded in London in 1965 (see para. 103 below). In its other resolution, the Conference recommended the provision of assistance by United Nations organs in furthering the transit trade of land-locked and transit States.

(e) *Centre for Industrial Development*

97. The functions of the Centre for Industrial Development are, *inter alia*, to promote and co-ordinate activities within the United Nations system of organizations in the field of industrialization and to carry out research and the preparation of studies in the field of industrialization.

98. In this connexion mention should be made of certain projects on the work programme of the Centre which are of relevance here. These include a study of the problems of the harmonization of industrial tax incentives within the framework of regional co-operation and integration, and research into the role of national export organizations in promoting the export of manufactured goods.

99. Research is also being conducted in order to identify industries from the point of view of simultaneous import substitution and export promotion.

100. Another relevant project to be undertaken by the Centre in 1967 is the Industrial Legislative Series which is to provide a world-wide review of industrial laws and regulations. The main purpose of publishing the Industrial Legislative Series is to enable developing countries to benefit from the experience acquired by other countries when drafting their industrial laws or amending existing ones. The series is to cover all the different aspects of industrial legislation, such as laws and regulations on patents, standards and specifications, requirements for plant operating licences, industrial sites, factory layout and structure, investment incentives, inspection, import controls, trade marks, taxation, training, forms of organization and registration, use of machinery and equipment, industrial safety and hygiene.

5. THE UNITED NATIONS SPECIALIZED AGENCIES

(a) *International Bank for Reconstruction and Development (IBRD)*

101. In accordance with resolution No. 214, adopted by the Board of Governors on 10 September 1964, the Executive Directors of the IBRD formulated the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The submission of the Convention to member Governments of the Bank was approved by the Executive Directors on 18 March 1965. Although investment disputes are generally settled through judicial, arbitral or other procedures available under the laws of the country in which the investment was made, experience has shown that in many instances international machinery for the settlement of investment disputes is considered preferable by both States and investors. The Convention therefore provides, *inter alia*, for the establishment of an International Centre for Settlement of Investment Dis-

⁴⁵ See document TD/B/18.

putes which will "provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States" (article 1 (2)). The Centre, while not itself engaging in conciliation or arbitration, will provide facilities for the Conciliation Commission and Arbitral Tribunal which are to be instituted in accordance with the Convention. The organs of the Centre are the Administrative Council, composed of one representative of each contracting State, and the secretariat. The Centre is required to maintain a Panel of Conciliators and a Panel of Arbitrators, from which the parties to a dispute may select the members of the Commission or Tribunal to which the dispute is to be submitted. The jurisdiction of the Centre in disputes is dependent upon the written consent of the parties thereto and extends to "any legal dispute arising directly out of an investment" (article 25 (1)) between a contracting State or a constituent subdivision of a contracting State and a national of another contracting State, either a natural or juridical person. Contracting States may, if they so desire, notify the Centre in advance as to the classes of disputes which they would, or would not, consider submitting to the jurisdiction of the Centre (article 25 (4)). Article 53 provides that arbitral awards under the Convention are binding upon the parties and are not subject to any appeal or any other remedy except those stipulated in the Convention. Those remedies are revision (article 51) and annulment (article 52). Parties may also request that the Tribunal make a supplementary award or may request an interpretation of an award.

102. The Convention is open for signature to the States members of IBRD as well as to any State party to the Statute of the International Court of Justice which the Administrative Council shall have invited to sign the Convention, and is subject to ratification, acceptance or approval by each signatory State. It will enter into force thirty days after the deposit of the twentieth instrument of ratification, acceptance or approval. Thus far it has been signed by forty-four States and ratified by the Central African Republic, Congo (Brazzaville), Gabon, Ghana, the Ivory Coast, Mauritania, Nigeria, Tunisia, Uganda and the United States of America.

(b) *Inter-Governmental Maritime Consultative Organization (IMCO)*

103. A Conference of Plenipotentiaries, convened in London under the auspices of IMCO, adopted the Convention on the Facilitation of International Maritime Travel and Transport, which was opened for signature on 9 April 1965 (see also para. 96 above). The Convention provides, *inter alia*, for arrangements designed to unify and simplify the formalities required of shipowners by public authorities on the arrival, stay and departure of ships of the crew and passengers and miscellaneous other provisions.

104. In addition, IMCO has carried out studies on a number of topics relevant to transport for trade and has undertaken work on a universal system of tonnage measurement designed to simplify and harmonize existing methods of calculating tonnage measurements of ships.

(c) *The International Civil Aviation Organization (ICAO)*

105. This organization has sponsored numerous conventions on air law including the Protocol (signed at The Hague on 28 September 1955)⁴⁶ to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October 1929. The Protocol, which entered into force on 1 August 1963, and to which thirty-three States are parties, is designed to bring up to date and amend certain portions of the Warsaw Convention of 1929, which in turn had as its main object the unification of the rules of private law concerning the carrier's liability in international air carriage and in respect of documents for such carriage.

106. In addition, ICAO has also sponsored the Convention, supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air, Performed by a Person Other than the Contracting Carrier,⁴⁷ which was signed at Guadalajara, Mexico, 18 September 1961. The Convention, which entered into force on 1 May 1964, provides for the extension of certain of the rules of the Warsaw Convention to cases in which the actual carriage by air is performed by a person who was not a party to the agreement for carriage.

107. Furthermore, within the framework of the Convention on International Civil Aviation, concluded at Chicago in 1944,⁴⁸ ICAO has engaged in a Facilitation Programme designed to simplify and standardize procedures, *inter alia*, with respect to aircraft cargo and baggage entering and departing from international airports.

6. UNITED INTERNATIONAL BUREAUX FOR THE PROTECTION OF INTELLECTUAL PROPERTY (BIRPI)

108. The United International Bureaux for the Protection of Intellectual Property, which were founded in 1893, form the permanent organization controlling seven inter-governmental conventions or agreements. In acceding to these international Conventions and Agreements, the Contracting States have undertaken legal and administrative obligations with a view to securing and developing the protection of intellectual property. There are two main types of intellectual property: industrial property (patents, trademarks, etc.); and copyrights on literary and artistic works. The membership of BIRPI comprises countries of free enterprise and centrally planned economies, and includes countries at various stages of development.

109. The present programme of BIRPI is largely concentrated on the territorial extension of the two principal Unions, i.e., the Paris Union for the Protection of Industrial Property (seventy-four member States) and the Bern Union for the Protection of Literary and Artistic Works (fifty-five member States). In addition, BIRPI is engaged in the preparation of

⁴⁶ United Nations, *Treaty Series*, vol. 478 (1963), No. 6943, p. 371.

⁴⁷ *Ibid.*, vol. 500 (1964), No. 7305, p. 31.

⁴⁸ *Ibid.*, vol. 15 (1948), No. 102, p. 295.

model laws in conformity with the principles of the Conventions.

110. A description of BIRPI's work and the Conventions it administers will be found in annex III.

111. Under a working agreement with the United Nations, concluded in 1964, BIRPI is co-operating with the United Nations and several of its subsidiary bodies under various resolutions in assisting the transfer of technology to developing countries.

B. Regional inter-governmental organizations and groupings

1. THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE (CMEA) *

112. The Council for Mutual Economic Assistance (CMEA) was established on 25 January 1949. The present members are Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, Mongolia, Romania and the USSR. In the words of a Polish writer, the purpose of CMEA is "to provide a framework for the systematic exchange of information, economic co-operation, mutual technical and scientific aid, and the exchange of raw materials, food-stuffs, machinery and equipment."⁴⁹ A new charter of CMEA⁵⁰ was adopted in 1959, which in turn was amended in July 1962, by a provision adding an Executive Committee.

113. The preamble of the charter of CMEA provides that the members are "determined to continue the development of comprehensive economic co-operation based on the consistent implementation of the international socialist division of labour in the interest of the building of socialism and communism in their countries..."⁵¹

114. Foreign trade among members of CMEA has from the beginning been regarded as an important technique of economic integration and co-ordination of national plans. To promote foreign trade in a planned manner members concluded bilateral commercial treaties in which they specified the classes and quantities of goods which had to be exchanged, the mode of payment and, in a protocol, the general conditions for the delivery of the goods. The execution of these commercial treaties was left to the foreign trade corporations of the countries in question, which enter into ordinary export and import contracts. The bilateral commercial treaties between the member countries have been described as "the general framework"⁵² in which the foreign trade corporations of those countries carry on their mutual trade.

115. On the recommendation of the Foreign Trade Commission of the Council, a multilateral arrangement, known as the General Conditions of the Delivery of Goods between Foreign Trade Organizations of Mem-

ber Countries of the Council of Mutual Economic Assistance of 1958, was concluded.⁵³ The General Conditions took the place of twenty-eight sets of bilateral Conditions for Delivery which were appended as protocols to the bilateral commercial treaties between CMEA members.

116. The General Conditions of Delivery of 1958 have been given the force of law in the municipal jurisdictions of all CMEA members. It has been said that the General Conditions "are compulsory, and an enterprise may, when concluding a contract, depart from them only if the deflection is justified by the special nature of the merchandise or a special element in its delivery".⁵⁴

117. The General Conditions, as is the case for Incoterms 1953, issued by the International Chamber of Commerce (see paras. 161-166 below), provide an interpretation of the customary trade terms. The terms regulated by them are f.o.r., free on lorry, free frontier, f.o.b., c.i.f., c. and f., free air transport, free delivered. The General Conditions exceed Incoterms in scope in that they provide a complete code of export trade law; they regulate the transfer of property in the sold goods, the passing of the risk, the delivery of the goods, the payment of the price through the bank under commercial credit or collection instructions, and the usual arrangements for insurance and transport.

118. The General Conditions provide a clear and practical codification of international trade custom as it relates to members of CMEA.

119. Some other activities of CMEA may briefly be mentioned. In December 1962, a system of multilateral accounting in the trade of member States, permitting free movement of balances from account to account, was introduced, and, on 22 October 1963, the Governments of the member States signed an Agreement on Multilateral Payments and Clearing in Convertible Roubles, of which the statute of the International Bank for Economic Co-operation forms an integral part.⁵⁵

120. The contribution of CMEA to the progressive development of international trade law is best exemplified by the elaboration and promotion of the General Conditions of Delivery, the practical usefulness of which is restricted to CMEA members. Beyond that, however, the General Conditions have demonstrated that the trading techniques of the countries of centrally planned economy do not differ essentially from those of the countries of free enterprise economy.

2. THE EUROPEAN ECONOMIC COMMUNITY (EEC)

121. The Treaty establishing the European Economic Community signed at Rome on 25 March 1957⁵⁶

* Also known as the Council for Mutual Economic Aid and Comecon.

⁴⁹ See K. Grzybowski, *The Socialist Commonwealth of Nations, Organisations and Institutions* (New Haven, Yale University Press, 1964), p. 67.

⁵⁰ United Nations, *Treaty Series*, vol. 368 (1960), No. 5245, p. 253.

⁵¹ *Ibid.*, p. 264.

⁵² See Trajan Ionesco and Ion Nestor, "The Limits of Party Autonomy" in Schmitthoff, *op. cit.*, p. 170.

⁵³ See Viktor Knapp, "The Function, Organization and Activities of Foreign Trade Corporations in the European Socialist Countries," in Schmitthoff, *op. cit.*, p. 68.

⁵⁴ *Ibid.*

⁵⁵ See K. Grzybowski, *op. cit.*, p. 106; see also I. Vajda "Linking East and West", in *The Times* (London), 4 March 1966.

⁵⁶ United Nations, *Treaty Series*, vol. 298 (1958), No. 4300, p. 3.

is an international treaty to which Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands are parties. In addition to two European countries (Greece and Turkey), the following nineteen African countries are "associated countries": Burundi, Cameroon, the Central African Republic, Chad, Congo (Brazzaville), Congo (Democratic Republic of), Dahomey, Gabon, the Ivory Coast, Madagascar, Mali, Mauritania, Niger, Nigeria, Rwanda, Senegal, Somalia, Togo and Upper Volta.

122. The Treaty of Rome provides in article 100 that "the Council, acting by means of a unanimous vote on a proposal of the Commission, shall issue directives for the approximation of such legislative and administrative provisions of the member States as have a direct incidence on the establishment or functioning of the Common Market". Article 220 provides that "member States shall, in so far as necessary, engage in negotiations with each other with a view to ensuring for the benefit of their nationals . . . the elimination of double taxation within the Community; the mutual recognition of companies . . . , the maintenance of their legal personality in cases where the registered office is transferred from one country to another, and the possibility for companies subject to the municipal law of different member States to form mergers; and the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards".

123. The measures promoted or prepared in pursuance of these provisions fall into two categories: directives issued by the Council of EEC and Draft Conventions among member States (see below, annex I).

124. The directives promoted or prepared by the Council can be arranged under three headings: firstly, those aiming at the unification, in the member States, of technical rules on additives to food-stuffs, on pharmaceutical products, motor vehicles, farm tractors, industrial tools, measuring instruments, electrical household appliances and precious metals. Secondly, the Commission has proposed to the Council a draft directive relating to the harmonization of company law suggesting uniform provisions for the disclosure of information, the validity of acts of directors and the validity of company formation; other drafts relating to company law are in preparation. Thirdly, a draft directive on insurance will be sent by the Commission to the Council in the near future; its aim is to co-ordinate the national rules concerning the financial requirements and administrative control of insurance companies.

125. The following draft conventions, based on article 220 of the Treaty of Rome, are under preparation by member States: on European patents; on recognition of companies and legal persons; on the recognition and enforcement of judgements originating in other member countries in civil and commercial cases.

3. THE EUROPEAN FREE TRADE ASSOCIATION (EFTA)

126. The Convention establishing the European Free Trade Association (EFTA) was concluded in Stock-

holm on 4 January 1960.⁵⁷ Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom are member States of EFTA⁵⁸ which has among its objectives to promote the expansion of economic activity and to contribute to the development and expansion of world trade and the progressive removal of barriers to it. The Council of EFTA, as its governing organ, has the prerogative of issuing decisions binding upon member States (article 32 (4)), as well as non-binding recommendations on matters within its competence. In an effort to harmonize practices in the field of international trade among member States, the Council has issued certain directives which are relevant here, such as: Decision No. 4/1960, relating to Evidence of Origin for Re-Exported Goods and Spare Parts for Engineering Goods; Decision No. 7/1960, Relating to the Origin of Materials Taken into Stock before July 1960; Decision No. 16/1960 on Evidence of Origin for Consignments of Small Value.

127. In addition, EFTA has constituted a Restrictive Practices Working Party on the effects of restrictive business practices on international trade. The Working Party has carried out, in the course of its work, a general survey of national legislation and practice in this field.

128. Studies have also been carried out on national law and administrative regulations with respect to restrictions on the establishment and operation in EFTA countries of business enterprises by nationals of other EFTA countries, in order to determine whether the provisions of article 16, paragraph 1, of the Stockholm Convention relevant to this aspect of international economic co-operation are sufficient.

4. THE LATIN AMERICAN COUNTRIES

129. In the countries of Latin America significant progress has been made in the unification of conflict-of-laws rules. In addition, there have been other activities within the scope of this report, notably in the fields of international commercial arbitration, international sale of tangible personal property and harmonization and unification of international trade law within the framework of regional economic integration.

(a) *Unification of conflict rules*

130. The treaties of Montevideo of 12 February 1889, which provided for the unification of conflict rules in the field of civil and commercial law, are still in force with respect to Bolivia, Colombia and Peru. The other three signatories, Argentina, Paraguay and Uruguay, have withdrawn from it. A revision of the 1889 Treaties was carried out at the second session of the Second South American Congress on Private International Law (held at Montevideo in March 1940). Of the treaties adopted on 19 March 1940 by the Con-

⁵⁷ *Ibid.*, vol. 370 (1960), No. 5266, p. 3.

⁵⁸ Finland has concluded an Agreement of Association with EFTA (27 March 1961). This Agreement was extended to Liechtenstein by means of a Protocol concluded between the Member States of EFTA and Finland on the one hand and Liechtenstein on the other (27 March 1961). *Ibid.*, vol. 420 (1962), No. 6043, p. 109.

gress as part of this revision, the following should be mentioned: Treaty on International Commercial Navigation Law; Treaty on International Procedural Law; Treaty on International Commercial Terrestrial Law; and the Treaty on International Civil Law. These treaties are in force with respect to Argentina, Paraguay and Uruguay. The Sixth International Conference of American States, held at Havana in 1928, adopted the Convention on Private International Law (20 February 1928), to which was annexed the Code of Private International Law. The Conference agreed that the code would be officially named the Bustamante Code after its distinguished drafter. This code has been described as "the most important codification of the rules of the conflict of laws in force today".⁵⁹ The following fifteen countries of South and Central America have accepted the Bustamante Code, though some with reservations: Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, El Salvador and Venezuela. The code establishes rules of conflict of laws on a variety of subjects, including the following which relate to international commercial law: merchants, commercial companies, commercial commission, commercial deposit and loans, land transportation, contracts of insurance, contracts and bills of exchange, forgery, robbery, larceny, or loss of public securities and negotiable instruments, ships and aircraft, special contracts of maritime and aerial commerce. At a meeting held in San Salvador in 1965, the Inter-American Council of Jurists of the Organization of American States proposed that the Council of the Organization of American States should convene a conference in 1967 for a revision of the Bustamante Code.

(b) *International commercial arbitration*

(i) *The Inter-American Commercial Arbitration Commission*

131. The Inter-American Commercial Arbitration Commission, a non-governmental organization, was established in September 1934, at the request of the Governing Board of the Pan American Union, pursuant to resolution XLI of the Seventh International Conference of American States, for the purpose of creating an inter-American system of commercial arbitration. The purposes of the Commission, which has its headquarters in New York, are: (first, the establishment of arbitration facilities in each American country, for which purpose the Commission has appointed national committees in a number of Latin-American countries, responsible for organizing panels of arbitrators and for administering the standard rules of the Commission); secondly, the modification of arbitration laws in order to facilitate the conduct of arbitrations and ensure the enforcement of arbitration agreements and awards; thirdly, the familiarization of businessmen in the American countries with arbitration procedure and its advantages to exporters and importers in inter-American trade; and fourthly, the arbitration or adjustment of

differences or controversies, arising in the course of inter-American trade.

(ii) *Inter-American draft uniform law on commercial arbitration*

132. The Inter-American Council of Jurists, at its Third Meeting, held in Mexico City in 1956, approved an Inter-American draft Uniform Law on Commercial Arbitration (resolution VIII), which was based on the studies undertaken by the Inter-American Juridical Committee.⁶⁰ In that resolution, the Inter-American Council of Jurists recommended that the American States should, to the extent practicable, adopt in their legislation, in accordance with their constitutional procedures, the said draft uniform law in such form as they considered desirable within their several jurisdictions.⁶¹

(c) *International sale of tangible personal property*

133. At its Fifth Meeting, the Inter-American Council of Jurists, after examining a draft convention on a uniform law on international sale of tangible personal property prepared by the Juridical Committee,⁶² instructed the Committee to revise its draft and to direct its efforts toward drafting a uniform law that would consider problems of international trade in the broadest sense possible. It should take into consideration the statements and proposals made at the Fifth Meeting of the Inter-American Council of Jurists, and the conventions adopted at the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods held at The Hague in April 1964 (see para. 30 above). This topic is on the agenda of the meeting of the Inter-American Juridical Committee, which will start on 10 July 1967.

(d) *Other activities*

134. Other activities in the field of harmonization and unification of international trade law have been carried out under the auspices of the Inter-American Institute of International Legal Studies, a non-governmental organization located in Washington. These include two seminars held in 1964 and 1965 for the purpose of furthering research and studies on legal aspects of economic integration, such as commercial law, transportation, commercial companies and negotiable instruments, insurance, patents and trademarks.

5. THE COUNCIL OF EUROPE

135. The Council of Europe was established in 1949 by the Statute of the Council of Europe.⁶³ At present the following eighteen countries are members of the Council: Austria, Belgium, Cyprus, Denmark,

⁵⁹ See G. A. L. Droz, "L'harmonisation des règles de conflits de lois et de juridictions dans les groupes régionaux d'États," in *Rapports généraux aux VI^e Congrès international de droit comparé* (Hamburg, 30 July-4 August 1962), p. 399.

⁶⁰ *Uniform Law on International Commercial Arbitration, Second draft*, document CIJ-20-A. Pan American Union, Washington, D.C., 1955.

⁶¹ *Final Act of the Third Meeting of the Inter-American Council of Jurists*, document CIJ-29. Pan American Union, Washington, D.C., 1956.

⁶² *Draft Convention on a Uniform Law on the International Sale of Tangible Personal Property*, document CIJ-46. Pan American Union, Washington, D.C., 1960.

⁶³ United Nations, *Treaty Series*, vol. 87 (1951), No. 1168, p. 103.

the Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Sweden, Switzerland, Turkey and the United Kingdom.

136. The Council of Europe has promoted the following conventions in the field of the law of international trade:

Conventions relating to patents. European Convention relating to the Formalities Required for Patent Applications,⁶⁴ which came into force on 1 June 1955; European Convention on the International Classification of Patents for Invention,⁶⁵ which came into force on 1 August 1955; Convention on the Unification of Certain Points of Substantive Law on Patents for Invention, which is not yet in force.

Conventions relating to arbitration. Agreement of 17 December 1962⁶⁶ relating to the Application of the European Convention on International Commercial Arbitration, which had come into force on 7 January 1964; European Convention of 20 January 1962 providing a Uniform Law on Arbitration, which is not yet in force.

Convention relating to hotelkeepers. European Convention on the Liability of Hotelkeepers concerning the Property of their Guests, which is not yet in force.

Convention relating to companies. European Convention of 20 January 1966 on Establishment of Companies, which is not yet in force.

137. In 1965 the European Committee on Legal Co-operation established under the auspices of the Council of Europe, approved the text of a draft Convention on Foreign Money Liabilities which will be opened for signature by the member States in the near future.

138. Studies are also being carried out on questions concerning companies with limited liability, and the Committee will shortly begin work on study of the sale of goods (corporeal movables).

139. The Committee is at present examining other matters which may lead to the conclusion of the following instruments: a convention on the place of payment of foreign money liabilities; a draft European convention on information on foreign law, which will provide for the establishment of a body to supply information about the law in force in the territories of the Contracting Parties in civil and commercial matters; a convention on lost or stolen bearer securities; and a convention on the recognition and execution in one Contracting State of arbitral awards made in another Contracting State.

6. THE BENELUX COUNTRIES

140. The three Benelux countries — Belgium, the Netherlands and Luxembourg — have constituted the

Benelux Commission for the Unification of Private Law.

141. The work of unification carried out by the Commission has led to three measures. On 11 May 1951, the three countries signed a Treaty on a Uniform Law on Private International Law. The object of the Uniform Law is to establish complete unity of conflict rules in the three countries. Only Luxembourg has ratified the treaty. Secondly, the Commission has prepared a draft treaty on jurisdiction, bankruptcy, the execution of judgements, arbitral awards and official documents. Thirdly, a Benelux Trade-Mark Convention was concluded on 19 March 1962 but has not yet entered into force.

7. THE NORDIC COUNCIL

142. The Nordic Council was established in 1952 by the Governments of Denmark, Norway, Iceland and Sweden. Finland adhered to the Statute of the Council in 1955.

143. The countries of the Nordic Council adopted uniform laws relating to bills of exchange and the sale of goods. Further, a Uniform Contracts Act, a Mercantile Agents Act and an Act on Conditional Sales were adopted. The Conditional Sales Act was enacted in Denmark, Norway and Sweden. Essentially uniform Acts on copyright, including copyright in photographs, were enacted in Denmark, Finland, Norway and Sweden in 1960 and 1961. Denmark, Sweden and Norway enacted uniform legislation on trade-marks between 1959 to 1961. Uniform legislative measures are being considered or are in preparation on company law, bankruptcy, unfair competition, patents, trade names, enforcement of judgements and other topics.

144. The Scandinavian countries have further concluded a number of international conventions for the settlement of problems of inter-Scandinavian conflicts of laws. In addition, those countries have concluded a Convention regarding the Recognition and Enforcement of Judgements (1932)⁶⁷ and a Convention regarding Bankruptcy (1933).⁶⁸

8. THE ORGANIZATION OF AFRICAN UNITY (OAU)

145. Since its establishment on 25 May 1963 the Organization of African Unity (OAU) has devoted attention to the problems of trade and transport among its member States. Preliminary studies, such as that made by the secretariat of the OAU of the possible establishment of an African Free-Trade Area, have formed the basis of the work of various expert groups dealing with economic co-operation and integration. More recently the Transport and Communications Commission of the OAU has given consideration to possible methods of the harmonization and co-ordination of national and regional systems of land, water and air transport.

⁶⁴ *Ibid.*, vol. 218 (1955), No. 2952, p. 27.

⁶⁵ *Ibid.*, vol. 218 (1955), No. 2953, p. 51.

⁶⁶ *Ibid.*, vol. 523 (1965), No. 7555, p. 93.

⁶⁷ League of Nations, *Treaty Series*, vol. CXXXIX (1933-1934), No. 3209, p. 165.

⁶⁸ *Ibid.*, vol. CLV (1934-1935), No. 3574, p. 115.

9. THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

146. The Committee, established at New Delhi in 1956 as an inter-governmental organization composed of legal experts acting in an advisory capacity, engages, *inter alia*, in studies of problems referred to it by member countries. It has made recommendations concerning the elaboration of proposed model rules on the recognition and enforcement of foreign judgements in civil cases (Baghdad, 1965) and on immunity of States in respect of commercial transactions of a private character (Cairo, 1958). It has furthermore carried out studies on double taxation and on laws relating to international sales and purchases.

C. Non-governmental organizations

1. THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

147. The International Chamber of Commerce (ICC) was founded in 1919. Its origins can be traced back to a meeting of the International Congress of Chambers of Commerce and Commercial and Industrial Associations in 1905, which was followed by further periodic meetings. In 1919 it was resolved that, instead of periodic meetings, a permanent organization should be created and the ICC was established at the Congress of Paris in July 1920. It has Category A consultative status with the Economic and Social Council.

148. The ICC constitutes a federation of business organizations and businessmen. It is a non-governmental body, neither supervised nor subsidized by Governments.

149. The ICC has national committees in more than forty countries; with the exception of Yugoslavia, these are all countries having a free enterprise economy. In other countries the ICC is represented by organizations or associate members without national Committees. The ICC is represented in many regions of the world. Of the countries in which it is represented, twenty-one are in Europe, nineteen in Asia, nine in Africa, sixteen in America and two in Oceania.

150. The ICC's activities extend to two fields. First, its aim is to act as spokesman for the business community in the international field and to present the business point of view to Governments and to world public opinion. Secondly, it attempts to ease the mechanism of world trade by removing the various technical obstacles which hamper the free flow of goods and services. Its programme is divided into four main parts: economic and financial policy; production, distribution and advertising; transport and communications; law and commercial practice.

151. The ICC's organization is based on its national committees. Every national committee has a secretariat and working parties. In addition, the ICC has a congress which meets every second year, a council and an international secretariat with its headquarters in Paris.

152. The main aim of the ICC in the development of international trade law is to ascertain trade customs

and to formulate them in a generally acceptable form. This is done through study groups of businessmen assisted by the international secretariat, and through the sending of detailed questionnaires to the national committees, which reply after consulting the national working parties. The result of this research is then published and, where required, the publications are revised from time to time. The form of publication reflects the certainty of the trade custom with which it deals. In some instances the customs of international trade can be stated with a high degree of certainty, e.g., in the case of Incoterms 1953 (see paras. 161-163 below) and the Uniform Customs and Practice for Documentary Credits. In other cases, only general guidance can be given, e.g., in the case of Commercial Agency. In a third type of case, commercial custom is vague so that only a tentative statement of facts can be offered, e.g., in the Problem of Clean Bills of Lading.

153. In addition, the ICC has played an active part in the preparation of a number of multilateral instruments in the field of the law of international trade, such as the Convention of 1 July 1964 relating to a Uniform Law on the International Sale of Goods (Corporal Movables).

154. A catalogue of ICC's main publications is found in annex I.

155. The major contributions of the ICC to the development of commercial law are the Court of Arbitration and its rules of procedure, the Incoterms and the Uniform Customs and Practice for Documentary Credits.

(a) The Court of Arbitration

156. The Court of Arbitration is an institutional arbitration tribunal having a permanent secretariat and utilizing the ICC national committees, however, the arbitrators are appointed *ad hoc* in every arbitrable dispute. There is no panel of arbitrators, but according to article 7 (2) of the Rules of Conciliation and Arbitration of 1 June 1955,⁹⁹ arbitrators suggested by the parties must be confirmed by the Court of Arbitration. If the parties fail to appoint one or several arbitrators and that task falls upon the Court, the Court will choose the national committee or committees from which it shall request nominations. Sole arbitrators and umpires must be nationals of countries other than those of the parties (article 7 (3)). Unless the parties agree in advance on the place of arbitration, the Court of Arbitration determines the venue of the arbitration.

157. Conciliation procedure is optional and is carried out by the Administrative Commission for Conciliation established at the ICC (articles 1-5).

158. In major international transactions, arbitration before the Court of Arbitration of the International Chamber of Commerce is becoming increasingly popular. It is used not only in disputes between private enterprises but also between private enterprises and States which have submitted to its procedure. It is also sometimes used in disputes between trading concerns of free enterprise and centrally planned economies.

⁹⁹ International Chamber of Commerce, *Rules of Conciliation and Arbitration* (Paris, 1955).

159. In February 1963, the ICC published an analysis of 300 cases decided by the Court.⁷⁰ Of these, about 4 per cent concerned disputes between States and individuals. The following is the breakdown according to parties:

Twenty-two European countries: 253 plaintiffs and 246 defendants.

The American continent: 26 plaintiffs and 33 defendants.

Asia: 18 plaintiffs and 13 defendants.

Africa: 15 plaintiffs and 12 defendants.

Australia: 2 plaintiffs and 2 defendants.⁷¹

160. While the sums involved in the disputes submitted to the Court varied as widely as the subjects of the disputes, the average sum in dispute in the 300 cases under review was approximately \$US 150,000, the total amount involved in the 300 cases thus amounting to almost \$US 40 million.

(b) *Incoterms 1953*

161. Incoterms 1953 is a set of international rules for the interpretation of nine frequently used trade terms. The terms regulated by the formulation are: *ex works*, *f.o.r.* (free on rail, free on truck), *f.a.s.* (free alongside), *f.o.b.* (free on board), *c.* and *f.* (cost and freight), *c.i.f.* (cost, insurance, freight), freight and carriage paid to, *ex ship*, and *ex quay*. The obligations of the seller and the buyer are defined in Incoterms as clearly and precisely as possible.

162. Incoterms are based upon the greatest common measure of practice current in international trade and ascertained by the ICC as the result of detailed studies by the various national committees. The ICC refused to incorporate in these terms desirable improvements on current practice. "In the opinion of the Chamber's Committee, there are two objections to this policy: (i) what practical merchants have evolved over the years as convenient is always likely to be better than theoretical improvements, and (ii) the prime consideration is to get one set of international rules agreed and widely adopted. If that could be achieved it would be a great step forward, and on the basis of it thereafter improvements may gradually be accepted."⁷²

163. The practical utilization of Incoterms is widespread. It was reported in July 1963⁷³ that more than 100,000 copies of the English and French original had been issued: in addition, translations exist in fifteen languages. Incoterms are widely used as standard terms of business by trade associations. Instances of that use occur, for example, in the German *Mühlenbau- und Industrie G.m.b.H.* or the French *Syndicat général de l'industrie de jute*. The United Nations Economic Commission for Europe embodied a reference to Incoterms, with regard to the passing of the risk in the

General Conditions for the Supply of Plants and Machinery for Export, Forms Nos. 188 and 188A (1953), but substituted its own regulation for such reference in later formulations. Some foreign trade corporations of countries with centrally planned economies use Incoterms in their transactions with enterprises of countries with free enterprise economies. This is done, for example, by the Polish corporations Varimax and Cetebe and by the Czechoslovak corporations Controtex, Ligna, Prago-Export. Sometimes even bilateral agreements between countries of centrally-planned economy which are not both members of CMEA provide for the application of Incoterms, e.g. the agreements between East Germany, on the one hand, and North Korea and North Viet-Nam respectively, on the other.

(c) *Uniform customs and practice for documentary credits*

164. The 1962 Revision of these rules is considered to be a successful example of the unification of modern practices in international trade. Prepared by the Commission on Banking Techniques and Practice of the ICC, the Revision first sets out general provisions and definitions relating to bankers' commercial credits, then deals with the form and notification of credits, the documents to be presented to the correspondent bank, various miscellaneous provisions, and finally the transfer of credits.

165. While the earlier Revision of 1951 had already been widely accepted and used for the opening and the execution of bankers' commercial credits, since the Revision of 1962, which came into operation on 1 July 1963, the British and Commonwealth banks as well have adhered to the Uniform Customs. Today the Uniform Customs are accepted in 173 countries and territories⁷⁴ adhering to different economic systems. Since the commercial credit is the most important and most frequently employed mechanism for the payment of the purchase price in export transactions,⁷⁵ the importance of this unifying formulation of the ICC is significant.

166. It should be kept in mind that the Uniform Customs are considered to be implicitly embodied into contractual relations and there is rarely an express reference to them. Although formerly the parties were required to express adoption of the Incoterms, a tendency has become apparent to consider that the Incoterms are relevant also to commercial transactions, even in the absence of explicit reference, unless the parties have expressed a contrary intention.

2. THE INTERNATIONAL MARITIME COMMITTEE (IMC)

167. The International Maritime Committee (IMC) was founded in 1896 and held its first congress in 1897. In the words of one writer, "today the [IMC] is the only international organization dedicated exclusively to the unification of private maritime law on a global scale... Its main object is to further by conferences

⁷⁰ International Chamber of Commerce, *Guide to ICC Arbitration* (Paris, 1963), p. 11.

⁷¹ *Ibid.*, pp. 9-10.

⁷² International Chamber of Commerce, *Incoterms 1953* (Paris 1953/1954), p. 8.

⁷³ By Gunnar Lagergren in the Introduction to Frédéric Eisemann's *Die Incoterms in Handel und Verkehr* (Vienna, GOF-Verlag, 1963), p. ix.

⁷⁴ For listings of the countries and territories concerned, see ICC document 470/INT.79 (19 April 1966).

⁷⁵ See Clive M. Schmitthoff, *The Export Trade*, 4th ed. (London, Stevens and Sons, 1962), pp. 211 ff.

and by publications and divers works the unification of maritime law".⁷⁶

168. The IMC is a non-governmental organization on which are represented predominantly commercial interests engaged in maritime transport, such as ship-owners, cargo owners, forwarding agents, bankers and insurers; lawyers specializing in shipping law are likewise represented. The membership of the IMC consists of individuals and national organizations interested in shipping. Today twenty-seven of these national associations adhere to it.⁷⁷ The twenty-sixth conference of the IMC, which was held in Stockholm in June 1963, was attended by delegations from twenty-one countries: Belgium, Canada, Denmark, the Federal Republic of Germany, Finland, France, Greece, India, Ireland, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, the United Kingdom, the United States of America and Yugoslavia.

169. The IMC has prepared thirteen conventions on uniform laws, most of which have been ratified by a considerable number of countries.

170. A list of the Conventions is appended in annex I.

171. The most successful convention promoted by the IMC is the International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels on 25 August 1924.⁷⁸ The Brussels Convention has been ratified by twenty-eight countries (see annex I). In 1963, at the twenty-sixth meeting of the IMC in Stockholm, certain amendments to The Hague Rules were adopted under the title of the Visby Rules, which were to be submitted to governmental consideration at a Diplomatic Conference at Brussels. So far, no diplomatic conference has been convened for that purpose, but the Governments of the Scandinavian countries have requested the Belgian Government to call such a Conference as soon as possible.

3. THE INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE

172. The Association is a non-governmental organization established under the auspices of UNESCO and having its seat in Paris. The main objects of the Association are, according to article 3 of its statutes, to "foster the development of legal science throughout the world through the study of foreign laws and the use of the comparative method. It has the ultimate object to aid the mutual knowledge and understanding of nations."

173. The membership of the Association is composed of national committees and associated members. The latter are international institutions, (the goals of which are in harmony with those of the Association and to

which that status is accorded by the International Committee of Comparative Law, which is the Executive Committee of the Association. The Association has no individual members.

174. National committees exist in the thirty-nine countries listed in annex I. Of these, six countries have centrally planned economies. Geographically, twenty-three are European, seven Latin American, six Asian, two North American and one African. The Association has a Council, an Executive Committee (the International Committee of Comparative Law) and a Secretary-General. The Association, assisted by UNESCO, held four colloquia on the law of international trade: in Helsinki in 1960; in Trier in 1961; in London in 1962; and in New York in 1964. The research of these colloquia is contained in three volumes, with a fourth in preparation.⁷⁹

175. The Association is currently sponsoring the publication, under the general direction of the Max Planck Institut für ausländisches und internationales Privatrecht, in Hamburg, of an International Encyclopedia of Comparative Law which will deal, in large part, with the law relating to international trade.

4. THE INTERNATIONAL LAW ASSOCIATION (ILA)

176. The International Law Association was founded on 10 October 1873. According to article II of its constitution, as amended in 1950 and 1958, its objects include "the study, elucidation and advancement of international law, public and private, the study of comparative law, the making of proposals for the solution of conflicts of laws, and for the unification of law, and the furthering of international understanding and goodwill".

177. The International Law Association is a non-governmental organization, established in London, which in 1956 had over 2,600 members who were either individuals or bodies.⁸⁰ In 1962 it had thirty-four branches in countries located in all continents and belonging to different economic systems, including the United States and the USSR.⁸¹

178. The Association, which has an Executive Council and a Secretary-General, arranges biannual conferences at which a number of topics pertaining to public and private international law are discussed. The reports of these meetings are published.

179. The major contributions of the International Law Association are: the formulation of the York-

⁷⁶ See A. N. Yiannopoulos, "The Unification of Private Maritime Law by International Conventions," in *Law and Contemporary Problems* (Durham, North Carolina, 1965), vol. 30, pp. 370, 372-3 (foot-notes omitted).

⁷⁷ See P. Chauveau, "L'unification du droit maritime et le C.M.I.," in *Revue trimestrielle de droit commercial* (Paris), vol. 16, 1963, p. 137.

⁷⁸ League of Nations, *Treaty Series*, vol. CXX (1931-1932), No. 2764, p. 155.

⁷⁹ Harold J. Berman and others, *Aspects juridiques du commerce avec les pays d'économie planifiée* (Paris, Librairie générale de Droit et de Jurisprudence, 1961); *Some Problems of Non-Performance and Force Majeure in International Contracts of Sale*, edited by H. E. Jokela (Helsinki, Institute of Comparative Law at the University of Helsinki, 1961); *The Sources of the Law of International Trade with special reference to East-West Trade*, edited by Clive M. Schmitthoff (New York, Praeger, 1964); and *L'unification du droit de la vente internationale*, edited by John Honnold (in preparation).

⁸⁰ See N. V. Boeg, "The International Law Association" in *Liber Amicorum of Congratulations to Algor Bagge...* (Stockholm, Norstedt, 1956).

⁸¹ International Law Association, *Report of the 50th Conference*, (Brussels, 1962), pp. lii to lxvii.

Antwerp Rules 1950 on the adjustment of General Average; and the drafting of The Hague Rules relating to bills of lading, which formed the basis of the Brussels Convention on Bills of Lading of 25 August 1924 (see para. 171 above).

180. In addition, the Association has made a number of valuable suggestions for the unification of international commercial law, such as the Rules of Copenhagen of 1950, which deal with commercial arbitration.

5. THE INSTITUTE OF INTERNATIONAL LAW

181. The Institute of International Law is a non-governmental organization founded in 1873 and having its headquarters in Paris. It has fifty-seven members and fifty-five associate members from thirty-nine countries. The members and associate members serve in their individual capacity and are selected from among persons who have rendered valuable service to international law, either in the theoretical or practical sphere.

182. Among the objectives of the Institute is the promotion of the progressive development of international law by giving assistance to genuine attempts at gradual and progressive codification of international law.

183. In the field of international commercial law, various commissions of the Institute have dealt with such topics as the legal aspects of capital investments in the developing countries (9th Commission); the contract of transport in private international law (19th Commission); and companies in private international law (28th Commission).

D. Summary: main areas of harmonization and unification

184. The foregoing survey has shown that, in addition to matters relating to industrial property and transportation by sea, air and land, the following are the major areas in which the most progress has been made towards the unification and harmonization of the law of international trade: the law of international sale of goods; the law relating to the supply and erection of plant and machinery abroad; the law relating to bills of exchange; the law relating to bankers' commercial credits; and the law of commercial arbitration.

185. With respect to the *law of international sale of goods* the major formulations are: the Convention of 1 July 1964 relating to a Uniform Law on the International Sale of Goods (Corporeal Movables), promoted by the International Institute for the Unification of Private Law; the Convention of 1 July 1964 relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (Corporeal Movables), promoted by the same organization; the Convention of 15 June 1955 on the Law Applicable to International Sales of Goods, promoted by The Hague Conference on Private International Law; Incoterms 1953, sponsored by the International Chamber of Commerce; General Conditions of Delivery of Goods, 1958, issued by the Council for Mutual Economic Assistance; Various General Conditions for Sale and Standard Forms of

Contract elaborated by ECE; the Convention of 15 April 1958 on the Competence of the Forum in the International Sale of Goods; and the Convention of 25 November 1965 on the Choice of Court, sponsored by The Hague Conference.

186. In the area of the *law relating to the supply and erection of plant and machinery abroad* the only formulations are General Conditions (Forms Nos. 188, 188A, 574 and 574A) issued by ECE.

187. As regards *bills of exchange*, a considerable degree of uniformity of law has been achieved by the Geneva Conventions on the Unification of Law relating to Bills of Exchange and to Cheques of 1930 and 1931, sponsored by the League of Nations.

188. With respect to *bankers' commercial credits*, the only formulation available is the Uniform Customs and Practice for Documentary Credits (1962 Revision), sponsored by the International Chamber of Commerce.

189. In the area of *commercial arbitration*, the following should be mentioned: the Geneva Protocol of 1923 and the Geneva Convention of 1927, both sponsored by the League of Nations; the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958; the European Convention on International Commercial Arbitration, sponsored by ECE; the Council of Europe Convention on International Commercial Arbitration and on Uniform Law on Arbitration; the ECAFE Centre for Commercial Arbitration, and the Convention on the Settlement of Investment Disputes between States and Nationals of other States, sponsored by the International Bank for Reconstruction and Development.

III. Methods, approaches and topics suitable for the progressive harmonization and unification of the law of international trade

A. Methods

190. An analysis of the work thus far done in this area reveals that essentially three methods have been adopted to further the progressive unification and harmonization of the law of international trade.

191. The first is the introduction of normative regulations devised and elaborated within the framework of international treaties and agreements concluded by two or more States. Illustrations of this method are the General Conditions of Delivery of Goods 1958, issued by the Council for Mutual Economic Assistance (CMEA), the Brussels Convention of 1924 on Bills of Lading, the Geneva Conventions on the Unification of the Law relating to Bills of Exchange and to Cheques of 1930 and 1931, The Hague Convention of 1955 on the Applicable Law relating to International Sales of Goods, and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

192. The second, which is, in effect, an alternative to the first, is the formulation of model laws to serve as guides for local adaptation, and uniform laws to be incorporated by States into their legislation. Examples of the former are model laws prepared under the

auspices of the United International Bureaux for the Protection of Intellectual Property (BIRPI); examples of uniform laws may be found in the practice of the Scandinavian countries acting within the framework of the Nordic Council.

193. The third consists in the formulation, normally under the auspices of an international agency, of commercial customs and practices which are founded upon the usages of the international commercial community. Illustrations of the third method mentioned are the Incoterms 1953 and the Uniform Customs and Practice for Documentary Credits, prepared by the International Chamber of Commerce (ICC), and the various General Conditions of Sale and Standard Forms of Contract sponsored by the Economic Commission for Europe (ECE).

194. Essential differences exist among the methods described above. The first and second are applied by virtue of the authority of the State, whereas the third is founded upon the autonomy of the will of the parties who adopt it as the régime applicable to the individual transaction at hand.

195. The experience of the past has shown that each of these methods is essential to the unification of the law of international trade and, furthermore, that each complements the other. It is therefore evident that the future development of the law of international trade requires that all of them should continue to be actively pursued.

B. Approaches

196. Until now there has been a variety of approaches to the progressive harmonization and unification of international trade law. One approach encompasses geographically contiguous countries having similar political, economic and legal systems and a comparable stage of economic development. When all these factors are present a considerable measure of harmonization may be achieved, as has happened among the Scandinavian countries belonging to the Nordic Council.

197. Unifying measures have also been taken among countries having a similar socio-economic system, regardless of geographical location; this is the case for the members of CMEA which includes nine countries having centrally planned economies, eight in Europe and one in Asia. In other cases there has been a measure of unification among countries located in the same region, regardless of their socio-economic system; this approach has been followed, for example, by European countries in the context of ECE. A degree of unification has also been achieved among countries belonging to common markets and free trade areas which are committed to the integration of their trading areas and institutions; this is the case for the countries belonging to the European Economic Community and for those belonging to the European Free Trade Association.

198. Another approach has been based on the premise that it would be in the interest of developing countries having a comparable stage of economic development to adopt, on certain subjects, uniform provisions which should be especially geared to the re-

quirements of their economies. This approach was followed in the preparation of the recent Model Law for Developing Countries on Inventions⁸² which was elaborated by BIRPI, with the co-operation of the United Nations.

199. Finally, steps have been taken to further harmonization and unification on a world-wide scale. Perhaps the most successful example is the 1962 Revision of the Uniform Customs and Practice for Documentary Credits issued by the ICC, which has been accepted in 173 countries and territories.

200. All of the foregoing approaches are complementary and any of them may prove to be the most practical for a particular topic, depending on the economic, legal and other factors involved.

201. Undoubtedly, it may be easier to make progress in harmonizing national laws and practices when the countries involved have similar legal or socio-economic systems. However, international trade transcends geographical proximity and legal, social or economic affinity. A country often engages in more trade with a country having a different legal or economic system and located in another part of the world than it does with a contiguous country with which it has closer bonds. In such cases only harmonization on a world-wide scale would help reduce the obstacles of a legal nature hampering the flow of trade between those countries.

202. It should be stressed that modern commercial life, which has been affected by technological advances with respect to travel and transport and by the rapprochement of different economic systems, tends to require to a great extent harmonization and unification on a broad scale with respect to the law of international trade. The following comment made by Professor Tunc, although it refers to the internal legislation of a particular country, is relevant to the present study in that it points out the interdependence of the progressive development of international trade law:

"Today France must amend her legislation, knowing that she will have to amend it again tomorrow to comply with the constitution of the Common Market; for at the same time, she may have to amend it to harmonise it, at least in some fields, with the legislations of the seven members of the European Free Trade Association or of the eight members of the socialist Council for Mutual Economic Aid; later on, the problem will be of harmonisation with the legislation of the twenty member nations of the Organization for Economic Co-operation and Development, with the seven members of the Montevideo Treaty and with other trade associations in Africa or Asia."⁸³

C. Suitable topics

203. In considering topics suitable for harmonization and unification, three general observations should be made. First, whether harmonization is attempted on a

⁸² BIRPI publication 801 (E), Geneva, 1965.

⁸³ See André Tunc, "English and Continental Commercial Law" in *Journal of Business Law*, (London, 1961), p. 246.

world-wide scale or not, it is more easily achieved in technical branches of the law than in subjects closely connected with national traditions and basic principles of domestic law. Thus, harmonization has been most widely accepted in the law of industrial property, transportation by sea, air and land, international banking (bills of exchange and commercial credits) and arbitration.

204. Secondly, it should be kept in mind that the unification process is desirable *per se* only when there is an economic need and when unifying measures would have a beneficial effect on the development of international trade.

205. Thirdly, in addition to their direct impact, unifying measures tend to have what has been called a "radiation" effect.⁸⁴ This occurs when, for example, a State which is not a party to an international convention decides to apply the principle on which the convention is founded, or when a unifying technique used in one international instrument is subsequently made part of another. Thus, as has been previously noted (paras. 42-43), the principle that the seller's law is the presumptive law in conflict problems arising from the international sale of goods, which was incorporated in The Hague Convention of 15 June 1955, has been followed with respect to ECE's General Conditions of Delivery of Goods and General Conditions, Forms Nos. 188, 574 and 730.

206. It would be premature at this stage to make specific suggestions regarding desirable priorities in the future work of unification, or to identify topics particularly suitable for world-wide or other action.

207. Nevertheless, most unification activities have been in the areas mentioned in paragraph 184 above. Further progress in those areas could be made, for instance, by encouraging wider participation in the conventions relating to the international sale of goods, bills of exchange and arbitration, and wider adoption of certain contractual forms and definitions of frequently used commercial terms. In addition, it would be beneficial to international trade if more efforts were made in the direction of unification on such topics as problems of agency law, including those relating to commission agents and brokers; the law relating to joint ventures by bodies incorporated in different countries; rules relating to corporations entering into foreign trade relations; and the general law of contract, as far as it is relevant to international trade, e.g., problems of frustration and *force majeure*, or of time limits and prescription.

IV. Role of the United Nations in the progressive harmonization and unification of the law of international trade

A. Progress and shortcomings of the work in the field of harmonization and unification of the law of international trade

208. The preceding survey of the work done up to now in the unification and harmonization of the

law of international trade shows a picture of some progress but at the same time some significant shortcomings.

209. Owing primarily to the efforts of the "formulating agencies", there has been a degree of unification and harmonization, especially on such subjects as the international sale of goods, bills of exchange, bankers' commercial credits, international maritime trade, and commercial arbitration.

210. On the other hand, an objective evaluation of the efforts made in this field cannot fail to reveal the following main shortcomings:

(a) The progress made in the unification and harmonization of the law of international trade has been rather slow in relation to the amount of time and effort expended on it. The relatively modest results obtained up to now are attributable to a number of factors, such as the difficulties inherent in any attempt to bring about changes in national legislation and practices, and the limited membership and authority of formulating agencies. As a consequence, the completion of the technical work of preparing draft conventions, model laws or uniform laws has often failed to culminate in an international conference or in the adoption of uniform legislation. Where conventions have been adopted, generally speaking only a small percentage of the present Members of the United Nations have become parties.

(b) The developing countries of recent independence have had the opportunity to participate only to a small degree in the activities carried out up to now in the field of harmonization, unification, and modernization of the law of international trade. Yet those are the countries that especially need adequate and modern laws, which are indispensable to gaining equality in their international trade.⁸⁵ In many of these States the prevailing legal system was introduced before their independence by the metropolitan countries; often the provisions thus received are unsuitable to their present stage of economic development or to the requirements of newly independent states.⁸⁶ The unification process in the field of international trade law would be a step in the direction of remedying this situation. As to the attitude of new States towards playing a more active

⁸⁵ As the representative of Hungary said, "It was particularly important for them [the developing countries] that the law of international trade should be updated and guarantee the highest security so that they would not be at the mercy of more experienced trade partners." (See *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 894th meeting, para. 8.)

⁸⁶ The technique of law reception is not a phenomenon which relates solely to the recent history of newly independent States. The legal systems of some countries or territories which in the past were dependencies of European States are still influenced by the law of the former colonial Powers. Thus the law in almost all states of the United States is derived from English law; many Latin-American States have received Spanish law; the Province of Québec in Canada and the State of Louisiana in the United States have received French law. Furthermore, as between sovereign States the problem of adaptation to modern conditions has sometimes been dealt with by the same technique of law reception. Thus, for example, modern Greek and Japanese law have received German law and modern Turkish law has received Swiss law.

⁸⁴ *Ibid.*, p. 240.

role in this endeavour, the following words written by an authority on African law are significant:

"African countries have not opted out of discussions on world unification of laws — quite the contrary; I am sure that they wish to be more closely and directly involved in such discussions in the future than they have been in the past."⁸⁷

(c) None of the formulating agencies commands world-wide acceptance; none has a balanced representation of countries of free enterprise economy, countries of centrally planned economy, developed and developing countries. In some cases, those agencies have a membership confined either to countries of centrally planned economy (e.g. CMEA) or to countries of free enterprise economies (e.g. the ICC); in other instances, members must belong to a specific region (e.g. the ECE). In the case of UNIDROIT, although there is no geographical limitation on membership, the present membership is predominantly European.

(d) There has been insufficient co-ordination and co-operation among formulating agencies. Therefore, their activities have tended to be unrelated, and a considerable amount of duplication has resulted. The following observations made some years ago by the late Professor H. C. Gutteridge still seem relevant:

"The most urgent problem of all, however, is that of the waste of effort and confusion that has, at times, been caused by the existence of competing agencies engaged in the work of unification. The remedy for this state of affairs would seem to lie in the establishment of a rallying ground for unificatory activities — a kind of international clearing house — which would co-ordinate and supervise activities of this nature and also facilitate the collection of any information that might be required, either from governmental or other sources. . . . it would be possible, in this way, to avoid the overlapping of attempts to achieve uniformity, and to discourage the ill-timed, or over-ambitious, projects which are largely responsible for the paucity of success which has hitherto characterised the movement for the unification of law."⁸⁸

B. Desirable action to remedy the existing shortcomings

211. The General Assembly, in the preamble to resolution 2102 (XX), has recognized that "conflicts and divergencies arising from the laws of different States in matters relating to international trade constitute an obstacle to the development of world trade" and has expressed its conviction that "it is desirable to further co-operation among the agencies active in this field and to explore the need for other measures for the progressive unification and harmonization of the law of international trade".

212. To remedy the shortcomings described above, several measures such as the following should be taken. The process of harmonization and unification of the

law of international trade should be substantially systematized and accelerated. This would entail a concerted effort to secure a wider participation in existing international conventions and a wider adoption of uniform legislation, where such conventions and uniform laws reflect the present requirements of world trade, as well as a wider use of standard trade terms, provisions and practices. It would also entail action towards further unification and modernization of legal techniques in this area, such as the adoption of new international conventions and uniform laws, codification of existing rules and trade practices and the dissemination of information on up-to-date methods and solutions. In addition, it would be desirable to secure a broad participation of the developing countries of recent independence in the progressive development and codification of the law of international trade; this would facilitate the adoption by those countries of laws and other measures adequate for the protection of the interests of their international trade transactions. Finally, it would be appropriate to bring about a close co-ordination of the activities of the existing formulating agencies, regardless of whether their members belong to one or another economic or legal system.

C. Role of the United Nations

213. It should now be considered whether it would be desirable for the United Nations to assume responsibilities in this field and, if so, what should be the extent of such responsibilities. In this connexion, the following questions should be examined.

1. IS THE UNIFICATION AND HARMONIZATION OF THE LAW OF INTERNATIONAL TRADE AN APPROPRIATE SUBJECT FOR UNITED NATIONS ACTION?

214. Action by the United Nations for the purpose of removing or reducing legal obstacles to the flow of international trade would be properly within the scope and competence of the Organization under the terms of Articles 1 (3) and 13, Chapters IX and X of the United Nations Charter. In particular, such action would be fully consistent with General Principle Six of the United Nations Conference on Trade and Development (UNCTAD) which reads: "International trade is one of the most important factors in economic development. It should be governed by such rules as are consistent with the attainment of economic and social progress and should not be hampered by measures incompatible therewith."

215. As previously mentioned in this report, the United Nations has already been engaged in some activities in the field of unification and harmonization of the law of international trade. But so far, there has been no attempt to survey the field as a whole in order to co-ordinate the activities of the different United Nations organs concerned and select the most suitable subjects. Consequently, the choice of subjects has been largely accidental and the activities often unrelated to one another.

216. What the United Nations has accomplished in the promotion of the law of international trade is in-

⁸⁷ See A. N. Allott, "Towards the Unification of Laws in Africa," in *International and Comparative Law Quarterly* (London), vol. 14, 1965, p. 389.

⁸⁸ See H. C. Gutteridge, *Comparative Law*, 2nd ed. (Cambridge, University Press, 1949), pp. 183-184.

significant compared with what it has done in promoting economic and social development. Although there is an increasing awareness that a modern legislative framework is the necessary foundation for sound economic and social progress, there is still what may be called a "legal lag".⁸⁹ There is no doubt, therefore, that United Nations action would be both appropriate and desirable.

2. WOULD A UNITED NATIONS PARTICIPATION IN THIS ACTIVITY UNNECESSARILY DUPLICATE THE WORK OF EXISTING AGENCIES AND REDUCE OR ABOLISH THEIR USEFULNESS?

217. One of the main reasons for the relatively slow progress made in the past has been the limited membership and authority of formulating agencies. This has resulted in a disproportion between the number of draft instruments prepared by formulating agencies and their acceptance by States. In view of its world-wide membership and authority, the United Nations would provide a most appropriate forum for convening international conferences for the adoption of conventions. Where unification and harmonization take the form of recommendations for the adoption of uniform laws and standard practices, such recommendations would be addressed directly to all Member States of the United Nations, thus increasing the chances of broad acceptance.

218. Rather than reducing the usefulness of existing formulating agencies, an active United Nations interest and participation in this work would tend to broaden their scope and enhance their activities. For example, some of the draft instruments prepared in the past by formulating agencies could be revised in the light of present requirements and could eventually be submitted to the United Nations for action; the Organization could request formulating agencies specializing in different subjects to deal with specific topics and could utilize those agencies' expert advice in general. Accordingly, it may be expected that United Nations participation in this field would increase the usefulness of existing formulating agencies, and improve the chances of bringing their work to a successful conclusion.

3. WOULD THE UNITED NATIONS BE IN A POSITION TO MAKE A SIGNIFICANT CONTRIBUTION TO FURTHERING UNIFICATION ON A WORLD-WIDE SCALE OR OTHERWISE?

219. As mentioned above (paragraphs 196 to 202), the choice of the approach to be followed in bringing about unifying measures depends on a variety of legal, economic and social factors. While world-wide unifi-

cation may be desirable and feasible for certain topics, a different approach may commend itself with respect to others.

220. As the United Nations comprises practically all the countries of the world, representing the various legal, economic and social systems as well as all stages of economic development, it would be in the best position to examine the question of the choice of approach (world-wide, regional or other) in the light of the relevant circumstances, acting as a kind of international clearing house for unification activities. The United Nations would also be in the best position to determine, for any topic, which method of unification should be adopted (international convention, model law, uniform law, harmonization or codification of commercial practices) and to provide the most suitable forum for unifying measures on a world-wide scale.

4. SHOULD THE FUNCTIONS OF THE UNITED NATIONS BE CONFINED TO CO-ORDINATION OR SHOULD THEY ALSO ENCOMPASS FORMULATION?

221. As the need for better co-ordination in this area is generally acknowledged, it seems clear that the United Nations could perform a useful role in promoting contacts and furthering collaboration between the existing formulating agencies, exercising some kind of supervision over their activities and initiating unifying measures. The performance of these functions would require the ability to exercise judgement, *inter alia*, on which projects and draft instruments should be carried to a conclusion and which should be revised and which shelved, as well as on the respective roles of existing formulating agencies. If a sufficient expertise to perform these tasks is to be acquired, it would be necessary to create a United Nations organ consisting of highly qualified authorities in the field, including experts from developing countries who would thus have the opportunity to participate actively in the work of unification. While co-ordination should be the primary function of such a United Nations organ, it would appear desirable not to confine it to a co-ordinating role but to authorize it, when appropriate, to perform formulating functions as well.

5. IS THERE A REALISTIC CHANCE OF SUCCESS OR IS THE TASK TOO DIFFICULT FOR TANGIBLE RESULTS?

222. Since one of the purposes of unification and harmonization is to bring about changes in national laws, the difficulties of this endeavour should not be underestimated. However, the matters relating to the unification of the law of international trade are primarily of a technical nature. It should therefore be less difficult to adapt national rules to the needs of international trade, than to unify rules on such matters as family law, succession, personal status, and other subjects deeply rooted in national or religious traditions. The common interest of all countries in removing or reducing obstacles to international trade should also act as an incentive towards progress.

223. Another difficulty that has been mentioned is that excessive zeal might lead to unification at the

⁸⁹ The representative of the Netherlands said, "The United Nations was already in the middle of the Development Decade, while the United Nations Conference on Trade and Development had initiated an ambitious programme of co-operation for economic development and the expansion of international trade. It was therefore important that the development of the law should not lag behind technical progress and material achievements..." (See *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 896th meeting, para. 13.)

lowest common denominator. There is no merit in unification if it results in the adoption by a group of States of the legal concepts acceptable to the least progressive among them. Nor is there any merit in formulating a convention or uniform law on a subject which would not appreciably benefit international trade. Accordingly, it is most important that any attempt at unification and harmonization should be preceded by a thorough search for the right and ripe topics. It is essential that the topics should be selected in close collaboration between legal experts and trade experts familiar with the requirements of international trade and its priorities, and aware of what results can be realistically achieved.

224. Progress in this field is bound to be rather slow, but the pace of such progress can be substantially accelerated if the United Nations assumes an active role and if Member States give it sustained and continuing support.

D. Establishment of a United Nations commission on international trade law

225. There is no existing United Nations organ which is both technically competent in this field and able to devote sufficient time to such a complex and long-term endeavour. The General Assembly may, therefore, wish to consider the possibility of establishing a new commission which might be called the "United Nations Commission on International Trade Law".

226. It would be essential to assure the most active and broadly based support of Governments, and at the same time to provide for the participation of recognized authorities in this field of law. It would therefore appear advisable to provide that the membership of such a commission should be composed of an appropriate number of States, elected by the General Assembly, and to provide, further, that the representatives of these States, appointed by them to serve on the commission, should be persons of eminence in the field. In this connexion, it may be recalled that a similar, but not identical arrangement was adopted under the terms of Economic and Social Council resolution 903 C (XXXIV) of 2 August 1962, dealing with the establishment of the Committee on Housing, Building and Planning. The Committee was "composed of eighteen States Members of the United Nations, elected by the Council . . ., the representatives on this committee to be designated by the Governments of these States in agreement with the Secretary-General, with a view to achieving, as far as possible, a balanced coverage of required expertise . . .". This arrangement is similar to the one suggested above.

227. It is suggested that the commission should have the following functions: to further the progressive harmonization and unification of the law of international trade by:

- (a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them;
- (b) Promoting wider participation in existing international conventions, and wider acceptance of existing model and uniform laws;

(c) Preparing, and promoting the adoption of, new international conventions, model laws and uniform laws, and the codification and wider acceptance of international trade terms, provisions, customs and practices;

(d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;

(e) Collecting and disseminating information on national legislation and modern legal developments in the field of the law of international trade;

(f) Maintaining liaison with UNCTAD, the Economic and Social Council and other United Nations organs and specialized agencies concerned with international trade;

(g) Taking any other action as it may deem useful to achieve its purposes.

228. The question of whether, and to what extent, the commission would deal with unification of conflict rules, in addition to unification of substantive rules, might be for the commission itself to consider at the appropriate time.

229. Because the work of the commission would be of an essentially technical nature, including a certain amount of legal drafting, it would seem desirable to have a membership of eighteen, and in any event not more than twenty-four. The commission should have an adequate representation of countries of free enterprise and centrally planned economies, and of developed and developing countries.

230. As the functions of the commission pertain to the field of law and trade, it must be considered whether the commission should report directly to the General Assembly or to UNCTAD which would, in turn, report to the General Assembly. Although important trade aspects would be involved requiring close liaison with UNCTAD, it seems clear that the bulk of the work would be of a technical legal nature. In these circumstances, it may be appropriate that the commission should report directly to the General Assembly, so that its activities would be considered by the Sixth (Legal) Committee at an early stage. The reports would be submitted simultaneously to UNCTAD for its comments. Any comments that UNCTAD may wish to make would be transmitted through the Economic and Social Council for consideration by the General Assembly and by the Sixth Committee, when the reports of the commission are examined. Such comments might, as appropriate, contain recommendations to the General Assembly on topics for inclusion in the programme of work of the commission. This arrangement would not only ensure the most expeditious and thorough consideration of the commission's work but also the indispensable close liaison with UNCTAD. It would also provide the commission with the central role and the appropriate level necessary for the effective performance of its functions.

231. The fourth session of the Trade and Development Board of UNCTAD, at its 113th meeting on 23 September 1966, considered the question of the progressive development of the law of international trade. The

section of the report of the Trade and Development Board (A/6315) dealing with this matter is reproduced in annex I.

232. In view of the vast scope and complexity of the commission's work it would be necessary to establish, within the Office of Legal Affairs, a new secretariat unit comprising three or four qualified officers, devoting its full time to work in this field.

233. In order to render effective assistance to the commission, the secretariat unit should be familiar with the different major legal systems of the world and with the problems of countries at various stages of economic development.

234. The functions of the unit would be:

(a) To provide the secretariat for the sessions of the commission and for international conferences and meetings of experts on the law of international trade;

(b) To assist the commission in its co-ordinating functions by:

(i) Preparing studies of the work done in the past and of the current work of formulating agencies, in order to ascertain the stage reached with respect to the different topics, and to examine what further action towards unification and harmonization is desirable;

(ii) Maintaining appropriate liaison with the secretariats of UNCTAD, other United Nations organs, specialized agencies and other interested inter-governmental and non-governmental organizations, as required in the performance of the commission's functions;

(c) To prepare studies and recommendations on problems concerning the unification and harmonization of the law of international trade, including comparative analyses of national legislation, studies and research on particular topics at the request of the commission and, when practicable, of other United Nations organs;

(d) To organize and maintain a comprehensive collection of national legislation and treaties pertaining to the law of international trade, and of documentation

on modern developments in this field, and to provide information thereon to the commission, to other interested United Nations organs and to States, within the limits of available resources;

(e) To provide services in connexion with technical assistance activities in this field, within the limits of available resources.

E. Financial implications of the establishment of a United Nations commission on international trade law

235. This study of the progressive development of the law of international trade has been prepared in response to General Assembly resolution 2102 (XX), in which it was requested that the Secretary-General submit a report to the General Assembly examining what has been accomplished, what might be accomplished, and what institutions might be utilized in promoting the goal of harmonizing and utilizing the law of international trade. In this report it is suggested that the General Assembly may wish to consider the possibility of establishing a new commission, which might be called the "United Nations Commission on International Trade Law". The Secretary-General would be prepared to submit the financial implications of the establishment of such a commission at the appropriate time after Member States have had an opportunity to consider what course of action it would be most appropriate for the United Nations to follow and when their views and wishes on the details of any possible new arrangement are more clearly known.

ANNEXES

I. Additional data on the activities of organizations concerned with the law of international trade

[Annex not reproduced]

II. Additional data on the activities of the International Institute for the Unification of Private Law (UNIDROIT)

[Annex not reproduced]

III. UNIDROIT: Table of legal activities on the programmes of certain international organizations as of 1 January 1966

[Annex not reproduced]

C. Debate in the Sixth Committee of the General Assembly on agenda item 88 (Progressive development of the law of international trade): excerpts from summary records*

Excerpt from the summary record of the 947th meeting (5 December 1966)

1. Mr. SPERDUTI (Italy) [said that] if the

3. ... the General Assembly decided to establish a United Nations commission responsible for furthering co-operation in the development of the law of international trade and promoting its progressive unification and

harmonization, every provision should be made to ensure that the commission, far from attempting to monopolize international efforts and activities, secured the benefit of the regular and constant assistance and the experience of the various institutions already working in that field. Consideration might be given to establishing relations with some of those institutions which would be similar to the relations existing between the General Assembly and the Economic and Social

* Official Records of the General Assembly, Twenty-first Session, Sixth Committee, 947th-955th meetings. The complete summary records are too extensive to be given in full; the excerpts reproduced here suggest the delegates' views on the objectives to be served by the new commission. The complete summary records appear in the documents cited above. The main currents of the debate also appear, in a more condensed form, in the report of the Sixth Committee (A/6594) given in section D below.

Council, on the one hand, and the specialized agencies, on the other hand. UNIDROIT, in particular, as the organization most directly specializing in the "preventive" method, whose work in the preparation of draft conventions was widely recognized as being of great value, might become one of the principal organizations collaborating with the new United Nations commission in the elaboration of uniform laws and the preparation of draft international conventions on uniform laws. In that connexion, he recalled that the Secretary-General, in the introduction to his annual report on the work of the Organization, had said that in the face of unlimited global needs, the most rational and effective utilization of available resources was not merely a desirable objective but a practical necessity.¹

4. His delegation hoped that all the complex problems of international trade law would be carefully considered by the Sixth Committee and that reasonable and constructive action would be taken. In particular, the developing countries must be enabled to participate actively in the formulation of an international trade law responsive to the needs of the modern world and to take effective advantage of all forms of assistance offered by the United Nations and by other governmental and non-governmental organizations in formulating and improving their internal legislation and their commercial practices...

5. Mr. POTOČNY (Czechoslovakia)... international trade offered a meeting place for the economic interests of individual States. The steady growth of trade relations among States emphasized the internationalization of the production and exchange of goods that was characteristic of the current world economic situation.

6. Economic contacts must necessarily be reflected in the legal sphere, both in public international law and in the legal provisions governing the mutual rights and obligations of the parties to commercial contracts in international trade. The laws of individual States were most similar with respect to their provisions governing international trade contracts; indeed, the law of international trade was remarkably similar in all States, despite differences in basic legal concepts which reflected differences in economic, social and political systems. That similarity was due to the fact that in all States legislative provisions, if they were to serve their purpose, must respect the technique and the practices of international trade. Under the current international system of production and exchange of goods, the smooth flow of international commerce depended in large part on the maintenance of a balance between sellers and buyers; consequently, individual States had to assume — willingly or not — that their nationals would be sellers on one occasion and buyers on another. As a result, the possibility that an individual legal system would give preferential treatment to sellers or buyers, was practically excluded; there was a universal trend towards balancing the interests of buyers and of sellers

in legal provisions. That in turn, led to certain similarities in the legal provisions governing the specific rights and obligations of the parties to international commercial contracts. Nevertheless, the influence wielded by the social and economic structure of individual States, by their legal tradition and by other relevant fields of their law still persisted.

7. Although the similarities arose mainly from general regulations, international trade often required special legal regulations, both national and international. Despite the existence of a separate and autonomous law of international trade that was, to a considerable extent, independent of the legislation of individual States, the objective necessity of maintaining an unobstructed flow of international trade had led States to attempt to ensure the legal stability of the rights and obligations of parties to international commercial contracts through various legal instruments. National commercial laws, such as the French and German commercial codes, which had served as models for the commercial codes of many other countries, and even the Swiss codification of the law of obligations and the Italian Civil Code of 1942 — those extensive bourgeois codifications of civil law promulgated in the twentieth century — rarely met the needs of the current highly developed international trade. Thus there had been a tendency to overcome some of the shortcomings of the commercial law and the civil law of the capitalist States through the establishment of special commercial customs and usage and the formulation in various commercial centres of standardized contracts and delivery terms for various types of goods. Those special regulations governing certain aspects of international trade were established as a rule within the framework of the autonomy of will and contractual freedom provided for in the commercial law and civil law of the bourgeois countries.

8. Although the creation of international trade law through the autonomy of parties to international commercial contracts might seem to be spontaneous, in fact various international institutions, both governmental and non-governmental, had played an important role in stimulating that process by formulating commercial customs and usage, by drawing up standard or model contracts for different types of goods and by urging the parties to international commercial contracts to trade on the basis of general terms drawn up for different types of goods. Such institutions included the International Chamber of Commerce, which had drawn up Incoterms, a number of United States organizations, which had prepared the Revised American Foreign Trade Definitions, and the International Law Association, which was responsible for the Warsaw-Oxford Rules. The special groups of experts set up by the United Nations Economic Commission for Europe to regulate East-West trade had drawn up a relatively large number of general terms of delivery and model contracts for specific types of goods, which parties to commercial contracts might make applicable by including a special clause in the contracts themselves.

9. On a quite different level, attempts had been made over the past several decades to unify the rules of

¹ Official Records of the General Assembly, Twenty-first Session, Supplement No. 1A (A/6301/Add.1).

substantive law governing international sales contracts in the form of international treaties or model laws. In western Europe, the activities of UNIDROIT had culminated in two drafts of uniform laws adopted by a diplomatic conference held at The Hague in 1964. The most comprehensive unification of the rules governing international sales contracts on the inter-State level was the General Conditions of Delivery of Goods between Foreign Trade Organisations of Member Countries of the Council for Mutual Economic Aid in 1958. Those General Conditions, however, in contrast to the 1964 drafts, were intended to apply not to all international sales contracts but only to transactions between the foreign trade corporations of the States members of the Council for Mutual Economic Aid (COMECON). They included not only mandatory provisions of substantive law but uniform rules concerning conflict of laws...

**Excerpt from the summary record of the 948th meeting
(6 December 1966)**

1. Mr. HERRAN MEDINA (Colombia) said that positive law, even with the contributions of customary law, was lagging behind the increasingly rapid development of international trade. The removal of the obstacles, including the legal obstacles, to international trade was of special importance to the developing countries whose economies depended largely on their foreign trade, but it would also be to the advantage of the developed countries, whose trade would expand proportionately.

2. Legal science owed international trade a secular debt that went back to the famous collections of commercial and maritime customs and jurisprudence — the Laws of Wisby, the Laws of Oleron, the Guidon de la mer and the Consolato del Mare — which had been compiled in the Middle Ages for the traders of the North Sea, the Baltic and the Mediterranean and whose authority, after the discovery of the New World, had spread to America. The very institution of the consular service had been conceived, to meet the needs of trade, in the same cities of northern Italy to which the world owed the first manifestations of private international law. The time had come for the United Nations General Assembly to pay that debt and, in so doing, to contribute effectively to the prosperity of all peoples and, thereby, to the maintenance of world peace and stability by undertaking the progressive unification and harmonization of international trade law. The report in document A/6396 and Corr.1 and 2 was the first stage in that task, which had been initiated by General Assembly resolution 2102 (XX). The report did honour to the Secretary-General and to all the experts. United Nations organs and other institutions that had contributed to it. According to the report, the objective was not to resolve conflicts of laws but to prevent them by establishing universally accepted rules. The very economic needs of States made the endeavour a viable one, for to the extent that those needs were tied to international trade they would facilitate and stimulate the task of harmonization and unification. In practice, it was a question chiefly of centralizing,

co-ordinating and encouraging the activities of the various bodies dealing with those matters, not of replacing them. It was a long-term project that should be carried on simultaneously in the various sectors by methods suited to the characteristics of each and to the techniques of international trade itself, taking into account the relationship between those techniques and the task of unification itself.

3. The Secretary-General's report recommended three basic methods of furthering the progressive unification and harmonization of international trade law (see A/6396, paras. 190-195). The first was the introduction of normative regulations within the framework of international treaties and agreements; the second was the formulation, normally under the auspices of an international agency, of commercial customs and practices founded upon the usages of the international commercial community; the third was the formulation of model laws and uniform laws, on the basis of both conventional and customary rules. The latter method was particularly promising in relation to countries having similar political, economic and legal systems, especially if they were geographically contiguous and had reached a comparable stage of economic development. That was true, for example, of the countries of Latin America. It would, however, be sufficient for one or two of those conditions to be satisfied as between any two countries for the process of co-ordination to spread gradually to other geographic regions and finally embrace all countries and groups of countries in the world, regardless of their social and economic systems.

4. That work of co-ordination would make it possible to speed up and make more fruitful the first steps towards unification, which had already been made possible by the similarity, as between various countries, of the general rules of international trade law and also by the efforts of a number of intergovernmental and non-governmental organizations...

...

8. Mr. PHIRI (Malawi) said that even when they disliked the political or social systems of other States, most countries made every effort to do business with those States. Inasmuch as international trade was the greatest source of development finance and incentive goods for developing countries like his own, it was right and proper that those countries should be keenly interested in the harmonization and unification of international trade law!...

9. The Secretary-General's report indicated the work that had already been done or was being done in the field under consideration by intergovernmental organizations. Those organizations, however, were composed mostly of representatives from one region of the world. There were two reasons, he thought, for establishing a United Nations commission on international trade law. The first and principal reason was that to obtain the best results the work of unification and harmonization should be carried out under the aegis of the United Nations, the most international of institutions. The second reason was that the developing countries needed all their financial resources for their development programmes and could not afford to belong

to many of the international organizations working in the field of international trade law.

10. [His delegation] wished to express two ideas that it thought should form part and parcel of the guiding principles for the work of the proposed commission. First, inasmuch as all countries of the world were interested in the growth of international trade in general, and that of the developing countries in particular, the commission should review the existing laws and suggest how they might be adjusted so as to help reduce the gap between the rich and the poor, which was partly due to the fact that some countries gained more from international trade than others. Second, the proposed commission should not confine itself to unifying and harmonizing the laws of international trade but should also seek to simplify them so that they might be better understood by members of a commercial class that was only beginning to emerge in the developing countries and, generally, by persons other than academic jurists or professional lawyers.

11. Mr. VANDERPUYE (Ghana) said that in his delegation's opinion the world community owed much to the architects of the United Nations Charter who, perhaps better than anyone else, had realized that the maintenance of international peace and security was tied up first and foremost with the general improvement of world economic conditions and, as was clear from Article 1, paragraph 3, Article 13 and Chapters IX and X of the Charter, that the problem must be considered from both the political and economic standpoints and that its solution presupposed that legal obstacles to international trade would be removed.

12. In that respect, the role of the United Nations has so far been negligible by comparison with its activities in the economic and social field; as the Secretary-General's report indicated, the United Nations had made no attempt to survey the whole field in order to co-ordinate the activities of its organizations, and the initiative had remained with the regional organizations. International trade transcended geographical proximity and legal, social or economic affinity, and only harmonization on a world-wide scale would help reduce the obstacles of a legal nature hampering the flow of trade, while the unification of international trade law would help the developing countries that had recently achieved independence to attain equality in their international trade. The African countries, which through no fault of their own had not been involved previously, wished to participate in discussions on the world unification of laws more actively in the future ...

Drafting a uniform law for application by States of divergent legal backgrounds was a task demanding not only a deep knowledge of the legal systems concerned but a synthetic mind able to find a compromise solution and to rise above national prejudices. The work of unification should not bring about a pure compromise but produce a text setting out in clear, understandable language the most important principles which could indicate the direction to be taken by the future development of the law.

15. Mr. RENOUEAU (France) ... wished to point out that the original purpose of the study of the harmonization of international trade law proposed at the last session had been economic. But even though it was an undoubted fact that the current diversity of legislation, as well as conflicts of laws, could be a serious barrier to international trade, it was doubtful whether it was necessary or even possible to unify the rules of private law in that sphere on a world scale. For example, the various federal States, for the most part, had not found it necessary — indeed, not even possible — to unify trade law on a federal scale. The French delegation therefore endorsed the observations made by the Secretary-General in paragraphs 203 and 204 of his report. However, unification might be justifiable in certain clearly demarcated technical fields in which it would provide economic advantages, and it would have been useful for the report to have specified more clearly the subjects in which such unification should be attempted. What was important was to avoid any tendency to be satisfied with general considerations, and to specify clearly, in the light of needs that still had to be determined, the best solutions and the means by which they could be carried into effect ...

18. ... [His delegation] endorsed the Secretary-General's views that efforts should be made to improve the co-ordination of the activities of existing agencies, that the developing countries should be drawn into the work of drafting international rules within such agencies and, lastly, that the harmonization of the law of international trade should be accelerated. The work of the existing organizations, far from being reduced, should be expanded and strengthened. The French delegation considered that the United Nations should not intervene in fields in which there were already in existence well-equipped and experienced institutions that could, in future, make all necessary efforts to determine the most important issues and encourage Member States to accede to any conventions drafted; and it congratulated the Secretary-General on having stressed the need to avoid any dispersal or duplication of activities.

19. The role of the United Nations in the field under consideration should be that of an international centre responsible for regrouping, supervising, co-ordinating and stimulating the activities for the unification of international law already being carried out by existing intergovernmental and non-governmental organizations, which were open to all States desiring to take part in their work and were perfectly adequate to the task. It therefore agreed that the United Nations should be given a new and constructive role in the field of private international law, but it could not help feeling some misgivings in connexion with the proposed establishment of a United Nations commission on international trade law; it feared that such a body would have a very natural tendency to supplement and then to supplant the role that should be retained by the existing all-inclusive institutions.

**Excerpt from the summary record of the 949th meeting
(6 December 1966)**

1. Mr. ABDULLA (Sudan) ... His delegation appreciated the efforts that were being made by all organizations, particularly The United Nations Conference on Trade and Development (UNCTAD), but it felt that those organizations were not sufficiently specialized for the task of harmonizing the law of international trade on a world-wide scale. It agreed with the Secretary-General that the time had come for the United Nations to take an active and guiding role in the progressive harmonization of international trade law in a manner that would not interfere with the valuable activities of the existing organizations.

2. The harmonization of international trade law would help his country and other developing countries to formulate their laws in a way that would enable them to reach the standard of the more fully developed countries and to enjoy the advantages in trading with those countries that they had lacked in the past. His country therefore attached special importance to the proposal for the establishment of a United Nations commission on international trade law. The new commission would serve to narrow the gap between the legal practices of countries with centrally planned economies and those of countries with free enterprise economies and would help both the developed and the developing countries to gain a better understanding of the legal problems arising in their international trade relations. It would not be easy to do away with the existing practices of those two groups, but because of the close contacts between highly qualified experts from all countries, it should be possible to establish better mutual understanding and, consequently, a closer co-ordination of international trade practices.

4. Mr. PIRADOV (Union of Soviet Socialist Republics) ... considered that the time had come for the United Nations to play a more active part in the legal regulation of international trade. Trade was an important factor in economic development, social progress and the development of international understanding. There had always been a direct connexion between the Soviet Union's efforts to achieve peaceful coexistence and its attempts to develop trade relations with all countries regardless of their social and economic systems or levels of development. As a result of economic expansion by the socialist countries and decolonization, conditions were now favourable for the development of world trade, which in turn could help to promote peaceful coexistence.

5. There were still, however, many artificial obstacles to the development of trade, due principally to the activities of monopolies, neo-colonialism, the existence of closed economic groupings and certain irregularities left over from the cold war. The recommendations of UNCTAD on the normalization of international trade were being put into effect very slowly. There were also legal barriers created by the lack of uniform rules on technical procedures and contracts. Trade relations were traditionally regulated by domestic law, which differed considerably from

State to State. Attempts to unify and harmonize trade law had therefore been made by many international bodies, including the Economic Commission for Europe (ECE) and The Council for Mutual Economic Aid (COMECON). The General Conditions of Delivery of Goods issued by the latter body in 1958 to replace a multiplicity of bilateral arrangements had passed into the national law of all COMECON member States. Other intergovernmental and non-governmental organizations, such as the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law also dealt with the problem. But their activity was usually conducted on a regional basis without the necessary co-ordination. It was time, therefore, for new efforts to achieve harmonization and unification, in which the United Nations should play a leading role. In doing so, it would be acting in accordance with Article 3, paragraph 3, Article 13 and Chapters IX and X of the Charter. It should be entrusted with co-ordination of all activities in the field and could itself make a direct contribution ...

6. Mr. RESICH (Poland) said that the progressive development of the law of international trade was essential for the establishment of peaceful and normal relations between nations in conformity with the Charter. Currently, international trade was hampered by a number of difficulties caused by the existence of different systems of law. That was particularly apparent in the free enterprise States, some of which followed the Roman system of law, whereas others were based on Anglo-Saxon or Germanic law. In addition, those States often belonged to different economic blocs. One of the duties of international trade law, therefore, should be to unify the principles observed within that group of States. Another duty should be to unify the principles observed among the socialist countries, which were based on new legislative systems. Still a third duty should be to unify the principles governing trade relations between the free enterprise States and the socialist States—a task that should be made easier by the fact that the new legislative systems of the socialist States allowed for broader international relations. In that connexion, he noted that the Secretary-General, in his report (see A/6396, para. 22), had quoted the following statement by the Polish jurist, Professor Henryk Trammer: "the law of external trade of the countries of planned economy does not differ in its fundamental principles from the law of external trade of other countries, such as, e.g., Austria or Switzerland". A further task would be to make it possible for the developing countries to accept that system of international trade law by having it meet their current requirements and offer none of the difficulties connected with the complicated legal systems of the developed countries.

7. Efforts to unify international trade law could take the form of multilateral conventions, such as the Geneva Conventions on the unification of the law relating to bills of exchange (1930) and those establishing a uniform law relating to cheques (1931), which were binding on

States, or of collections of trade customs and practices, such as those prepared by the International Chamber of Commerce (ICC), which were not binding. In his opinion, unification should be sought preferably through international agreements, inasmuch as that was the only way in which peremptory legal norms could be unified. The United Nations could play an important part in that effort by promoting the conclusion of multilateral agreements aimed at the unification of trade law.

10. Mr. YASSEEN (Iraq) said that international trade, which was becoming increasingly important, had long since crossed political borders and currently depended on more than one juridical order. The progressive development of the law of international trade, with a view to adapting it to reality, was therefore an obvious necessity. Accordingly, his delegation fully supported the Secretary-General's suggestion for the establishment of a United Nations Commission of International Trade Law. There was no existing organization, either within or outside the United Nations, that was equipped to deal with international trade law on a truly world-wide basis. He fully appreciated the excellent work being done by UNIDROIT and the Hague Conference on Private International Law but pointed out that those organizations were still far from being as representative as the United Nations. A commission appointed by the United Nations, in which all countries could participate, would be able to ensure close co-operation among all United Nations bodies concerned with trade problems, particularly UNCTAD and the Economic and Social Council. The task of that commission should be twofold: to serve as a co-ordinating body and to formulate uniform rules of trade law. In performing its function as a co-ordinating body, it would have to take into account the work being done by other governmental and intergovernmental organizations in the same field and find a common denominator between them. In formulating rules of international trade law, on the other hand, its task would be of a creative rather than a co-ordinating nature; it would have to fill the gaps in the existing law on the subject. He noted that the Secretary-General had stated (see A/6396, para. 228) that the question of whether, and to what extent, the commission would deal with unification of conflict rules, in addition to unification of substantive rules, might be for the commission itself to consider at the appropriate time. His delegation, however, had already expressed the view, which was shared by the delegation of Hungary, that the commission's work would be incomplete if it failed to deal with unification of conflict rules, inasmuch as differences between States were bound to arise whenever there were conflicts of law. In conclusion, he hoped that the commission's work of unification would reflect the legal systems of both the developed and the developing countries and thus contribute to the establishment of a truly international, if not universal, system of international trade law.

11. Mr. SINCLAIR (United Kingdom) ... [said that] the report described the real contribution of UNIDROIT and the Hague Conference on Private Inter-

national Law, the important progress made by the United Nations family of organizations on certain specific topics, both on a world-wide and on a regional level, and the work of regional intergovernmental organizations and of non-governmental organizations. The work of the non-governmental organizations concerned with international trade law had an importance which could not be overestimated. International custom was one of the principal sources of the law of international trade. It had been defined as consisting of commercial practices so widely used that business men expected their contracting partners to conform to them. The other main source of the law of international trade was international legislation — either international conventions or uniform laws for direct incorporation into national legislation.

12. The diversity and range of the activities described in the report seemed to suggest a real need for steps to co-ordinate them. That was the primary purpose that the proposed United Nations commission on international trade law could most suitably fulfil. There were already a number of formulating agencies currently engaged in detailed projects, and the proposed commission would want to make maximum use of their services ...

13. A valuable function that the proposed commission could perform would be to promote a wider recognition of the advantages to be obtained from the harmonization and unification of the law of international trade. It could inject a new sense of purpose and urgency into the work being carried out and could encourage Governments to focus their attention on those problems. It was the hope of his delegation that as a result those Governments which had not so far participated in the work of existing formulating agencies would be encouraged to do so.

14. He wished, however, to sound a note of caution. In this field, quick and easy results were not to be expected. As paragraphs 196-199 of the report indicated, unification among States having broadly similar legal and economic systems was easier to obtain than unification on a world-wide scale. Although it should be possible to promote wider acceptance of international conventions, unification inevitably involved changes in national laws difficult to bring about. Attempts to achieve unification on a world-wide scale might result in a document that simply set forth the different views. ...

16. Mr. HOUBEN (Netherlands) said that the need to simplify and facilitate international commercial relations had long been recognized, ... [and that] it was important that the development of the law of international trade should not lag behind technical progress and material achievements ...

18. ... The work being done in the development of international trade law by the United Nations and by other intergovernmental organizations was in need of greater co-ordination. His Government agreed that the United Nations was best suited to bring about

improvements in international co-operation, if only by functioning as an international clearing house ...

19. ... His delegation considered it absolutely necessary to establish the closest possible ties between the proposed commission and UNIDROIT and similar agencies. So that the commission might avail itself of all the expert knowledge that the existing agencies had assembled and avoid overlapping of activities, representatives of the organizations concerned should take part in all discussions in which topics for study were selected ...

20. ... The proposed commission should have the function of promoting the adoption of conventions and laws and the codification and wider acceptance of practices, as provided in subparagraph 8 (c) of the draft resolution. The commission could perform an important task by participating in the effort to secure wider participation in existing international conventions. He referred in particular to the 1964 Convention relating to a Uniform Law on the International Sale of Goods (Corporeal Movables) and the 1964 Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (Corporeal Movables), which had been signed by twelve countries. It seemed entirely possible for the commission to participate closely in the activities envisaged in Recommendation No. II adopted by the Diplomatic Conference on the unification of law governing the international sale of goods, held at The Hague in 1964, according to which UNIDROIT should establish a committee for the purpose of reviewing the operation of the uniform law and preparing recommendations for any conference of revision, or, in the event of the convention not having come into force by 1 May 1968, of considering what further action should be taken to promote the unification of law on the international sale of goods. Perhaps at that stage consideration could be given to harmonizing the 1964 Conventions with the 1955 Convention on the Law Applicable to International Sales of Corporeal Movables. Considerable progress could be made with regard to both 1964 Conventions if the proposed commission were to encourage wider participation in them. As Professor Tunc had said, those Conventions would render appreciable service in all parts of the world, and because the law governing internal sales was too deeply rooted in each nation's law of obligations for there to be any hope of unifying it in the foreseeable future except at a regional level, for the time being one must be content with the acceptance by different nations of a uniform law that would govern international transactions while their internal transactions continued to be governed by municipal law. ...

...

22. Mr. ROSENNE (Israel) ... The new organ would in many respects be comparable to some of the functional commissions established by the Economic and Social Council. Unlike the International Law Commission, it would not be a body of independent experts but would consist of experts representing States. His delegation considered that the correct approach, although it hoped the new commission would be able

to evolve a method of work comparable to that of the International Law Commission ...

23. As the International Law Commission itself had pointed out (see A/6396, para. 5), it would not be appropriate for it to become directly responsible for work in the field under discussion. That did not mean, however, that it could never deal with a branch of general international law having a direct bearing on the law of international trade if that branch came within the scope of a topic it was considering. For example, the topic of the most-favoured-nation clause, which it had been suggested the International Law Commission might take up, might be found to have a special connexion with international commercial arrangements, although as a general topic it was far wider in scope than international trade. The establishment of the new commission, therefore, should not mean that the International Law Commission was barred from dealing with the topic. However, the proposed method of work of the new commission and the fact that its main task would be co-ordination should provide a sufficient safeguard in such cases.

24. The establishment of a commission on international trade law would not mean any lessening of the competence of the intergovernmental organizations already operating in the field, particularly UNIDROIT and the Hague Conference on Private International Law. The proposed commission should work in close collaboration with such bodies, refraining from interference in their normal activities and procedures and making the fullest use of their experience and facilities, especially with regard to the task outlined in subparagraph 227 (c) of the report. That applied particularly to organizations with which the United Nations was already collaborating on topics other than the item under discussion. Such an approach might cut the cost of the new commission considerably and help to avoid duplication, waste and confusion. In stating those views, he had in mind the general principle that what was needed was not a new academic organ but a practical body created to meet an evident need ...

25. ... It would be appropriate for the new commission to report to the General Assembly, either annually or as occasion required, and for its reports to be allocated to the Sixth Committee for examination. It did not accept the view that the Committee was limited to questions of public international law, however defined. Incidentally, his delegation could not accept the definition of international law as law imposed by an international legislator in paragraph 24 of the Secretary General's report. Nor did it accept the view that the non-legal aspects of international trade carried such weight that the reports of the proposed commission might be allocated to another Main Committee. In appropriate circumstances, of course, other Main Committees might be invited to consider aspects of a given question, either alone or in conjunction with the Sixth Committee. UNCTAD, too, might be concerned with various aspects of the law of international trade and should have an opportunity to express its views on the work being done, and even some power of initiative with regard to the work of the new commission ...

27. Mr. YANGO (Philippines) ... The progressive unification and harmonization of the law of international trade would be advantageous on a world-wide basis, but particularly to developing countries.

...

28. ... [International trade] In the past, ... had encountered difficulties with such matters as export procedures, payments for its exports, customs procedures, foreign capital investment, joint ventures, and licensing of patents. Unification and harmonization of the law in such areas would therefore be of great interest to it.

29. Some progress in that direction already had been made by such bodies as UNIDROIT and the Hague Conference on Private International Law, and the Latin American countries had their own arrangements under the Treaties of Montevideo and the Bustamante Code. The regional economic commissions had also made a contribution. But the activities of the different bodies needed to be brought into harmony, a task that could best be performed by the United Nations. Countries would be more likely to accept the law of international trade and to ratify and accede to conventions on its various aspects if the United Nations played a role in its formulation. Even more important was the role the Organization could play in interpreting the law after it had been formulated, because unless there was an agreed interpretation the objective of a free flow of trade would not be achieved ...

**Excerpt from the summary record of the 950th meeting
(7 December 1966)**

1. Mr. TSURUOKA (Japan) ...

2. Efforts to harmonize and unify law and practice in international economic life had been made by various organizations, including United Nations bodies and such organizations as the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law. But there had not so far been sufficient co-ordination of their efforts, and participation in them had been limited numerically, geographically or otherwise. It therefore seemed desirable that the United Nations should attempt to survey the field as a whole and co-ordinate the activities of the various organizations.

...

In view of the highly technical and complex nature of the work, therefore, his delegation felt that the best possible solution would be the establishment of a United Nations commission on international trade law, consisting of States representing different types of economies and legal systems and different stages of development, and based on the principle of equitable geographical distribution. Its task would not be an easy one. As pointed out in paragraph 204 of the Secretary-General's report, unification was not necessarily desirable *per se*, but only when there was an economic need and when it would have a beneficial effect on the development of international trade. International trade was actually functioning, and a radical change in applicable law,

even if appropriate in theory, could prove unworkable or confusing or inimical to the further development of trade. Practicability and prudence therefore should be the guiding principles behind the proposed commission's work. Furthermore, care should be taken that the establishment of the commission did not lead to duplication of effort but helped to further the activities of other organizations ...

...

6. Mr. TERCEROS BANZER (Bolivia) ... There had so far been a "legal lag" in the development of international trade law, by comparison with the progress made in economic co-operation and the expansion of international trade. Further efforts must therefore be made to formulate trade law. ... Bolivia considered it essential to supplement the rules of trade policy formulated by the United Nations Conference on Trade and Development (UNCTAD) and the General Assembly with rules of law, which, by definition, would be binding ...

7. There could be no doubt about the need to co-ordinate the work of the proposed United Nations commission with that of other organizations active in the field, whose achievements were generally recognized. Far from duplicating work or dissipating resources, the proposed commission would give added momentum to the activities of the existing agencies and should itself draw on their experience and facilities for the general benefit. He paid tribute to UNIDROIT, the Hague Conference on Private International Law, the International Chamber of Commerce and other formulating agencies for their past achievements. In addition to its co-ordinating role, the new commission should also have powers of formulation. ... It should take steps to prepare and promote the adoption of international instruments, ranging from the formulation of standard clauses and model laws to actual codification, and should concern itself with conventions on specific subjects, uniform acceptance of international trade customs and practices and accession to existing trade conventions ...

...

9. Mr. LANNUNG (Denmark) said that action by the United Nations in the progressive development of the law of international trade would undoubtedly be of great practical importance, from both the legal and the economic points of view. The task, however, was not an easy one. Various international organizations had done and were doing valuable work in the field, but they suffered from certain short-comings. In particular, there had been insufficient co-ordination and co-operation among them, their membership and authority were too limited and there had been too little participation by the developing countries. ...

...

His delegation hoped that the work done by the regional economic commissions and by other international organizations active in the field could be utilized and co-ordinated through the proposed United Nations commission on international trade law, in order to facilitate and promote international trade between free-

enterprise countries and centrally planned economies and between developed and developing countries.

11. Mr. SINHA (India) ... peace must rest on a sound economic foundation and international co-operation based on equality, and the needs of economic development must be intensified. The unification of private law on international trade would contribute to those ends. National law was a reflection of the economic and social system existing in the State concerned, and different systems might therefore yield different legal solutions. All would benefit from a simplification and harmonization of the different legislations, and steps in that direction had already been taken. ...

[His delegation] considered that the commission proposed in the draft resolution should work in the closest co-operation with UNCTAD. Only thus could its objectives be achieved, inasmuch as UNCTAD had primary responsibility for the substantive aspects of the subject. The General Assembly should not act upon the reports of the new commission without first obtaining UNCTAD's views on them.

13. Mr. OGUNDERE (Nigeria) said that the Secretary-General's report showed that there was a real need for the establishment of a permanent United Nations organ that would be responsible for the systematic study of the rules and practices of international trade law, with a view to its progressive development and harmonization. UNIDROIT and the Hague Conference on Private International Law had made useful contributions in that field, but because of their restricted membership, their work and influence were of limited value. Moreover, both lacked that central direction and purpose which in the new pattern of international relations between States could be given only by the United Nations. In order to command the respect of the new countries of Asia and Africa, there was obviously a need for a new United Nations organ that would duplicate, in the legal field, the work so brilliantly begun by UNCTAD in the economic field. To an increasing extent, the developing countries were participating in general multilateral treaties, particularly in the field of trade, on which their plans for economic and social development were, in the last analysis, dependent. With respect to international trade law, those countries could no longer be expected to remain satisfied with the *status quo ante*; trade laws and practices would have to be reviewed and compared by representative experts from all States Members of the United Nations, meeting together in a central forum. The role that the United Nations could play in that respect had been admirably summed up in chapter IV, section 3, of the Secretary-General's report. Some fears had been expressed that the establishment of a United Nations commission on international trade law might spell the doom of the organizations currently engaged in that field, but in his opinion they were groundless; many of those organizations would continue to function as before and would be able, in fact, to provide the commission, with much useful material. Nor would the proposed commission duplicate in any way the work being done by the International Law Commission, in-

asmuch as the latter was primarily engaged in the comprehensive development of international public law and activity of the new commission would be devoted exclusively to the study of international private trade law ...

14. ... The *modus operandi* and general objectives of the new commission should conform to the general pattern set by the International Law Commission. Its work, however, should be directed towards the conclusion of international conventions rather than the formulation of codes. The Economic and Social Council and UNCTAD should also be closely associated with its work, and its reports should be submitted to the General Assembly for consideration by the Sixth Committee.

15. Trade was a universal activity, and the developing countries favoured a universal rather than a regional or subregional approach to the study of trade law. ...

16. Mr. BAL (Belgium) ...

17. If the United Nations was to undertake a concrete programme for the progressive development of trade law, it would clearly have to adopt a realistic method of work. Inasmuch as it was proposed to draft uniform rules that would find broad, practical application, the United Nations would have to consider the general problem of the quasi-legislative authority of its organs; at the same time, it should study in detail, in the particular field of international trade, the specific difficulties inherent in any attempt to state general rules that would be binding on a large number of countries. Several speakers had already stressed the very real economic, political and technological differences that still existed in international relations and obviously had repercussions on private international law. At the 949th meeting, for example, the representative of Iraq had emphasized the importance that must be attached to the question of conflicts of laws. Experience showed that attempts to introduce uniform rules were generally more successful when the latter were to apply in countries situated within the same geographic area or having comparable political and economic systems. In the latter case, however, serious difficulties were encountered with regard to certain parts of the law and that experience should be taken into account in any plans for action on a world level.

18. All efforts to promote the progressive development of trade law should clearly be based on a thorough knowledge of the work and experience of the governmental and non-governmental organizations already active in the field ...

20. Mr. TUERK (Austria) said that the Secretary-General's report clearly outlined the problems to be solved in the field of the progressive development of the law of international trade and contained adequate suggestions for their solution. In particular, it correctly explained the two ways in which the conflicts and divergencies arising from the trade laws of different States could be remedied — by the adoption of conflict of law rules and by the harmonization and unification of substantive rules. Those methods offered good pros-

pects of success, inasmuch as there were hardly any fundamental differences between the main legal systems of the world regarding trade law. But although the report rightly spoke of the universal similarity of the law of international trade, much painstaking effort would still be required to achieve the desired harmonization and unification of that law.

21. A number of organizations were currently engaged in that difficult task and had already done excellent work. Nevertheless, it seemed desirable to provide for the proper co-ordination and supervision of those activities. The creation of an appropriate organ to exercise those functions would also give developing countries a greater chance to participate in the progressive development of that branch of law. The proposed United Nations commission on international trade law would be well fitted to perform those functions, but it should not try to replace the existing agencies that had proved so valuable in the past. The commission, for example, might conceivably have formulating functions that could be more effectively carried out in consultation with existing formulating agencies. Although its membership should be world-wide, that fact should not be permitted to lead to the adoption of compromise texts on the basis of the lowest common denominator.

22. Countries should also be encouraged to adopt the international trade instruments already in existence, inasmuch as that would seem the best way to achieve greater harmonization and unification in the field of trade law. ...

24. ... He drew the Committee's attention to the problem of the scarcity of qualified personnel within national administrations and parliaments able to devote itself to the work of incorporating international trade instruments into the national legal order. If no remedy was found for that problem, the progressive development of the law of international trade might be a rather slow process in spite of the establishment of the commission.

25. Mr. ALCIVAR (Ecuador) observed that in spite of the discretion granted it under article 1 of its Statute, the International Law Commission had been compelled by circumstances to limit its work to the field of public international law and had, as yet, been unable to enter the field of private international law. The imperative needs of the atomic age, however, had at last forced the United Nations to take action in the sphere of private international law, particularly with respect to trade law. Undoubtedly, the most serious world problem was the great economic imbalance between the northern and the southern hemispheres and between the developed and the developing countries. That problem affected all spheres of social life, and law was no exception. As trade had developed throughout the centuries, it had always reflected the characteristics of the prevailing economic system, and the legal relations arising out of those systems had had to be adapted to the realities of each age.

26. Mankind was living in an era of extreme contradictions, and although the world, as the result of

technical progress, was becoming ever smaller, human solidarity had not yet been achieved, and the international community based on justice was still remote. Moreover, international co-operation was still viewed as a form of charity, and the world could be described as a Greek tragedy in which there were few actors and many extras. That situation had led to a decline in the prices of primary commodities, which were the main, often the sole, source of income of the developing countries. At the same time the latter had to pay the high prices imposed on them by the industrialized countries for their goods. There was, however, a growing realization that international trade should be carried out along just lines and in a spirit of universality ...

...

28. Mr. SECARIN (Romania) said that trade was one of the most important and dynamic elements of co-operation among States. The need for the international exchange of goods was objective—a product of the uninterrupted growth of national economies and the improvement of means of transportation and communication. Moreover, the newly independent nations, which had finally secured permanent sovereignty over their national wealth and natural resources, had an interest in developing their international trade in order to obtain, through exchange, the funds needed to build their economies and to ensure a better life for their peoples. The development of international trade, therefore, would meet real needs of the international community; it would be an essential contribution to the common efforts to create, in the words of Article 55 of the United Nations Charter, conditions of stability and well-being, which were necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. Accordingly, it was necessary to establish rules that would facilitate commercial transactions on the basis of respect for sovereignty and national independence, non-intervention in the domestic affairs of States and mutual benefit ...

29. The Sixth Committee must take advantage of the experience gained in the past. One of the reasons for the relatively modest results so far obtained was the multiplicity and diversity of trade relations. The legal aspects of those relations must be dealt with in a more organized manner, according to an appropriate system, and there must be close co-operation between legal specialist and experts in the science and technique of trade. The United Nations should undertake that task ...

...

35. Mr. BREWER (Liberia) ... Account must be taken of the different economic and legal systems in the contemporary world, and consideration must be given to existing conditions in developing countries. Consequently, his delegation was glad that the question of the progressive development of the law of international trade had been included in the agenda of the General Assembly.

...

38. Although the question was of immense importance to developing countries, it was not intended to favour them over developed countries. Its principal effect would be to enable the developing nations to help formulate the regulations governing the activities in which they were involved. Those nations would no longer have to accept and have their actions governed by rules in the formulation of which they had had no say. Inasmuch as commerce affected all nations and was so basic, international co-operation in accordance with Article 13 (b) of the Charter could surely be achieved with respect to the laws governing commerce.

39. The unification and harmonization of international trade law was an appropriate subject for United Nations action, because of the Organization's over-all role in maintaining international peace and security, achieving international co-operation and acting as a centre for harmonizing the actions of nations. The United Nations was in the best position to reduce conflicts and divergencies arising from the laws of different States in matters of international trade. Accordingly, his delegation supported the establishment of a United Nations commission with responsibility for co-ordinating activities in that field. The proposed commission, as a United Nations organ, could easily co-ordinate its activities with those of UNCTAD, with a view to arriving at the practical solutions which the developing countries, in particular, were seeking in international trade. His delegation urged States that were not members of UNIDROIT and the Hague Conference on Private International Law to take a closer look at those organizations and at the various conventions prepared by them.

40. Mr. KEARNEY (United States of America) ...

41. One of the most striking aspects of the law of international trade was the substantial similarity among the legal systems concerned, irrespective of economic, political and social differences. The legal systems of the common law countries and the civil law countries, of free and planned economies and of highly developed and less developed States all had much in common in that field. As Professor Trammer of Poland had observed, international trade specialists of all countries spoke a common language.

42. Because of that similarity it was feasible to seek to harmonize and unify the rules governing commercial relationships of a private law nature involving countries with different legal systems. Because the conflicts and divergencies arising from the laws of different States were not too deep or wide, the problem could be approached in the spirit of guarded optimism and confidence reflected in paragraph 222 of the Secretary-General's report. Nevertheless, the difficulties confronting efforts to unify the law of international trade should not be underestimated ...

...

44. Even under the favourable conditions of one language, one basic legal approach, one economic and social system and one country, the working out of uniform laws and authoritative statements of law had proved to be a complicated and laborious task, re-

quiring expert and technical assistance, on the one hand, and the accommodation of varying viewpoints, on the other. When the same task was undertaken on an international scale, the difficulties were multiplied. On the basis of its relatively limited international experience in the unification of private law, his country was convinced that the unification of law on an international basis required the use of all available expertise in the field and very heavy reliance upon the past experience of organizations active in that sphere.

45. The Secretary-General's report reflected a full appreciation of the problems that the proposed United Nations commission on international trade law would encounter; as the representative of Hungary had said (946th meeting), it raised and answered the correct questions. The main problem was not a lack of organizations to do the technical work in the field but a lack of purposeful co-operation among formulating international agencies. That lack of co-operation existed, not because goodwill or the desire to co-operate was wanting, but because there was no institutional bridge across which information could be freely exchanged and resources shared. In their comments (A/6396/Add.1) both UNIDROIT and the Hague Conference on Private International Law had stressed the need for co-ordination. Consequently, his Government was in complete accord with the conclusion in paragraph 221 of the Secretary-General's report that the United Nations could perform a useful role in promoting contracts and encouraging collaboration between the existing formulating agencies, and in exercising some kind of supervision over their activities and initiating unifying measures. Furthermore, his Government thought that the United Nations might assume the function of suggesting, where appropriate, revision of existing draft instruments, that had failed to command the widest possible support because they were too narrowly based and of future draft instruments that failed to take full account of the need to develop a world law of trade. A body of experts, such as the proposed United Nations commission on international trade law, might be uniquely qualified to draw on the work of regional agencies or regional trade arrangements, for example, and to make specific suggestions and recommendations to existing agencies having primary formulating responsibilities. On the basis of its own experience with the technical difficulties involved, his Government did not think that the proposed commission should itself engage to any considerable extent in drafting uniform laws.

46. The supervisory and co-ordinating roles suggested for the proposed commission differed from the formulating role of the International Law Commission because the two fields of work differed. Public international law was of enormous importance but limited dimensions. Furthermore, it was at a youthful stage; it had not hardened into a number of separate subjects, each with its own requirements of specialized knowledge and experience. Nor was it divided by the interposition of differing national legal systems or frozen by legislative enactments. Thus the formulating process could be entrusted to a single body of experts. In the

law of international trade, however, it was impossible for any man to have sufficient knowledge and experience to deal with all problems that rose. Unification in such varying fields of law as sales, agency, negotiable instruments, shipping and rail transport could be handled successfully only by experts in those fields. In unifying the law of international trade, it was advisable therefore to rely for expert assistance upon organizations such as UNIDROIT and the Hague Conference on Private International Law, which had developed specialized knowledge over the years and had experience in formulating uniform rules of law on an international basis.

47. Utilization of existing machinery for the work of formulation would not lessen the responsibilities of the members of the proposed commission. In fact, it might increase those responsibilities, for it meant that the work of developing a world-wide body of trade law could be carried forward on a far broader basis than if the commission were to attempt the task alone. The members of the commission would have to be very highly qualified in the area of private international law, for they would have to co-ordinate and review the work of specialists. Every effort must be made, therefore, to secure the highest level of talent for the commission . . .

**Excerpts from the summary record of the 951st meeting
(8 December 1966)**

6. Mr. MANNER (Finland) stressed the far-reaching importance of the decision that the General Assembly was called upon to take with respect to the development of the law of international trade. It was extremely important, for the developing countries in particular, that the basic legal concepts governing international trade should be clarified and harmonized. Countries with a long tradition in the application of private international law were now in a position to share their experience and knowledge of the subject for the benefit of all . . .

7. In his delegation's opinion, there were certain matters that would have to remain outside the new commission's sphere of activity, in particular, those parts of private international law which were not covered by the definition given in paragraph 10 of the Secretary-General's report and those topics which concerned the development of public international law. Although it was conceivable that the International Law Commission itself might deal with private international law some day, there would, for quite some time, remain a kind of no-man's-land between the respective fields of work of the proposed commission and the International Law Commission. There was no organized or co-ordinated activity for codification of the subjects within that no-man's-land. In his opinion, it was with respect to those subjects that the next step in United Nations action to further the progressive development of international law would have to be taken. In that connexion it might be desirable to consider possible ways of facilitating and promoting the work of the International Law Commission, and it also would be necessary to find out how the work already carried out

by various other international bodies with a view to the study and development of international law relating to the matters coming within that intermediate field could be used for the codification of those matters.

8. To illustrate his idea he cited the example, also mentioned in the Secretary-General's report, of the law of international rivers, in connexion with which the International Law Association had unanimously adopted the Helsinki Rules in August 1966. Although for a long time it had been theoretically possible to distinguish between the rules of international law based upon treaties and conventions and the principles of customary international law derived from rules, such as the Helsinki Rules, which were drawn up by a non-governmental body, the field of international law currently contained such a wealth of declarations, resolutions and other instruments that in view of their very different nature and impact one might have good reason to ask what significance should be given to rules and recommendations that had not been adopted by any official international body. That was a question which might concern the future work of the proposed commission and, in his delegation's view, due consideration should be given to it.

9. Mr. YANKOV (Bulgaria) said that his delegation was quite prepared to support the draft resolution in document A/C.6/L.613/Rev.1, inasmuch as it reflected the importance of the problem under consideration and the need for suitable action to promote the progressive development of international trade law. Because international trade, based on the equality and mutual benefit of the parties, was a prime factor in co-operation between States and offered the most constructive meeting-ground, free from tension and conflicts, every effort to promote it should be studied and encouraged . . .

...

13. The establishment of the list of possible topics for research was [...] an important task; his delegation wished to stress that the complexity of the problem called for reflection and that decisions that would have serious long-term effects should not be taken lightly. The future commission should be satisfied at first with a relatively unambitious programme and should view its functions realistically, so that it might achieve practical nature of every-day international trade law problems. . . .

...

22. Mr. JACOVIDES (Cyprus) . . .

23. The establishment of a United Nations commission on international trade law would fill a twofold gap: first, in the activities of the United Nations, which had never dealt specifically with the matter, and second, in the activities of the organizations active in the field, whose work, however praiseworthy, lacked precisely that element of universality that a United Nations organ could give. The number of members suggested by the Secretariat seemed sensible, on condition, of course, that the principle of equitable geographical distribution was observed and that there was adequate representation of the world's principal economic and legal systems and of developed and developing countries.

24. Mr. WERSHOF (Canada) ... If the work of the commission was organized within the reasonable limits suggested by the Secretary-General in his report, it could render service to all countries. But he must insist that it would be unfortunate, and even disastrous, if it left the field of international trade law and ventured into that of public international law.

29. Mr. KIBRET (Ethiopia) ...

30. It was obvious that the activities of the commission, the subjects to be studied and their order of priority should be determined essentially by the need to expand international trade. It would be pointless to draw up a convention and a uniform law if they did not appreciably benefit international trade. There was no doubt that the main unification effort should be directed towards the technical branches of trade law and that in that connexion the commission would gain by working in liaison with UNCTAD and requesting its comments and recommendations.

31. If, moreover, the commission was to do useful work, it was essential that it should not be confined to co-ordination but should be authorized to revise existing texts and draw up new ones. As a United Nations organ representing the international community it would be in the best position to carry out that task. In doing so, it would be no more likely to duplicate the activities of the existing bodies with which it would have to collaborate than the International Law Commission had been when it had drawn up its draft articles on the law of treaties on the basis of previous work. Like any work of harmonization and unification, the activities it was proposed to entrust to the new commission could not fail to produce new ideas, which, in their turn, would reveal the need to revise the texts drawn up by less representative bodies. Thus, for example, the General Conditions for the Supply and Erection of Plant and Machinery for Export should make it an obligation for the exporter to guarantee a regular supply of spare parts, and no such obligation has been stated explicitly to date ...

33. Mr. VAN LARE (Ghana) said that his country attached importance to the unification and harmonization of international trade law. Africa was seeking the widest possible markets for its goods, and the expansion of international trade was thus of the greatest interest to all African States ...

**Excerpts from the summary record of the 952nd meeting
(8 December 1966)**

4. Mr. KOITA (Mali) said that the Secretary-General's report was a significant contribution to the development of co-operation in trade and, thus, to friendly relations among States, regardless of their economic and legal systems. Existing world conditions made it more than ever necessary to develop a universally applicable international trade law that would serve in the interests of the international community.

5. The unification of international trade law was particularly important for the young countries that had recently been freed from colonial domination. For decades, trade practices had been established to the detriment of the countries under colonial rule, and his delegation was therefore pleased that the Secretary-General's report stressed the need for active participation by the developing countries in the formulation of an international trade law which would help to protect the still vulnerable economies of the less developed countries and to harmonize trade relations among them.

7. ... His delegation hoped that conflicts of laws resulting from differences in the trade legislation of different States would gradually be eliminated, for they were an obstacle not only to the development of world trade but to the establishment of an international law concerning friendly relations and co-operation among States.

8. Mr. ATAM (Turkey) ... The objectives of the proposed commission could be achieved both by the removal of obstacles to international trade and by the formulation of uniform laws. It must be remembered, however, that States had other objectives, too, such as the protection of their own economies.

9. The proposed commission would have to take advantage of the knowledge and experience acquired by the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law. How that would be done was a matter of great importance for the commission.

**Excerpts from the summary record of the 955th meeting
(14 December 1966)**

6. Mr. CORREA (Mexico) said that the first task of the future United Nations commission on international trade law, which was to have the twofold function of making international trade more flexible through the unification and harmonization of national laws relating to commercial transactions and of preventing national laws from constituting obstacles to the opening of new trade channels, would be to promote the adoption by States of model laws or uniform laws. That very difficult task had been carried on with only very partial success by the existing organizations, which had lacked, in particular, the authority that the new commission would enjoy as an organ of the United Nations General Assembly ...

12. Mr. MALLA (Nepal) ...

13. The function of the United Nations would be primarily one of co-ordination; nevertheless it would be desirable for the Organization not to be confined to a co-ordinating role but to be authorized to perform formulating functions as well. It would undoubtedly be easier to make progress in harmonizing national laws when the countries involved had similar socio-economic systems. But many countries that were geographically and ideologically far removed from one

another nevertheless engaged in trade. The legal obstacles to trade between such countries could be reduced only by harmonization on a world-wide scale. Progress in that field had always met with considerable difficulties, and those difficulties — both those inherent in any attempt to bring about changes in national legislation and practices and those due to the limited membership and authority of existing formulating agencies — had not yet been removed. Moreover, traditional international law, which had come into being at a time when the developed countries with free-enterprise economies had dominated the world political scene, was

passing through a period of readjustment rendered inevitable by the need to take account both of changed values and of the legitimate aspirations of the developing countries. The latter were most anxious to see the legal obstacles to their international trade eliminated and considered that the steps taken to promote the progressive development of international trade law should seek, above all, to strengthen international trade on the basis of co-operation among States and in conformity with the principle that economic development in general should benefit the whole international community.

D. Report of the Sixth Committee on agenda item 88*

I. INTRODUCTION

1. At the request of the Hungarian People's Republic, the item entitled "Consideration of steps to be taken for progressive development in the field of private international law with a particular view to promoting international trade" was considered by the General Assembly at its twentieth session. On the basis of the report and recommendations of the Sixth Committee,¹ the General Assembly at its 1404th plenary meeting, on 20 December 1965, adopted resolution 2102 (XX). The operative part of that resolution reads as follows:

"The General Assembly,

"...

"1. Requests the Secretary-General to submit to the General Assembly at its twenty-first session a comprehensive report including:

"(a) A survey of the work in the field of unification and harmonization of the law of international trade;

"(b) An analysis of the methods and approaches suitable for the unification and harmonization of the various topics, including the question whether particular topics are suitable for regional, interregional or world-wide action;

"(c) Consideration of the United Nations organs and other agencies which might be given responsibilities with a view to furthering co-operation in the development of the law of international trade and to promoting its progressive unification and harmonization;

"2. Decides to include in the provisional agenda of its twenty-first session an item entitled 'Progressive development of the law of international trade'."

2. At its 1415th plenary meeting, on 24 September 1966, the General Assembly decided to include item 88 entitled "Progressive development of the law of international trade" in the agenda of its twenty-first session and to allocate it to the Sixth Committee.

3. The Sixth Committee considered the item at its

946th to 953rd and 955th meetings, on 2, 5 to 9 and 14 December 1966.

4. The Sixth Committee had before it a report of the Secretary-General on this subject (A/6396 and Add.1 and 2), which was submitted in accordance with operative paragraph 1 of General Assembly resolution 2102 (XX). This report was prepared by the Office of Legal Affairs of the United Nations Secretariat on the basis of a preliminary draft elaborated by Professor Clive M. Schmitthoff of the City of London College, whose services had been retained by the Secretary-General for this purpose, and in consultation with the following experts: Dra. Margarita Argués (Argentina), Dr. Taslim O. Elias (Nigeria), Professor Gyula Eörsi (Hungary), Professor Willis L. Reese (United States) and Professor Mustafa Kamil Yasseen (Iraq).

5. In accordance with the agreement reached during the debate in the Sixth Committee at the twentieth session of the General Assembly, the Secretary-General held consultations with some organs and units of the United Nations, the specialized agencies and other inter-governmental and non-governmental organizations. The International Law Commission advised the Secretary-General that, in view of its many activities and responsibilities and considering its extensive agenda, the Commission did not consider that it would be appropriate for it to undertake responsibilities in the field of the law of international trade. In addition, consultations were carried out with the Secretariat units most directly concerned with responsibilities in this field. The draft report was sent for comments to the secretariat of the United Nations Conference on Trade and Development (UNCTAD), the Department of Economic and Social Affairs, the Centre for Industrial Development and the United Nations regional economic commissions.

6. The Secretary-General sent the draft report for comments to the following specialized agencies: the International Bank for Reconstruction and Development, the Inter-Governmental Maritime Consultative Organization and the International Civil Aviation Organization. Consultations were also carried out with other inter-governmental and non-governmental organi-

¹ See *Official Records of the General Assembly, Twentieth Session, Annexes*, agenda item 92, document A/6206.

* *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 88, document A/6594.

zations, namely: the International Institute for the Unification of Private Law, the Hague Conference on Private International Law, the International Chamber of Commerce and the United International Bureaux for the Protection of Intellectual Property.

7. Some of the suggestions received from the above-named United Nations organs, Secretariat units and other institutions were incorporated in the report. Certain observations submitted by the Hague Conference on Private International Law and by the International Institute for the Unification of Private Law, being of a general nature, were published as an addendum to the Secretary-General's report (A/6396/Add.1). The text of a resolution on the subject adopted by the Council of the International Chamber of Commerce was reproduced as document A/6396/Add.2. The Secretary-General of the International Institute for the Unification of Private Law and the Secretary-General of The Hague Conference on Private International Law attended the meetings of the Sixth Committee at which the present item was discussed, and each made a statement at the 946th meeting of the Committee.

8. Chapter I of the report of the Secretary-General contained an analysis of the concept of the term "law of international trade" and explained the two legal techniques which have been used to reduce the conflicts and divergencies arising from various national laws in matters relating to international trade, i.e., the establishment of rules regulating the conflict of laws and the harmonization of substantive rules. Chapter II consisted of a survey of the work in the field of harmonization and unification of international trade law, by inter-governmental organizations, by regional inter-governmental organization and groupings and by non-governmental organizations. Chapter III contained an analysis of the methods, approaches and topics which were considered suitable for the progressive harmonization and unification of the law of international trade. The final chapter of the report, chapter IV, dealt with the prospective role of the United Nations in this field; it presented a picture of the progress and shortcomings of the work done and recommended action to remedy the existing shortcomings. In particular it expressed the view that the General Assembly might wish to consider the possibility of establishing a new commission which might be called the United Nations commission on international trade law for the purpose of furthering the progressive development of the law of international trade.

II. PROPOSALS

9. Argentina, Ceylon, Chile, Colombia, Cyprus, Czechoslovakia, Ecuador, Ghana, Greece, Honduras, Hungary, India, Nepal, Nigeria, Panama, Sudan, the United Arab Republic, the United Republic of Tanzania, Uruguay and Yugoslavia submitted a draft resolution (A/C.6/L.613). Subsequently, Cameroon, Jamaica, Spain and Venezuela (A/C.6/L.613/Add.1) and Bolivia, Romania and the United States of America (A/C.6/L.613/Add.2) added their names to the list of sponsors. In the preamble of the draft resolution the

General Assembly would *inter alia*, refer, to the report of the Secretary-General on the progressive development of the law of international trade; reaffirm its conviction that conflicts and divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade; note the efforts made by inter-governmental organizations towards the harmonization and unification of international trade law; note that progress in this area had not been commensurate with the importance and urgency of the problem; express its conviction that it would be desirable for the United Nations to play a more active role in this field; note that such action would be properly within the scope and competence of the Organization under Articles 1 (3) and 13, and Chapters IX and X of the Charter; recall that UNCTAD had a particular interest in promoting the establishment of rules furthering international trade; and recognize that there is no existing United Nations organization which is both familiar with this subject and able to devote sufficient time to work in the field. The operative part of the draft resolution read as follows:

"1. *Decides* to establish a United Nations Commission on International Trade Law which shall have for its object the promotion of the progressive harmonization and unification of the law of international trade.

"Organization of the United Nations Commission on International Trade Law

"2. The United Nations Commission on International Trade Law shall consist of [eighteen] [twenty-one] [twenty-four] [thirty] States, elected by the General Assembly for a term of six years, provided however, that of the members elected at the first election, the terms of [six] [seven] [eight] [ten] members shall expire at the end of two years and the terms of [six] [seven] [eight] [ten] other members at the end of four years.

"3. In electing the members of the Commission, the General Assembly shall be guided by the principle of equitable geographical distribution and shall have due regard to the principle that in the Commission as a whole an adequate representation of countries of free enterprise and centrally planned economies, and of developed and developing countries, should be assured.

"4. The representatives of members of the Commission shall be appointed by member States in so far as possible from amongst persons of eminence in the field of the law of international trade.

"5. Retiring members shall be eligible for re-election.

"6. The Commission shall normally hold one regular session a year at the [Headquarters of the United Nations] [European Office of the United Nations].

"7. The Secretary-General shall make available to the Commission appropriate staff and facilities required by the Commission to fulfil its task.

"Functions"

"8. The Commission shall further the progressive harmonization and unification of the law of international trade by

"(a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them;

"(b) Promoting wider participation in existing international conventions, and wider acceptance of existing model and uniform laws;

"(c) In collaboration, where appropriate, with the organizations operating in this field, preparing, and promoting the adoption of, new international conventions, model laws and uniform laws, and the codification and wider acceptance of international trade terms, provisions, customs and practices;

"(d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the laws of international trade;

"(e) Collecting and disseminating information on national legislation and modern legal developments in the field of the law of international trade;

"(f) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;

"(g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade;

"(h) Taking any other action it may deem useful to fulfil its functions.

"9. The Commission shall submit an annual report, including its recommendations, to the General Assembly, and the report shall be submitted simultaneously to the United Nations Conference on Trade and Development for comments. Any such comments or recommendations which the United Nations Conference on Trade and Development or the Trade and Development Board may wish to make, including suggestions on topics for inclusion in the work of the Commission, shall be transmitted to the General Assembly in accordance with the relevant provisions of General Assembly resolution 1995 (XIX). Any other recommendations relevant to the work of the Commission which the United Nations Conference on Trade and Development of the Trade and Development Board may wish to make shall be similarly transmitted to the General Assembly.

"10. The Commission may consult with any international or national organization, scientific institution and individual expert, on any subject entrusted to it if it considers that such consultation might assist it in the performance of its functions.

"11. The Commission may establish appropriate working relationships with intergovernmental organizations and international non-governmental organizations concerned with the progressive harmonization and unification of the law of international trade."

10. Following informal consultations, the sponsors of draft resolution A/C.6/L.613, joined by Guatemala, Italy, Mali and Turkey, submitted a revised version of the draft resolution (A/C.6/L.613/Rev.1). Later, Malawi and the Netherlands (A/C.6/L.613/Rev.1/Add.1) and Belgium and Syria (A/C.6/L.613/Rev.1/Add.2) joined the sponsors of the revised draft resolution. In this revision: (a) the reference to "conflicts and" was deleted from the third preambular paragraph, so that the resolution would provide for the General Assembly to reaffirm "its conviction that divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade"; (b) the wording of operative paragraph 3 was changed to provide that the General Assembly should, in the election of the members of the commission, be guided by the principle of equitable geographical distribution "with due regard to the adequate representation of the principal economic and legal system of the world and of developed and developing countries"; (c) operative paragraph 8 (c) was changed to read as follows: "Preparing and/or promoting the adoption of new international conventions, model laws and uniform laws, and the codification and wider acceptance of international trade terms, provisions, customs and practices in collaboration, where appropriate, with the organizations operating in this field;"; (d) a reference to "case law" was introduced into operative paragraph 8 (e) so that it would read as follows: "Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;"; (e) the language in operative paragraph 10 was modified to read: "10. The Commission may consult with or request the services of any international or national organization, scientific institution and individual expert, on any subject entrusted to it if it considers that such consultation or services might assist it in the performance of its functions".

11. As a result of further discussions among the sponsors, a second revision (A/C.6/L.613/Rev.2) was submitted by the sponsors. In accordance with the second revised version of the draft resolution, the General Assembly would (a) express, in the second preambular paragraph, its appreciation for the report of the Secretary-General (A/6396 and Add.1 and 2); (b) add the following, as a new third preambular paragraph: "Considering that international trade co-operation among States is an important factor for promoting friendly relations and consequently for the maintenance of peace and security", and (c) provide for reversal of the order of the former third and fourth preambular paragraphs. The operative part of the second revised draft resolution (A/C.6/L.613/Rev.2) read as follows:

"I"

"1. *Decides* to establish a United Nations Commission on International Trade Law which shall have for its object the promotion of the progressive harmonization and unification of the law of international trade.

"II

"Organization and functions of the United Nations Commission on International Trade Law

"2. The United Nations Commission on International Trade Law shall consist of . . . States, elected by the General Assembly at its twenty-second session for a term of six years. In electing the members of the Commission, the General Assembly shall observe the following distribution of seats:

- "(a) . . . from African States;
- "(b) . . . from Asian States;
- "(c) . . . from Eastern European States;
- "(d) . . . from Latin American States;
- "(e) . . . from Western European and other States.

"3. Of the members elected at the first election, the terms of . . . members shall expire at the end of three years. The President of the General Assembly shall select these members within each of the five groups of States referred to in the preceding paragraph by drawing lots.

"4. The members elected at the first election shall take office on 1 January 1968. Subsequently, the members shall take office on 1 January of the year following each election.

"5. In electing the members of the Commission, the General Assembly shall be guided by the principle of equitable geographical distribution with due regard to the adequate representation of the principal economic and legal systems of the world, and of developed and developing countries.

"6. The representatives of members on the Commission shall be appointed by Member States in so far as possible from amongst persons of eminence in the field of the law of international trade.

"7. Retiring members shall be eligible for re-election.

"8. The Commission shall normally hold one regular session a year. It shall, if there are no technical difficulties, meet alternately at the United Nations Headquarters and the United Nations Office at Geneva.

"9. The Secretary-General shall make available to the Commission appropriate staff and facilities required by the Commission to fulfil its task.

"10. The Commission shall further the progressive harmonization and unification of the law of international trade by:

- "(a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them;
- "(b) Promoting wider participation in existing international conventions, and wider acceptance of existing model and uniform laws;
- "(c) Preparing and/or promoting the adoption of new international conventions, model laws and uniform laws, and the codification and wider acceptance of international trade terms, provisions, customs

and practices, in collaboration, where appropriate, with the organizations operating in this field;

"(d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;

"(e) Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;

"(f) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;

"(g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade;

"(h) Taking any other action it may deem useful to fulfil its functions.

"11. The Commission shall bear in mind the interests of all peoples and particularly those of developing countries in the extensive development of international trade.

"12. The Commission shall submit an annual report, including its recommendations, to the General Assembly, and the report shall be submitted simultaneously to the United Nations Conference on Trade and Development for comments. Any such comments or recommendations which the United Nations Conference on Trade and Development or the Trade and Development Board may wish to make, including suggestions on topics for inclusion in the work of the Commission, shall be transmitted to the General Assembly in accordance with the relevant provisions of General Assembly resolution 1995 (XIX). Any other recommendations relevant to the work of the Commission which the United Nations Conference on Trade and Development or the Trade and Development Board may wish to make shall be similarly transmitted to the General Assembly.

"13. The Commission may consult with or request the services of any international or national organization, scientific institution and individual expert, on any subject entrusted to it if it considers that such consultation or services might assist it in the performance of its functions.

"14. The Commission may establish appropriate working relationships with intergovernmental organizations and international non-governmental organizations concerned with the progressive harmonization and unification of the law of international trade.

"III

"15. *Requests* the Secretary-General, pending the election of the Commission, to carry out the preparatory work necessary for the organization of the work of the Commission and, in particular (i) to invite Member States to submit in writing before 1 July 1967, taking into account in particular the report of the Secretary-General (A/6396), comments on a programme of work to be undertaken by the Commission in discharging its functions under para-

graph 10 of this resolution and (ii) to request similar comments from the organs and organizations referred to in paragraph 10 (f) and (g) and in paragraph 14 of this resolution;

"16. *Decides* to include an item entitled 'Election of the members of the United Nations Commission on International Trade Law' in the provisional agenda of the twenty-second session of the General Assembly."

12. As a result of additional informal consultations, the sponsors of draft resolution A/C.6/L.613/Rev.2 submitted a third revision (A/C.6/L.613/Rev.3) on 13 December, paragraphs 1, 2, 3 and 5 of which read as follows:

"The General Assembly,

"...

"1. *Decides* to establish a 'United Nations Commission on International Trade Law' which shall have for its object the promotion of the progressive harmonization and unification of the law of international trade.

"II

"Organization and functions of the United Nations Commission on International Trade Law

"2. The United Nations Commission on International Trade Law shall consist of twenty-nine States, elected by the General Assembly for a term of six years, except as provided in paragraph 3 of this resolution. In electing the members of the Commission, the General Assembly shall observe the following distribution of seats:

"(a) Seven from Asian States;

"(b) Five from Asian States;

"(c) Four from Eastern European States;

"(d) Five from Latin American States;

"(e) Eight from Western European and other States.

"3. Of the members elected at the first election to be held at the twenty-second session of the General Assembly, the terms of fourteen members shall expire at the end of three years. The President of the General Assembly shall select these members within each of the five groups of States referred to in the preceding paragraph by drawing lots.

"...

"5. In electing the members of the Commission, the General Assembly shall also have due regard to the adequate representation of the principal economic and legal systems of the world, and of developed and developing countries."

13. In the course of the consideration of the third draft (A/C.6/L.613/Rev.3), it was orally agreed by the representative of Colombia on behalf of the sponsors that a more logical sequence of the operative paragraphs could be achieved by certain changes in the order thereof: (a) specifically, it was proposed to transpose the content of operative paragraph 5 without the opening words: "In electing the members of the Commission" to the end of operative paragraph 2; (b) operative

paragraphs 6-16 would be renumbered 5-15;² (c) the consequential changes would be made in renumbered operative paragraph 14 (former paragraph 15). Furthermore, the sponsors orally agreed to the following new wording of renumbered operative paragraph 9 (c) (formerly paragraph 10 (c)):

(c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws, and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field;"

It was also agreed to replace, in the Spanish version of operative paragraph 3, the words "*elegirá por sorteo*" by the words "*designará por sorteo*".

14. Following the submission of the original draft resolution (A/C.6/L.613 and Add.1 and 2), the Secretary-General presented for the consideration of the Sixth Committee a statement of the administrative and financial implications (A/C.6/L.615) of that draft resolution. Upon the submission of the third revised draft resolution (A/C.6/L.613/Rev.3), he presented a statement of the administrative and financial implications (A/C.6/L.615/Rev.1) of that revised draft resolution.

III. DISCUSSION

15. Numerous representatives expressed appreciation of the initiative taken by the Hungarian delegation at the twentieth session of the General Assembly with respect to the progressive development of the law of international trade, and welcomed the report of the Secretary-General. The assistance which had been provided by Mr. Schmitthoff in the preparation of the report was recognized as very valuable. The consultations carried on by the Secretary-General with individual experts, with organs of the United Nations and with institutions active in the field had been extremely profitable in the view of numerous representatives.

16. A great number of representatives supported the conclusions of the report, particularly that the United Nations should take an active part in efforts towards the harmonization and unification of the law of international trade. Many representatives stated that this could most appropriately be done by the establishment of a United Nations organ such as the one described in the Secretary-General's report.

17. Several representatives pointed out the extreme importance for developing countries of devoting attention to and participating in efforts towards the progressive development of the law of international trade. One representative pointed out that since developing countries were not able, by force of circumstance, to participate in numerous international institutions active in this field, their participation in such a United Nations organ as had been proposed was particularly important to them. It was pointed out in

² In drawing up the final text of the draft resolution adopted by the Sixth Committee, the numbering of the paragraphs in the three operative parts was changed to conform to United Nations editorial style.

this connexion that the commission could be instrumental in improving trade practices that had evolved in the past, which benefited developed countries at the expense of the developing countries.

Functions of the proposed commission

18. Certain representatives considered that the proposed commission should be authorized to take action both in the area of the harmonization and unification of substantive rules relating to trade law and in the field of conflict of law rules. Other representatives considered that the work of the proposed commission should be primarily in the field of the unification of substantive rules.

19. With respect to the specific role that such a commission should perform, representatives expressed varying views. Certain representatives considered that the commission should engage in co-ordinating and centralizing the efforts of organizations already active in the field under discussion, and in promoting the wider acceptance of instruments already in existence. Others considered that the commission should in addition, where appropriate, perform the function of formulating new international instruments designed to further the development of international trade law. One representative expressed the view that the proposed commission should, in its initial endeavours, concentrate on co-ordinating efforts of institutions already active in the progressive development of international trade law, before considering the possibility of initiating new measures in this field while bearing in mind the financial implications.

20. Certain representatives pointed out that the proposed commission's functions did not include the adoption of instruments binding upon States, but that in this connexion a clarification of the scope of the authority would be welcome. In response to this request, it was stated on behalf of the sponsors that under its terms of reference the commission would work out model laws and uniform laws which could then serve as standards which States might wish to consider as guides in the development of their own national legislation, and formulate draft international instruments to which States would give their consideration.

21. Reference was made by several representatives to the fact that the functions of the commission should not be interpreted to imply that it could engage in activities affecting sectors of private international law which fall outside the laws governing commercial transactions, or that it could take steps having a bearing on international trade relations governed by public law.

Collaboration with other organizations

22. It was pointed out by several representatives that, should the commission engage in formulating activities, it should maintain close liaison with the inter-governmental and non-governmental organizations already active in the field in order to avoid overlapping and duplication. In the latter connexion, numerous representatives pointed out the valuable contributions to the progressive development of international trade law which had been made by the International Institute for the Unification of Private Law and the Hague Con-

ference on Private International Law. One representative made reference to the fact that both of these institutions had welcomed the establishment of the proposed commission. The Sixth Committee agreed to express its appreciation to these organizations for the major contributions they had made to the work in this field, for their valuable comments on the report of the Secretary-General and for the participation of their representatives in the debates of the Committee. It was suggested that appropriate working relationships should be established between the proposed commission and these two organizations, since the experience and expertise which they had acquired would be of great assistance to the proposed commission. In connexion with the relationship to be established with the two organizations, attention was drawn to the agreements concluded between the Secretary-General of the United Nations and the secretaries-general of those organizations pursuant to Economic and Social Council resolution 678 (XXXVI) of 3 July 1958, and it was suggested that a similar method be followed in connexion with the work of the new commission.

23. Various representatives made mention of the participation of their respective countries in inter-governmental and non-governmental organizations active in this field. Reference was made, for instance, to the Council for Mutual Economic Assistance, the Council of Europe, the Nordic Council, the Asian-African Legal Consultative Commission, the European Economic Community, the Inter-American Council of Jurists, the European Free Trade Association, the United Nations regional economic commissions and to the International Chamber of Commerce and the International Maritime Committee. In this connexion it was pointed out that experience gained by States in the course of participation in such institutions and organizations was relevant to the work of the proposed commission to promote the progressive unification and harmonization of international trade law. It was also pointed out by several representatives that the experience gained by States in seeking to reduce the divergencies existing within their own legal systems could also be relevant to proposed efforts on the international level, which were far more complicated owing to numerous facts such as the variety of legal concepts and languages.

24. During the final stage of the Committee's deliberations and in view of the new formulation of operative paragraph 9 (c) of the draft resolution (A/C.6/L.613/Rev.3), as described in paragraph 13 of the present report, a question arose as to whether the collaboration in operative paragraph 9 (c) mentioned was to be understood to apply to all of the activities of the proposed commission described in that subparagraph. It was agreed by the representatives who spoke on this issue and on behalf of the sponsors that there was no doubt that the collaboration referred to applied to all the activities of the commission enumerated in the subparagraph under discussion.

Relationship with the United Nations Conference on Trade and Development (UNCTAD)

25. The Committee discussed the relationship which should exist between work relating to the progressive

development of the law of international trade and UNCTAD. Several representatives welcomed the provision in the draft resolution for the submission to UNCTAD of the reports prepared by the commission for the General Assembly since this would assure the required liaison with the Assembly and would assist the commission in reaching solutions which were attuned to the practical needs of the commercial world. Reference was made to paragraph 14 of General Assembly resolution 1995 (XIX), of 30 December 1964, providing that when the Conference was not in session, the Trade and Development Board carries out its functions.

Size and composition of the proposed commission and terms of office of its members

26. In commenting on the size of the proposed commission, representatives expressed various preferences. However, they agreed that it should be small enough not to be unwieldy but large enough to allow for a membership in which States of the various legal and socio-economic systems and States in different stages of development would be represented. One representative suggested, for example, that there should be between twenty-four and thirty members; another believed that the size should be between twenty-four and twenty-seven; yet another suggested a commission with from eighteen to twenty-four members, while another considered that from twenty-one to twenty-eight would be an appropriate solution. It was pointed out by one representative that it should be borne in mind that in certain areas there existed a scarcity of persons who are highly qualified legal experts in the technical and complicated field of international trade law.

27. Upon the introduction of draft resolution A/C.6/L.613/Rev.3, it was pointed out on behalf of the sponsors that the formulation of the revised version and the distribution of seats provided for in operative paragraph 2 thereof had been arrived at in a spirit of co-operation and compromise. It was hoped that although the solution proposed in the revised draft resolution was not completely satisfactory to all delegations, it could be adopted in the same spirit of co-operation. Several representatives spoke in support of this view.

28. The representative of Ecuador, speaking on behalf of his delegation and the delegations of Bolivia, Colombia, El Salvador, Honduras, Jamaica, Mexico, Panama, Paraguay and Uruguay, and the representative of Venezuela on his own behalf, wished to record the conviction of these delegations that the distribution of seats in the proposed commission, as provided for in the draft resolution A/C.6/L.613/Rev.3, did not reflect an equitable geographical distribution in respect of the States of Latin America and did not take into consideration the realities of that region. The Ecuadorian representative stated that, in the view of the delegations for which he spoke, the disposition of seats suggested in the draft resolution should not constitute a precedent in respect of any future organs which might be established. The representatives of the African and Asian States, of the Eastern European States and of

the Western European and other States, giving the views of their groups or of their own delegations, expressed their belief that the representation provided for was not an equitable solution, but that in the interest of progress and in view of the contribution which the proposed commission could be expected to make, they would accept the compromise reached. Another representative expressed the hope that the resolution would not be interpreted with undue rigidity.

29. The draft resolution (A/C.6/L.613/Rev.3) provided that the term of office of the members of the commission should be six years, but in order to ensure a degree of continuity in its membership, a rotation system was envisaged whereby the terms of office of fourteen of the members elected at the first election — which would take place at the twenty-second session of the General Assembly — would expire at the end of three years; the President at that session would select those fourteen members by drawing lots. The sponsors of the draft resolution agreed that the fourteen members with three-year terms would be selected as follows from the different groups:

- Four from African States;
- Two from Asian States;
- Two from Eastern European States;
- Two from Latin American States; and
- Four from Western European and other States.

Place of meeting

30. With respect to the place where the sessions of the proposed commission should be held, various representatives expressed divergent opinions. It was pointed out, on the one hand, that reasons of economy and efficiency would call for a choice of the United Nations Headquarters as the seat of the proposed commission; on the other hand, some argued it might be more appropriate and convenient if Geneva were chosen. A number of delegations remarked that the commission should co-operate closely with UNCTAD whose headquarters are located in Geneva, in view of the importance of that organ and of its interest in promoting the establishment of rules furthering international trade. It was finally agreed, as a compromise solution, that if there were no technical difficulties, the commission should meet alternately at United Nations Headquarters and the European Office of the United Nations at Geneva.

Time of election of members of the commission and of its first session

31. Certain representatives expressed the need for careful preparation in connexion with the establishment of the proposed commission. Some representatives suggested that prior to the establishment of the commission preliminary studies should be made of subjects which might be suitable for consideration by the commission. Other representatives stated that there was a need for careful consideration of the financial implications of the establishment at the appropriate time of such a commission. It was suggested by several representatives that prior to the election of the members of the commission it might be wise to provide for further study

and consultation. It was suggested in this connexion that were such a course to be adopted, during the intervening period the Secretariat could make administrative and technical preparations for the work of the commission and might circulate requests to Member States and to inter-governmental and non-governmental institutions for suggestions as to the work programmes of the commission.

32. It was finally agreed that the commission would be elected by the General Assembly at its twenty-second session and that, pending the election, the Secretary-General would be requested to carry out the preparatory work necessary for the organization of the work of the commission.

IV. VOTING

33. At its 955th meeting, on 14 December 1966, the Sixth Committee adopted unanimously revised draft resolution A/C.6/L.613/Rev.3), as amended (see para. 13 above). The representatives of Cameroon, Dahomey, Ecuador, France, Ghana, Greece, Mexico, Nepal, Somalia, Venezuela and the United States of America explained their votes.

Recommendation of the Sixth Committee

[The text of the recommendation, not included here, was adopted without change by the General Assembly as the resolution which appears in section E below.]

E. The establishment of UNCITRAL: General Assembly resolution 2205 (XXI) of 17 December 1966

2205 (XXI). ESTABLISHMENT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

The General Assembly,

Recalling its resolution 2102 (XX) of 20 December 1965, by which it requested the Secretary-General to submit to the General Assembly at its twenty-first session a comprehensive report on the progressive development of the law of international trade,

Having considered with appreciation the report of the Secretary-General on that subject,¹

Considering that international trade co-operation among States is an important factor in the promotion of friendly relations and, consequently, in the maintenance of peace and security,

Recalling its belief that the interests of all peoples, and particularly those of developing countries, demand the betterment of conditions favouring the extensive development of international trade,

Reaffirming its conviction that divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade.

Having noted with appreciation the efforts made by intergovernmental and non-governmental organizations towards the progressive harmonization and unification of the law of international trade by promoting the adoption of international conventions, uniform laws, standard contract provisions, general conditions of sale, standard trade terms and other measures,

Noting at the same time that progress in this area has not been commensurate with the importance and urgency of the problem, owing to a number of factors, in particular insufficient co-ordination and co-operation between the organizations concerned, their limited membership or authority and the small degree of participation in this field on the part of many developing countries,

Considering it desirable that the process of harmonization and unification of the law of international trade should be substantially co-ordinated, systematized and accelerated and that a broader participation should be secured in furthering progress in this area,

Convinced that it would therefore be desirable for the United Nations to play a more active role towards reducing or removing legal obstacles to the flow of international trade.

Noting that such action would be properly within the scope and competence of the Organization under the terms of Article 1, paragraph 3, and Article 13, and of Chapters IX and X of the Charter of the United Nations,

Having in mind the responsibilities of the United Nations Conference on Trade and Development in the field of international trade,

Recalling that the Conference, in accordance with its General Principle Six,² has a particular interest in promoting the establishment of rules furthering international trade as one of the most important factors in economic development,

Recognizing that there is no existing United Nations organ which is both familiar with this technical legal subject and able to devote sufficient time to work in this field.

I

Decides to establish a United Nations Commission on International Trade Law (hereinafter referred to as the Commission), which shall have for its object the promotion of the progressive harmonization and unification of the law of international trade, in accordance with the provisions set forth in section II below;

II

Organization and functions of the United Nations Commission on International Trade Law

1. The Commission shall consist of twenty-nine States, elected by the General Assembly for a term of

¹ Official Records of the General Assembly, Twenty-first Session, Annexes, agenda item 88, documents A/6396 and Add.1 and 2.

² See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No.: 64.II.B.11), annex A.I.1, p. 18.

six years, except as provided in paragraph 2 of the present resolution. In electing the members of the Commission, the Assembly shall observe the following distribution of seats:

- (a) Seven from African States;
- (b) Five from Asian States;
- (c) Four from Eastern European States;
- (d) Five from Latin American States;
- (e) Eight from Western European and other States.

The General Assembly shall also have due regard to the adequate representation of the principal economic and legal systems of the world, and of developed and developing countries.

2. Of the members elected at the first election, to be held at the twenty-second session of the General Assembly, the terms of fourteen members shall expire at the end of three years. The President of the General Assembly shall select these members within each of the five groups of States referred to in paragraph 1 above, by drawing lots.

3. The members elected at the first election shall take office on 1 January 1968. Subsequently, the members shall take office on 1 January of the year following each election.

4. The representatives of members on the Commission shall be appointed by Member States in so far as possible from among persons of eminence in the field the law of international trade.

5. Retiring members shall be eligible for re-election.

6. The Commission shall normally hold one regular session a year. It shall, if there are no technical difficulties, meet alternately at United Nations Headquarters and at the United Nations Office at Geneva.

7. The Secretary-General shall make available to the Commission the appropriate staff and facilities required by the Commission to fulfil its task.

8. The Commission shall further the progressive harmonization and unification of the law of international trade by:

- (a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them;
- (b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws;
- (c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field;
- (d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;
- (e) Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;
- (f) Establishing and maintaining a close collabora-

tion with the United Nations Conference on Trade and Development;

(g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade;

(h) Taking any other action it may deem useful to fulfil its functions.

9. The Commission shall bear in mind the interests of all peoples, and particularly those of developing countries, in the extensive development of international trade.

10. The Commission shall submit an annual report, including its recommendations, to the General Assembly, and the report shall be submitted simultaneously to the United Nations Conference on Trade and Development for comments. Any such comments or recommendations which the Conference or the Trade and Development Board may wish to make, including suggestions on topics for inclusion in the work of the Commission, shall be transmitted to the General Assembly in accordance with the relevant provisions of Assembly resolution 1995 (XIX) of 30 December 1964. Any other recommendations relevant to the work of the Commission which the Conference or the Board may wish to make shall be similarly transmitted to the General Assembly.

11. The Commission may consult with or request the services of any international or national organization, scientific institution and individual expert, on any subject entrusted to it, if it considers such consultation or services might assist it in the performance of its functions.

12. The Commission may establish appropriate working relationships with intergovernmental organizations and international non-governmental organizations concerned with the progressive harmonization and unification of the law of international trade.

III

1. *Requests* the Secretary-General, pending the election of the Commission, to carry out the preparatory work necessary for the organization of the work of the Commission and, in particular:

(a) To invite Member States to submit in writing before 1 July 1967, taking into account in particular the report of the Secretary-General,³ comments on a programme of work to be undertaken by the Commission in discharging its functions under paragraph 8 of section II above;

(b) To request similar comments from the organs and organizations referred to in paragraph 8 (f) and (g) and in paragraph 12 of section II above;

2. *Decides* to include an item entitled "Election of the members of the United Nations Commission on International Trade Law" in the provisional agenda of its twenty-second session.

*1497th plenary meeting,
17 December 1966.*

³ *Official Records of the General Assembly, Twenty-first Session, Annexes, agenda item 88, documents A/6396 and Add.1 and 2.*

III. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Note by the secretariat of UNIDROIT on the progressive development of the law of international trade	<i>Official Records of the General Assembly, Twenty-first Session, Annexes</i> , agenda item 88, document A/6396/Add.1
Text of resolution adopted by the Council of the International Chamber of Commerce on the need to associate the ICC with the commission's work on a consultative basis	<i>Ibid.</i> , document A/6396/Add.2
Note by the Secretary-General on the financial implications of the establishment of a United Nations commission on international trade law	<i>Ibid.</i> , document A/C.5/1107
Summary records of the debate in the Sixth Committee on agenda item 88 (Progressive development of the law of international trade)	<i>Ibid.</i> , <i>Twenty-first Session, Sixth Committee</i> , 947th to 955th meetings

I. THE FIRST SESSION (1968)

A. Report of the Commission*

CONTENTS

	<i>Page</i>
INTRODUCTION	72
<i>Chapter</i>	<i>Paragraphs</i>
I. ESTABLISHMENT AND TERMS OF REFERENCE OF THE COMMISSION	1-7
A. Establishment and composition of the Commission	1-3
B. Terms of reference given to the Commission by the General Assembly in resolution 2205 (XXI)	4-7
II. ORGANIZATION OF THE FIRST SESSION	8-19
A. Opening, duration and attendance	8-13
B. Election of officers	14
C. Agenda	15
D. Rules of procedure	16-18
E. Preparatory documents	19
III. GENERAL DEBATE	20-38
A. General observations	21-24
B. Relationship between the Commission and other bodies	25-28
1. Relationship to the United Nations Conference on Trade and Development and to other United Nations organs	25-27
2. Relationship to non-United Nations bodies	28
C. Programme of work	29-34
1. Collection and dissemination of information concerning international trade law	29-30
2. Discussion of topics and priorities	31-34
D. Organizational matters	35-37
1. The principle of consensus	35
2. Working arrangements	36-37
E. Conclusion of the general debate	38
IV. PROGRAMME OF WORK OF THE COMMISSION	39-56
A. Selection of topics and priorities	39-44
B. Organization of work and methods	45-55
1. Methods of work for priority topics	45-51
2. Establishment of a working group	52-55
C. Working relationships and collaboration with other bodies	56
V. ESTABLISHMENT WITHIN THE SECRETARIAT OF A REGISTER OF ORGANIZATIONS AND A REGISTER OF TEXTS	57-63
VI. TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL LAW	64-68
VII. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION	69-73
A. Legislation on shipping	69
B. Chairman's visit to the second session of the United Nations Conference on Trade and Development	70-71
C. Date of the second session	72
D. Adoption of the report of the Commission	73
<i>Annexes</i>	
I. List of participants	83
II. Resolution 2205 (XXI), adopted by the General Assembly at its 1497th plenary meeting on 17 December 1966	86
III. List of documents of the first session of the Commission	86

* Report of the United Nations Commission on International Trade Law on the work of its first session (1968). *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216)*.

INTRODUCTION

The present report, the first report of the United Nations Commission on International Trade Law, is submitted to the General Assembly in accordance with Assembly resolution 2205 (XXI) of 17 December 1966. As provided in the same resolution this report is submitted simultaneously to the United Nations Conference on Trade and Development for comments.

The Commission adopted the present report at its twenty-fifth meeting, on 26 February 1968. The report covers the first session of the Commission, which was held at United Nations Headquarters from 29 January to 26 February 1968.

CHAPTER I

ESTABLISHMENT AND TERMS OF REFERENCE OF THE COMMISSION

A. *Establishment and composition of the Commission*

1. The United Nations Commission on International Trade Law was established by resolution 2205 (XXI) adopted by the General Assembly on 17 December 1966. The resolution provided that the Commission would consist of twenty-nine States elected by the Assembly, with the following distribution of seats:

- "(a) Seven from African States;
- "(b) Five from Asian States;
- "(c) Four from Eastern European States;
- "(d) Five from Latin American States;
- "(e) Eight from Western European and other States."

The Assembly, the resolution stated, should also have due regard, in the election, to the adequate representation of the principal economic and legal systems of the world, and of the developed and developing countries. The representatives of members on the Commission were to be appointed by member States, in so far as possible, from among persons of eminence in the field of international trade law.

2. The resolution also provided that members would be elected for a term of six years. However, the term of fourteen of the members elected at the first election would expire after a three-year term. The President of the General Assembly would, by drawing lots, select the fourteen members who would serve for three years within each of the groups of States referred to above. Members elected at the first election would take office on 1 January 1968. Thereafter, members elected to the Commission would take office on 1 January of the year following their election.

3. On 30 October 1967, at its twenty-second session, the General Assembly elected the following twenty-nine States as members of the Commission:

Argentina	Mexico
Australia	Nigeria*
Belgium	Norway*
Brazil	Romania
Chile*	Spain
Colombia*	Syria
Congo (Democratic Republic of)	Thailand*
	Tunisia

Czechoslovakia*
France*
Ghana*
Hungary
India
Iran
Italy*
Japan*
Kenya

Union of Soviet Socialist Republics*
United Arab Republic*
United Kingdom of Great Britain and Northern Ireland*
United Republic of Tanzania*
United States of America

The term of office of all members began, in accordance with resolution 2205 (XXI), on 1 January 1968. The fourteen members indicated by asterisks were selected by the President of the General Assembly to serve for a term of three years ending on 31 December 1970. The other fifteen members will serve for the full term of six years ending on 31 December 1973.

B. *Terms of reference given to the Commission by the General Assembly in resolution 2205 (XXI)*

4. The Commission was established by the General Assembly to promote the progressive harmonization and unification of the law of international trade by:

- (a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them;
- (b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws;

(c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field;

(d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;

(e) Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;

(f) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;

(g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade;

(h) Taking any other action it may deem useful to fulfil its functions.

5. The Commission is required to bear in mind the interests of all peoples, and particularly those of developing countries, in the extensive development of international trade. An annual report, including the recommendations of the Commission is to be submitted to the General Assembly and, simultaneously, to the United Nations Conference on Trade and Development for comments.

6. The Commission may consult with or request the services of any international or national organization, scientific institution and individual expert on any

subject entrusted to it, if it considers that such consultation or services might assist it in the performance of its functions.

7. Appropriate working relationships with inter-governmental organizations and international non-governmental organizations concerned with the progressive harmonization and unification of the law of international trade may be established by the Commission.

CHAPTER II ORGANIZATION OF THE FIRST SESSION

A. Opening, duration and attendance

8. The first session of the Commission was opened on 29 January 1968 on behalf of the Secretary-General by Mr. Constantin A. Stavropoulos, the Legal Counsel of the United Nations, at the United Nations Headquarters, New York. In the course of the session, which ended on 26 February 1968, the Commission held twenty-five meetings.

9. All the States members of the Commission were represented at the session.

10. The United Nations Conference on Trade and Development was represented by an observer.

11. The following specialized agencies were represented by observers: Food and Agriculture Organization of the United Nations (FAO), International Bank for Reconstruction and Development (IBRD), International Labour Organisation (ILO) and the International Monetary Fund (IMF).

12. The following other inter-governmental organizations were represented by observers: Council of Europe, Commission of European Communities, Hague Conference on Private International Law, International Institute for the Unification of Private Law (UNIDROIT), Organization of American States (OAS), United International Bureaux for the Protection of Intellectual Property (BIRPI).

13. The following international non-governmental organizations were represented by observers: International Chamber of Commerce (ICC) and International Juridical Organization for Developing Countries (IJO).

B. Election of officers

14. At its 1st and 2nd meetings, on 29 and 30 January 1968, the Commission elected the following officers:

Chairman: Mr. Emmanuel Kodjoe Dadzie (Ghana);
Vice-Chairman: Mr. Anthony Mason (Australia);
Vice-Chairman: Mr. Laszlo Reczei (Hungary);
Vice-Chairman: Mr. Shinichiro Michida (Japan);
Rapporteur: Mr. Jorge Barrera Graf (Mexico).

Prior to the election of the Vice-Chairmen at its 2nd meeting, the Commission decided that it should have three Vice-Chairmen as it deemed it desirable that each of the five groups of States listed in paragraph 1 of section II of General Assembly resolution 2205 (XXI) (see paragraph 1 above) should be represented on the bureau of the Commission.

C. Agenda

15. The agenda of the session as adopted by the Commission at its 2nd meeting was as follows:

1. Opening of session.
2. Election of officers.
3. Adoption of the agenda.
4. Adoption of rules of procedure.
5. Programme of work of the Commission under section II, paragraph 8, of General Assembly resolution 2205 (XXI) including:
 - (a) Selection of topics and priorities;*
 - (b) Organization of work and methods;*
 - (c) Working relationships and collaboration with other bodies.*
6. Date of second session.
7. Adoption of the report of the Commission.

The Commission agreed that its consideration of item 5 of the agenda should begin with a general discussion covering all the sub-headings under that item. Thus sub-headings (a), (b) and (c) would be discussed concurrently, together with any other points members considered as coming within the programme of work of the Commission. It was also agreed that at the end of the general discussion the sub-headings could be dealt with separately.

D. Rules of procedure

16. At its 2nd meeting the Commission decided, on the basis of rule 162 of the rules of procedure of the General Assembly, that the rules relating to the procedure of committees of the General Assembly (rules 98-134), as well as rules 45 and 62, would apply to the procedure of the Commission, until such time as the Commission adopted its own rules of procedure. The Commission noted in this connexion that it had, by its decision to have three Vice-Chairmen, in effect amended rule 105 in its application to the Commission as rule 105 provides for the election of only one Vice-Chairman for each committee of the General Assembly. On matters not covered by the rules relating to the procedure of committees of the General Assembly, it was decided that the Commission would be guided by the general principle that the rules of procedure of the General Assembly would apply *mutatis mutandis* to the Commission as may be appropriate for the performance of its functions.

17. Should the Commission decide at a later stage that it was necessary, it would then adopt its own rules of procedure.

18. The view was expressed by several speakers that every effort should be made to reach all decisions by way of consensus, and that it was only after every effort to reach consensus had been exhausted that decisions should be made by a vote. The Commission agreed that its decisions should as far as possible be reached by way of consensus within the Commission, but that in the absence of a consensus, decisions should be made by a vote as provided for in the rules of procedure relating to the procedure of committees of the General Assembly (see paragraph 35 below).

* Items (a), (b) and (c) to be discussed concurrently.

E. Preparatory documents

19. At the opening of its session the Commission had before it the following documents, submitted by the Secretary-General: First session of the United Nations Commission on International Trade Law (A/CN.9/1); Provisional agenda (A/CN.9/2); Adoption of rules of procedure (A/CN.9/3); Comments by Member States, organs and organizations on the work programme of the Commission (A/CN.9/4 and Corr.1 and Add.2); Analysis of the comments submitted by Member States, organs and organizations on the work programme of the Commission (A/CN.9/4/Add.1); Survey of activities of organizations concerned with the harmonization and unification of the law of international trade (A/CN.9/5); Organization and methods of work (A/CN.9/6 and Corr.1); Collaboration and working relationships with organs and organizations concerned with international trade law (A/CN.9/7). The Commission also had before it the report on the progressive development of the law of international trade (A/6396), which was submitted by the Secretary-General to the General Assembly at its twenty-first session.

CHAPTER III GENERAL DEBATE

20. At its 2nd meeting the Commission began consideration of item 5 of its agenda concerning the programme of work of the Commission. In accordance with the decision taken at its 2nd meeting (see paragraph 15 above), the Commission's consideration of the item commenced with a general debate covering all points of the item; namely, sub-item (a), selection of topics and priorities; sub-item (b), the organization of work and methods; and sub-item (c), working relationships and collaboration with other bodies. The Commission concluded its general debate at its 9th meeting.

A. General observations

21. Many representatives expressed appreciation of the initiative taken by the Hungarian delegation at the twentieth session of the General Assembly, resulting in the establishment of the Commission.

22. There was general recognition that the establishment of the Commission marked the opening of a new and important chapter in the progressive harmonization and unification of the law of international trade. The Commission, whose membership reflected the principal economic and legal systems of the world and the developed and developing countries, was considered to be most suited for the purpose of eliminating divergencies between national systems of law which formed barriers to the development of international trade. While the work facing the Commission was considerable, both in scope and complexity, there were a number of encouraging factors. The unanimous adoption by the General Assembly of resolution 2205 (XXI), which established the Commission, augured well for the work of harmonization and unification. The hope was expressed, by a number of representatives, that out of the co-operative endeavours of the Commission and of other bodies active in the field, a new *lex mercatoria* would in time evolve reflecting the interest of the entire international community.

23. A number of representatives made reference in their statements to the question of the definition of international trade law. Attention was drawn to the definition contained in paragraph 10 of the report of the Secretary-General (A/6396). The law of international trade was there defined as "the body of rules governing commercial relationships of a private law nature involving different countries". Many representatives thought that the definition might be accepted by the Commission as a provisional definition. Some other representatives called attention to problems which they thought should also include questions of a public law nature, if a truly comprehensive definition of trade law was to be established by the Commission.

24. There appeared, however, to be general agreement that it was not essential at this stage of its work for the Commission to formulate a definition of international trade law. It was observed that it was a difficult matter to formulate such a definition; that it was not essential to the adoption of the Commission's programme of work; and however interesting attempts to do so might be from a theoretical point of view, they could give rise to controversies within the Commission.

B. Relationship between the Commission and other bodies

1. Relationship to the United Nations Conference on Trade and Development and to other United Nations organs

25. Several representatives made reference to the close relationship that should obtain between the work of the Commission and the United Nations Conference on Trade and Development (UNCTAD). It was a matter to which, they pointed out, the General Assembly had in resolution 2205 (XXI) given special attention, by providing as follows in section II, paragraph 10, of the resolution:

"The Commission shall submit an annual report, including its recommendations, to the General Assembly, and the report shall be submitted simultaneously to the United Nations Conference on Trade and Development for comments. Any such comments or recommendations which the Conference or the Trade and Development Board may wish to make, including suggestions on topics for inclusion in the work of the Commission, shall be transmitted to the General Assembly in accordance with the relevant provisions of Assembly resolution 1995 (XIX) of 30 December 1964. Any other recommendations relevant to the work of the Commission which the Conference or the Board may wish to make shall be similarly transmitted to the General Assembly."

26. The harmonization, progressive unification and modernization of international trade law have, it was observed, an essential role to play in the development of countries which, together with the expansion of international commerce, constitutes the primary objective of UNCTAD.

27. The valuable work of other United Nations organs in the field of international trade law was also referred to by many representatives who attached importance to close collaboration between the Commission and such other United Nations bodies. They drew attention in particular to the work towards harmonization and unifi-

cation that had been accomplished in certain areas of trade law by the United Nations regional economic commissions.

2. *Relationship to non-United Nations bodies*

28. The considerable efforts that had already been made, and continued to be made, by international and national, world-wide and regional, governmental and non-governmental organizations towards the harmonization and unification of the law of international trade was widely acknowledged in the Commission. The importance attached by the General Assembly, in resolution 2205 (XXI), to close co-operation between the Commission and such organizations was also recalled in several statements. The work of the Commission, it was observed by a number of representatives, should be complementary to the efforts of such organizations and they should be encouraged by the Commission. Attention was drawn to the acknowledgement contained in the Secretary-General's report on the progressive development of the law of international trade (A/6396, chapter II) with respect to the great value of the work done by such organizations. Close co-operation between the Commission and organizations active in the field would avoid duplication of effort and of result, and the Commission, it was stressed, should make full use of such bodies; according to some delegations this should be done particularly when initiating new studies.

C. *Programme of work*

1. *Collection and dissemination of information concerning international trade law*

29. The view was expressed by the great majority of speakers that the collection and dissemination of information pertaining to international trade law was a matter to which the Commission should give very early consideration. The Commission, it was said, could only have a complete view of what should be accomplished in the field of harmonization and unification, and more usefully expend its efforts to that end, if it had a complete picture of what had already been accomplished. The collection and dissemination of such information would ensure, on the part of the Commission as well as on the part of other bodies active in the field, that wasteful duplication of effort and of result was avoided. On the basis of such information, the activities of the Commission and of other bodies could be satisfactorily co-ordinated. The circulation of information would make possible the dissemination on an international level of more exact and complete data on activities under way and on the results already achieved in the field of international trade law.

30. The information to be collected, it was suggested, might include information as to all bodies active in the field of the harmonization and unification of international trade law and information as to all work already accomplished and presently undertaken in the field of harmonization and unification. The collection and dissemination of such information was envisaged as a permanent aspect of the work of the Commission. It was thought that it would be appropriate to entrust this function to the Secretariat, which would act as a clearing-house, or documentation centre, for information on international trade law.

2. *Discussion of topics and priorities*

31. The suggestion was made, in the document submitted by the Secretary-General to the Commission on organization and methods of work (A/CN.9/6), that the Commission might consider different approaches to the matter of establishing a programme of work. One possible approach might be for the Commission to select one specific topic at a time, concentrate on it and pass on to another topic after completing its work on the first. A different approach would be for the Commission to include in its work programme all the subjects falling within the scope of international trade law. The Commission might also consider whether it might not choose a single but broad topic and then take up simultaneously or successively, various aspects of that topic for detailed study. Still a further approach would be for the Commission to choose a number of topics which would not necessarily be related one to another, and establish an order of priority among them. The approach last referred to, it was pointed out, was the one adopted by the International Law Commission at its first session in 1949. The International Law Commission drew up a list of fourteen topics for possible codification, and from that list decided to give priority to the law of treaties, arbitral procedure and the régime of the high seas.

32. Of these different approaches, the Commission, in the course of its general discussion, favoured the selection of certain substantive topics for inclusion in the programme of its future work and the selection of certain topics for priority.

33. In the course of the Commission's general discussion, a number of specific topics were proposed for inclusion in the Commission's programme of future work. Towards the conclusion of the general discussion, it was apparent that there were certain topics on whose inclusion a wide measure of agreement existed in the Commission. The suggestion was accordingly made that all the specific topics that had been proposed might be listed and that each member of the Commission should be requested to express a preference for a specified number of topics, for inclusion in the Commission's programme of work.

34. In a statement to the Commission at the close of the discussion, the Chairman stated that in the course of the debate, certain topics had been proposed for inclusion in the Commission's programme of work: the topics most frequently suggested were international sale of goods, including the promotion of the Hague Conventions of 1964 and 1955 (proposed by fifteen delegations); commercial arbitration, including the promotion of wider acceptance of the 1958 United Nations Convention (proposed by ten delegations); negotiable instruments and banker's commercial credits (proposed by eight delegations); limitations (proposed by six delegations); promotion of wider acceptance of trade terms, general conditions of sale and standard contracts, including "Incoterms"¹ (proposed by five delegations). Other topics, he stated, had also been put forward, including transportation (proposed by four delegations), insurance (proposed by four delegations).

¹ *Incoterms 1953*, international rules for the interpretation of trade terms, prepared by the International Chamber of Commerce.

ions), intellectual property (proposed by two delegations). Finally, certain topics had been suggested by one delegation each; e.g., consequence of frustration; *force majeure* clauses in contracts; elimination of discrimination in international trade including the application of the most-favoured-nation principle; agency; guarantees and securities; and the legalization of documents.

D. Organizational matters

1. The principle of consensus

35. The view was expressed by a number of speakers that the work of the Commission should be based on consensus within the Commission. It was said that such harmonization and unification as had already been achieved in the field of international trade law was the result of consensus, and that there were several instances where, notwithstanding long and patient research and discussion, progress had not been realized because of an absence of consensus. Some representatives, however, while expressing support for the view that every endeavour should be made on the part of members of the Commission to reach consensus in making decisions, pointed out that if consensus was not attainable the Commission would need to abide by its rules of procedure which provided for decisions of the Commission being made by vote. At the 8th meeting of the Commission, the Chairman, in answer to a question raised in debate, stated that he would always endeavour to base decisions on a consensus within the Commission, but if consensus was not obtainable he would, under the rules of procedure of the Commission, have to put the particular issue to the vote.

2. Working arrangements

36. A variety of suggestions were made in the course of the Commission's general discussion as to the procedural arrangements which might be adopted by the Commission in its work. These included the establishment of sessional or inter-sessional committees or working groups; the appointment of special rapporteurs, selected from among the members of the Commission for the study of particular subjects; the retention of consultants; requests to organizations active in the field of the harmonization and unification of international trade law to study and advise the Commission on particular subjects; assignment of certain matters to the Secretariat; and variations of these procedures. The suggestion was also made that the Commission might, usefully, hold an extraordinary session in New York prior to its second regular session in Geneva or establish an inter-sessional working group to meet prior to its second session to ensure that the Commission would at its second session have precisely defined topics on its agenda and be advised as to the work that had already been accomplished with respect to each of such topics and the degree to which other organizations might be in a position to co-operate with the Commission in its work.

37. In the view of several speakers, the particular procedures to be adopted by the Commission would depend to a large degree on the particular topics concerned, and, accordingly, it was desirable that in the matter of procedures of work the Commission should maintain considerable flexibility. The possibility that certain procedures may have financial implications was also a matter to be

taken into account, and where financial implications were involved, the advice of the Secretariat should be obtained.

E. Conclusion of the general debate

38. At the 9th meeting of the Commission, at the end of the Commission's general debate on agenda item 5, the Chairman made a concluding statement. The general debate on agenda item 5, he stated, had served a most useful purpose. The matters were now clear in regard to which a consensus seemed to exist within the Commission as were the matters in regard to which some further discussion seemed desirable with a view to arriving at a consensus. The importance of collaboration with UNCTAD and other United Nations organs had been emphasized, he said, and there appeared to be general recognition within the Commission that, in promoting the harmonization and unification of international trade law, collaboration between the Commission and other bodies working in the field was most desirable. He referred to the variety of suggestions that had been made in the course of the general debate on the selection of topics and priorities and he listed the specific topics that had been proposed for selection (see paragraph 34 above). The determination of the organization and methods of work, he stated, would, in his opinion, depend primarily on the particular topic selected.

CHAPTER IV

PROGRAMME OF WORK OF THE COMMISSION

A. Selection of topics and priorities

39. On the conclusion of the Commission's general debate on its programme of work, the Commission discussed the nature of the list of topics and priorities to be prepared by the Commission. The observation was made by some representatives that there were two approaches possible to the question of the harmonization and unification of international trade law, namely, the unification of substantive rules of law, and the establishment of rules to regulate the conflict of laws. To both of these approaches, they said, consideration should be given. The suggestion was made by other representatives that the list of topics should be divided into short-term and long-term subjects. The Commission, it was observed, might include in its programme of work all items mentioned in the course of the general debate, and then give priority to certain items. Such a list would be provisional, not exhaustive or final, and deletions, additions or changes in priorities would, accordingly, be possible at later sessions of the Commission. The view was also expressed that the list of topics to be prepared by the Commission at the present session should be limited to a few topics which could be dealt with over a short term. It would be inadvisable, it was said, for the Commission at this session to decide on a programme of work for many years to come; and the topics to be examined by the Commission on a long-term basis might be more satisfactorily decided upon later, when more information was available. It was suggested therefore that, while all topics proposed at the present session might be recorded with indications as to the representatives by whom topics were proposed, the Commission itself should at the present session decide to deal only with a few short-term topics.

40. Following informal consultations between members of the Commission, a working paper on a list of topics, priorities and methods of work was submitted to the Commission at its 13th meeting by the delegations of the Democratic Republic of the Congo, Ghana, India, Iran, Japan, Kenya, Nigeria, Syria, Thailand, Tunisia, the United Arab Republic and the United Republic of Tanzania. After certain amendments had been made, the working paper was unanimously accepted by the Commission as a working paper of the Commission. As revised (A/CN.9/L.1/Rev.1), the working paper read as follows:

I. List of topics

During the general debate the following topics were suggested by several delegations. A great number of delegations considered that all these topics should form the future work programme of the Commission. This list of topics is not exhaustive.

- (1) International sale of goods:
 - (a) In general;
 - (b) Promotion of wider acceptance of existing formulations for unification and harmonization of international trade law in this field including the promotion of uniform trade terms, general conditions of sale and standard contracts;
 - (c) Different legal aspects of contracts of sale like:
 - (i) Limitations;
 - (ii) Representation and full powers;
 - (iii) Consequences of frustration;
 - (iv) *Force majeure* clauses in contracts.
- (2) Commercial arbitration:
 - (a) In general;
 - (b) Promotion of wider acceptance of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
- (3) Transportation.
- (4) Insurance.
- (5) International payments:
 - (a) Negotiable instruments and banker's commercial credit;
 - (b) Guarantees and securities.
- (6) Intellectual property.
- (7) Elimination of discrimination in laws affecting international trade.
- (8) Agency.
- (9) Legalization of documents.

II. Priorities

The Commission decided that priority should be given to the following topics:

- (i) International sale of goods;
- (ii) International payments;
- (iii) Commercial arbitration.

III. Methods of work

Methods of work should be suitable to the particular topic under consideration.

- IV. Workings groups, or sub-committees or other appropriate bodies of the Commission, should be appointed during the present session to deal respectively with the topics mentioned in paragraph II and submit their reports to the Commission at its next session.

- V. The Commission endorses the statement of the Chairman that it should take its decisions as far as possible by a consensus, failing which by a vote, as under the rules of procedure for the subsidiary organs of the General Assembly.

41. The representative of the USSR wished it noted, with respect to item (7) of section I of the working paper, that, since some representatives had called attention to the fact that the most-favoured-nation clause was being considered by the International Law Commission, his delegation reserved its position on the inclusion of the most-favoured-nation clause under item (7) pending the further steps to be taken by the International Law Commission concerning the legal aspects of that question.

42. The order in which the three topics were listed in section II of the working paper was not considered by the Commission as implying any order of priority as between the three topics. It was observed in that connexion that the Commission might consider it appropriate that work on the three topics should proceed concurrently.

43. It was understood, with respect to section III of the working paper, that the particular methods of work to be followed by the Commission, including consultations with other bodies active in the progressive harmonization and unification of international trade law, would be decided upon by the Commission in light of the requirements of each particular topic. It was clarified, at the 15th meeting of the Commission and later at its 17th meeting, that section IV of the working paper was to be read as being subject to section III of the working paper. Accordingly, the question of the establishment of working groups or sub-committees or other appropriate bodies, as referred to in section IV, was a matter that would be open for discussion when the Commission considered, in terms of section III of the working paper, the methods of work that would be suitable with respect to a particular topic.

44. The purpose of section V of the working paper, it was also noted, was to acknowledge the understanding reached within the Commission with respect to the principle of consensus as stated by the Chairman at the 8th meeting of the Commission.

B. Organization of work and methods

1. Methods of work for priority topics

45. The Commission decided at its 15th meeting, on 15 February 1968, that a working group should be established to advise the Commission, at its present session, on the methods of work that should be followed in dealing with the three topics given priority; namely, international sale of goods, international payments, and commercial arbitration. The Commission, after considering various suggestions as to the composition of such a working group, decided that the working group should consist of the members of the bureau of the Commission; namely, the Chairman, Mr. Emmanuel Kodjoe Dadzie (Ghana); the three Vice-Chairmen, Mr. Anthony Mason (Australia), Mr. Laszlo Reczei (Hungary), and Mr. Shinichiro Michida (Japan); and the Rapporteur, Mr. Jorge Barrera Graf (Mexico), assisted by the Secretariat. The working group would hold meetings open to rep-

representatives and observers. Accordingly, any representative or observer who might be interested in a particular phase of the work could express his views at meetings to be held by the working group for that purpose. The meetings of the working group would be informal.

46. On 20 February 1968, at the 16th meeting of the Commission, a working paper entitled "Methods of work for priority topics" (A/CN.9/L.3) was submitted to the Commission by the Working Group. The purpose of the working paper, it was stated, was to indicate possible methods which the Commission might wish to consider in dealing with the three priority topics which had been selected for inclusion in the work programme of the Commission: international sale of goods, international payments and international commercial arbitration. The scope of the working paper was confined, it was also stated, to the period between the first and the second sessions of the Commission.

47. The working paper was discussed by the Commission at its 16th, 17th, 18th and 19th meetings; and on the basis of such discussions, the Commission decided upon methods of work to be followed between the first and second sessions of the Commission with respect to the three topics given priority.

48. The decisions of the Commission were recorded in document A/CN.9/9, on the methods of work for priority topics, as follows

I. INTRODUCTION

1. The purpose of this paper is to indicate possible methods that may be used in dealing with the priority topics selected for inclusion in the work programme of the Commission. The scope of this paper is confined to the period between the first and the second sessions of the Commission.

2. At its 14th meeting, the Commission decided that the following topics should be given priority:

- (a) International sale of goods;
- (b) International payments;
- (c) Internal commercial arbitration.

3. The Commission also decided that the methods of work should be suitable to the particular topic under consideration.

4. During the general debate the importance of making a thorough study of each topic in order to enable the Commission to make substantive decisions was emphasized. Paragraph IV of working paper A/CN.9/L.1/Rev.1 suggests that "working groups, or sub-committees or other appropriate bodies of the Commission, should be appointed during the present session to deal respectively with the topics mentioned in paragraph II and submit their reports to the Commission at its next session". It was also stressed during the debate that in carrying out its functions the Commission should co-operate with the respective organizations and avoid duplication of work.

II. INTERNATIONAL SALE OF GOODS

5. During the general debate the following items, falling within the scope of international sale of goods, were suggested by delegations:

- (a) International sale of goods in general;
- (b) Hague Conventions of 1964 relating to a Uniform Law on the International Sale of Goods and to a Uniform Law on the Formation of Contracts for the International Sale of Goods;

(c) Hague Convention of 1955 on the Law Applicable to International Sale of Goods;

(d) Elaboration of a commercial code;

(e) Contracts of sale;

(f) Different legal aspects of contracts of sale:

- (i) Time-limits and limitations (prescription) in the field of international sale of goods;
- (ii) Agency;²
- (iii) Consequences of frustration;
- (iv) *Force majeure* clauses in contracts;

(g) General conditions of sale, standard contracts, Incoterms and other trade terms.

Principal international instruments and formulations

6. The following international instruments and formulations may be considered as being of special importance with respect to the harmonization and unification of the law of the international sale of goods:

(a) Convention relating to a Uniform Law on the International Sale of Goods of 1964 (prepared by UNIDROIT);

(b) Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods of 1964 (prepared by UNIDROIT);

(c) Convention on the Law Applicable to International Sale of Goods of 1955 (formulated by the Hague Conference on Private International Law);

(d) Convention on the Law Applicable for the Transfer of Property in International Sales of Corporeal Movables of 1958 (formulated by the Hague Conference);

(e) "Incoterms of 1953" — international rules for the interpretation of trade terms — (formulated by the International Chamber of Commerce);

(f) International rules for the interpretation of the trade terms "Delivered at frontier..." (named place of delivery at frontier) and "Delivered..." (named place of destination in the country of importation) duty paid" (formulated by the International Chamber of Commerce);

(g) General conditions of sale and standard forms of contract as listed in paragraph 67 of document A/6396 (formulated by the Economic Commission for Europe).

Selected items

7. In view of the wide scope and complex nature of the concept of international sale of goods as laid down in paragraph 5 above, at this early stage the Commission found it impractical to deal with all the facets of the subject at the same time. Accordingly, the Commission selected some of the main items within the topic, i.e.: (a) the Hague Conventions of 1964; (b) the Hague Convention on Applicable Law of 1955; (c) time-limits and limitations (prescription) in the field of international sale of goods; (d) general conditions of sale, standard contracts, Incoterms and other trade terms.

Other items within the priority list

8. It was agreed that any member of the Commission would be at liberty to submit to the Secretary-General studies on any topic on the priority list other than the selected items referred to in paragraph 7 above. The Secretary-General was requested to circulate such studies to all the members of the Commission.

² Under this item it is intended to deal both with the common law concept of "agency" and the concepts of "*représentation*" (in French) and "full powers" in other systems.

*Methods of work**(a) Study of the items as a whole*

9. As regards methods of work, one possibility would be to make a comprehensive study of the selected items referred to in paragraph 7, having in mind the over-all aim of promoting the progressive harmonization and unification of the law of the international sale of goods, as a whole.

10. It would not seem possible, however, to prepare a study of such magnitude in time for submission to the second session of the Commission. As indicated in paragraph 6 above, the main instruments relating to the selected items were formulated by different organizations (UNIDROIT, the Hague Conference, ICC, ECE). Accordingly, the Commission did not find it desirable to entrust the work as a whole to a single organization. On the other hand, the Commission considered that if the organizations concerned were invited to deal jointly with the matter, it would be difficult for such organizations to make substantial progress within the short time available.

11. Other methods could be envisaged, such as entrusting the work to the Secretariat, in which case the assistance of consultants would be required. However, in view of the limited financial resources available to the Commission in 1968 this method was not found to be entirely suitable for the purpose.

(b) Study of the items separately

12. The Commission decided therefore, at this stage, to deal separately with the selected items, i.e.:

- (i) The Hague Conventions of 1964;
- (ii) The Hague Convention on Applicable Law of 1955;
- (iii) Time-limits and limitations (prescription) in the field of international sale of goods;
- (iv) General conditions of sale, standard contracts, Incoterms and other trade terms.

(i) The Hague Conventions of 1964

13. While the Hague Conventions of 1964 have not yet come into force³ they encompass a very wide area within the scope of the international sale of goods and are the product of many years of preparatory work.

14. It was considered desirable, therefore, to take stock of the attitude of States in respect of those conventions. For this purpose the Commission decided to adopt the following procedure:

A. The Secretary-General should send to States Members of the United Nations and States members of any of its specialized agencies a questionnaire, together with the text of the conventions and Professor Tunc's commentary thereon. Each of the States concerned should be invited to indicate whether or not the State intends to adhere to the 1964 Conventions and the reasons for its position.

B. In addition, the States members of the Commission should be invited to make, if possible, a study in depth of the subject, taking into account the aim of the Commission in the promotion of the harmonization and unification of the law of international sale of goods.

C. The replies and studies referred to in A and B above should be transmitted by Governments to the Secretary-General within six months from the receipt of the Secretary-General's invitation to that effect.

D. The Secretary-General should circulate the text of the aforementioned replies and studies to the States members of the Commission, UNIDROIT and any other organization especially concerned for their comments.

E. The Secretary-General should also prepare, in consultation with the secretariat of UNIDROIT, an analysis of the

replies and studies received from Governments. In the preparation of such an analysis account should be taken of any action which might be undertaken by UNIDROIT, pursuant to Recommendation II adopted by the Diplomatic Conference on the Unification of the Law Governing the International Sale of Goods.⁴ The analysis should be circulated to the States members of the Commission, UNIDROIT and any other organization especially concerned, for their comments.

F. The Commission, at its second session, should consider the replies and studies referred to in A and B, the analysis referred to in E, as well as any comments made under D and E.

15. The Commission considered desirable that the replies and studies referred to in A and B of the preceding paragraph should reflect adequately the points of view of the different legal and economic systems as well as those of developed and developing countries.

(ii) The Hague Convention of 1955 on the Law Applicable to International Sale of Goods

16. As of this date, seven States⁵ have adhered to the Hague Convention of 1955, which was established under the auspices of the Hague Conference on Private International Law. While the scope of the Convention is much less wide than the 1964 Conventions, it deals with a matter of considerable importance in avoiding conflicts of law in international sale of goods transactions. The Commission found it desirable, therefore, to draw the 1955 Convention to the attention of a wider range of States than those which are members of the Hague Conference on Private International Law.

17. For this purpose the Commission decided to adopt the following procedure:

A. The Secretary-General should transmit the text of the Convention to States Members of the United Nations and States members of any of its specialized agencies. At the same time each of the States approached should be invited to indicate whether or not the State intends to adhere to the 1955 Convention and the reasons for its position.

B. The replies to the above questions should be transmitted by Governments to the Secretary-General within six months from the receipt of the Secretary-General's invitation.

C. The Secretary-General should transmit the text of the replies to the Hague Conference on Private International Law for comments.

D. The Commission, at its second session, should consider the replies from Governments as well as any comments thereon made by the Hague Conference.

(iii) Time-limits and limitations (prescription) in the field of international sale of goods

18. The Commission decided to request the Secretary-General, after appropriate consultation, to invite interested Governments of States who are members of the Commission to submit to the Secretary-General studies on the subject of time-limits and limitations (prescription) in the field of international sale of goods. The Secretary-General shall, in addressing invitations to Governments, have regard to the desirability of obtaining studies which are illustrative of the legal systems of the world.

(iv) General conditions of sale, standard contracts, Incoterms and other trade terms

19. With respect to general conditions of sale and standard contracts, the Commission decided to request the Secretary-General, in consultation with the secretariats of the ECE, the other regional economic commissions and other organizations concerned, to submit to the second session of the Commission

⁴ See A/CN.9/5, para. 5.

⁵ Belgium, Denmark, Finland, France, Italy, Norway and Sweden.

³ See A/CN.9/5, para. 4 and foot-note 4.

a preliminary report examining the possibility of promoting the wider use of the existing general conditions of sale and standard contracts.

20. As regards Incoterms 1953, the Commission decided to request the Secretary-General to invite the International Chamber of Commerce to submit to the Secretary-General, before the second session of the Commission, a report including its views and suggestions concerning possible action that might be taken for the purpose of promoting the wider use of Incoterms and other trade terms by those engaged in international commerce.

21. The reports referred to in the preceding paragraphs 19 and 20 should state the considerations and factors which are impeding a wider use and acceptance of general conditions of sale, standard contracts, Incoterms and other trade terms.

III. INTERNATIONAL PAYMENTS

22. During the general debate the following topics, falling within the scope of international payments, were suggested by delegations:

- (a) Negotiable instruments;
- (b) Banker's commercial credits;
- (c) Guarantees and securities.

Principal international instruments and formulations

23. The following international instruments and formulations may be considered as being of special importance with respect to the harmonization and unification of the law of international payments:

- (a) Convention providing a Uniform Law for Bills of Exchange and Promissory Notes of 1930;
- (b) Convention for the Settlement of Certain Conflicts of Laws in connexion with Bills of Exchange and Promissory Notes of 1930;
- (c) Convention providing a Uniform Law of Cheques of 1931;
- (d) Convention for the Settlement of Certain Conflicts of Laws in connexion with Cheques of 1931;
- (e) Uniform Customs and Practice for Documentary Credits (formulated by the International Chamber of Commerce);
- (f) Uniform Rules for the Collection of Commercial Paper (formulated by the International Chamber of Commerce).

Method of work

24. The considerations contained in paragraphs 9-11 above in connexion with international sale of goods are generally applicable to the concept of international payments as well, which is also a wide and complex subject.

25. Rather than making a comprehensive study of international payments as a whole, the Commission found it convenient, therefore, to deal separately with (i) negotiable instruments; (ii) banker's commercial credit and (iii) guarantees and securities. Consistent with the object of the Commission, i.e. the progressive harmonization and unification of the law of international trade, it was agreed that the consideration of these items by the Commission should relate primarily to international transactions.

(i) Negotiable instruments

26. UNIDROIT has been working on the subject of unification of law relating to negotiable instruments.⁶ The Commission therefore considered it appropriate to request the Secretary-General to consult with UNIDROIT as to whether the latter would be prepared to make a study of the measures that

could be adopted in order to promote the harmonization and unification of the law relating to negotiable instruments, in so far as transactions involving different countries are concerned, and especially:

(a) To examine the question of the convenience of promoting a wider acceptance of the Conventions of 1930 and 1931 referred to in sub-paragraphs (a), (b), (c) and (d) of paragraph 23 above;

(b) To study the possible means of giving reciprocal international recognition and protection to negotiable instruments under the Common Law and to the instruments recognized under the Geneva Conventions; and

(c) To consider the creation of a new international negotiable instrument for international payments.

27. The Commission will consider the reply from UNIDROIT at its second session, together with any suggestions that may be submitted by the States members of the Commission.

(ii) Banker's commercial credits

28. In view of the interest of, and work done by, the International Chamber of Commerce on this and related topics⁷ the Commission decided to request the Secretary-General to inquire whether the ICC would be prepared to undertake a study of the subject. The Secretary-General was also requested to consult with other organizations concerned.

(iii) Guarantees and securities

29. It does not appear that any existing organizations have dealt with the subject of the harmonization and unification of law with respect to guarantees and securities as related to international payments. At this stage, therefore, the Commission decided to request the Secretary-General to make a preliminary examination of this matter with a view to the possibility of making a study for submission to the Commission at the appropriate time.

IV. INTERNATIONAL COMMERCIAL ARBITRATION

Principal international instruments and formulations

30. The following international instruments and formulations may be considered as being of special importance with respect to the harmonization and unification of the law relating to international commercial arbitration:

- (a) Geneva Protocol on Arbitration Clauses of 1923;
- (b) Convention on the Execution of Foreign Arbitral Awards of 1927;
- (c) Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (adopted by a Conference convened by the United Nations);
- (d) European Convention on International Commercial Arbitration of 1961;
- (e) Arbitration Rules (formulated by the Economic Commission for Europe);
- (f) Agreement of 17 December 1962 relating to the Application of the European Convention on International Commercial Arbitration (formulated by the Council of Europe);
- (g) Convention on the Settlement of Investment Disputes between States and Nationals of Other States (formulated by the International Bank for Reconstruction and Development);
- (h) European Convention providing a Uniform Law on Arbitration (formulated by the Council of Europe);
- (i) Rules for International Commercial Arbitration (formulated by the Economic Commission for Asia and the Far East);
- (j) Standards for Conciliation (formulated by the Economic Commission for Asia and the Far East);

⁶ See A/6396, annex II A 3.

⁷ See A/6396, paras. 147-166.

(k) Draft Inter-American Convention on Commercial Arbitration (formulated by the Inter-American Juridical Committee);

(l) Draft Protocol on the Recognition and Enforcement of Arbitral Awards (formulated by the Council of Europe).

Methods of work

31. As indicated in the list contained in the preceding paragraph, the United Nations (including its regional economic commissions) has been working on several aspects of international commercial arbitration.

32. The Commission decided therefore to request the Secretary-General, in consultation with the organs and organizations concerned, to prepare a preliminary study of steps that might be taken with a view to promoting the harmonization and unification of law in this field, having particularly in mind the desirability of avoiding divergencies among the different instruments on this subject.

33. With respect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was established under the auspices of the United Nations, the Commission decided to draw the attention of Member States of the United Nations to the existence of the Convention and to invite States to consider the possibility of adhering to it.

V. COLLABORATION WITH ORGANIZATIONS

34. In carrying out its work on the topics selected as priority items the Commission considered it desirable to collaborate with organs and organizations concerned with the progressive harmonization and unification of those aspects of the law of international trade.

35. With this aim in view the Commission decided to request the Secretary-General to hold suitable consultations with the organs and organizations concerned as may be indicated in the different phases of the work.

49. As regards the provisions of paragraph 14.A and 17.A of the above paper, the representative of the USSR expressed the view that, as all countries engaged in international trade, the documents referred to in those paragraphs should be transmitted not only to members of the United Nations and of the specialized agencies but to all countries. The representatives of Czechoslovakia, Hungary, Kenya, Romania, Syria, the United Arab Republic and the United Republic of Tanzania expressed agreement with the view of the representative of the USSR.

50. A number of representatives expressed the view that the question raised by the representative of the USSR involved political and practical difficulties and was not a question that could be appropriately determined by a technical body such as the Commission. They also drew attention to the statement made by the Secretary-General on the same question in the General Assembly at its 1258th plenary meeting on 18 November 1963, which was reaffirmed by the Secretary-General in a communication circulated to the Security Council on 18 May 1967 (S/7891).

51. It was noted that some legal concepts, as for example the common law concepts of "agency" and "limitations" (in English), may not have exact equivalents in the terminology of other legal systems. It was generally agreed that whenever a legal concept in one language or legal system has a broader connotation than its version in another language or legal system the concept should be understood to encompass the broader scope, unless the Commission decides otherwise.

2. *Establishment of a working group*

52. The Commission at its 21st meeting adopted the following proposal made by the representative of India concerning the establishment of a working group:

"A Working Group of this Commission be established composed of fourteen member States represented on the Commission:

"Six from the Asian-African States;

"Two from the Eastern European States;

"Two from the Latin American States; and

"Four from the Western European and other States, to be appointed by the Chairman in consultation with the different groups concerned.

"The Secretary-General should arrange for a meeting of such Working Group, one week before the opening of the second session of the Commission, if in the light of the comments, reports and studies on the priority topics received pursuant to the proposals in working paper A/CN.9/L.3,⁸ the Secretary-General is of the opinion that it would be of assistance to the Commission's future work to arrange such meeting.

"If such meeting is convened, other members of the Commission shall be entitled to be present at the meetings of the Working Group and to present their observations orally or in writing.

"The Working Group shall examine the comments of Governments, reports and studies received pursuant to the recommendations in working paper A/CN.9/L.3 on the priority topics, and generally consider the progress made in the work programme established by the Commission at its first session and shall make appropriate proposals or recommendations to the Commission at its second session."

53. At the 23rd meeting of the Commission, the Chairman appointed for membership in the working group the Congo (Democratic Republic of), Ghana, Kenya and the United Arab Republic, nominated by the African States, and Brazil and Chile, nominated by the Latin American States.

54. At the same meeting, the Commission decided that the other groups of States represented on the Commission should submit to the Secretary-General their nominations of States for membership in the working group not later than one month before the date on which the working group might be convened by the Secretary-General, namely one week before the opening of the second session of the Commission.

55. At the 25th meeting of the Commission, the Chairman appointed for membership in the working group India and Japan, nominated by the Asian group.

C. *Working relationships and collaboration with other bodies*

56. The Commission decided, at its 23rd meeting, that the question of working relationships and collaboration with other bodies (item 5 (c) of the agenda) should be considered at its next session. The Chairman noted that

⁸ For the text as approved by the Commission, see paragraph 48 above.

the temporary arrangements described in section A of chapter III of the Secretary-General's note on collaboration and working relationships with organs and organizations concerned with international trade law (A/CN.9/7) would continue to apply pending a decision by the Commission on this subject. With reference to paragraphs 12 and 13 of document A/CN.9/7, the Secretary-General was requested to place on the mailing list for documents relating to the activities of the Commission those inter-governmental and international non-governmental organizations which are concerned with the priority topics included in the work programme of the Commission.

CHAPTER V

ESTABLISHMENT WITHIN THE SECRETARIAT OF A REGISTER OF ORGANIZATIONS AND A REGISTER OF TEXTS

57. A working paper (A/CN.9/L.2) containing recommendations with respect to the establishment within the Secretariat of a register of organizations and a register of certain treaties and legislative texts was submitted to the Commission at its 14th meeting by the representative of the United Kingdom.

58. The working paper was considered at the 14th meeting of the Commission, in the course of which a number of points pertaining to the proposed collection and dissemination of such information by the Secretariat was discussed.

59. At the 16th meeting, the representative of the United Kingdom informed the Commission that, in the light of the previous discussion in the Commission and following informal consultations between members, he was submitting a revised proposal to the Commission (A/CN.9/L.5). His original proposal was, accordingly, withdrawn. The proposal of the United Kingdom was accompanied by a statement prepared by the Secretariat on the financial and administrative implications of the proposal (A/CN.9/L.5/Add.1).

60. The revised proposal of the United Kingdom was, together with the Secretariat's statement on financial and administrative implications, considered by the Commission at its 20th and 21st meetings. After certain amendments had been made, the proposal was approved by the Commission for inclusion in its report as follows:

RECOMMENDATION APPROVED BY THE COMMISSION AT ITS 21st MEETING, ON 23 FEBRUARY 1968, FOR INCLUSION IN THE REPORT

I

1. The Commission requests the Secretary-General to set up a register of organizations, together with their work, and a register of certain international instruments, texts and related documentation. These registers would be maintained in accordance with paragraphs 2 to 5 below.

Register of organizations

2. The register of organizations would contain the names of:
 - (a) Organs of the United Nations;
 - (b) Specialized agencies and inter-governmental organizations; and

- (c) International non-governmental organizations in consultative status with the Economic and Social Council of the United Nations; which are actively engaged in work, in the fields mentioned in paragraph 5 below, towards the progressive harmonization and unification of the law of international trade by promoting the adoption of international conventions, uniform laws, standard contract provisions, general conditions of sale, standard trade terms and other measures of a legal nature.

3. This register would be compiled in consultation with the organizations concerned and would contain a summary of work relating to the fields referred to in paragraph 5 below, which has been accomplished or is being undertaken by the organizations referred to in the register.

Register of texts

4. The register of texts would contain material relating to the fields mentioned in paragraph 5 below as follows:

- (a) The text of existing international conventions, model and uniform laws, customs and usages of a multilateral nature which have been published in written form;
- (b) A brief summary of proposed international conventions, model and uniform laws, customs and usages of a multilateral nature which are in preparation and have been published in written form.

Fields to be covered

5. The registers envisaged above would, in the first instance, be concerned with the following fields:

- (a) The law of sale of goods (corporeal movables);
- (b) Standard trade terms;
- (c) Arbitration law;
- (d) Negotiable instruments;
- (e) Documentary credits and the collection of commercial paper.

Publication

6. The information contained in the registers would be published and disseminated in the English, French, Spanish and Russian languages.

Bibliography

7. The Secretary-General should inquire whether one or more universities, research or similar institutions in the States Members of the United Nations would be willing to compile and disseminate a list of published books, articles and commentaries on 4 (a) and (b) above, and should report on this matter to the Commission at its second session.

II

Continuity of registers

In order that the scope of the registers mentioned in section I may be reviewed and expanded, the Commission recommends that the agenda of the second session of the Commission should include the following item: "Register of organizations and register of texts".

61. As regards paragraph 7 of the proposal, certain representatives expressed the view that the Secretary-General's inquiry should be directed to all countries. They drew attention to the views recorded in paragraph 49 of the report. Certain other representatives referred to the political and practical difficulties which the question

involved and drew attention to the views recorded in paragraph 50 of the report.

62. The Commission in approving the inclusion of the proposal in the report decided to draw the attention of the General Assembly to the financial implications of the proposal and requested the Secretary-General to make a detailed study of the financial implications of the proposal for submission to the General Assembly.

63. As regards paragraph 4 (a) of the proposal, the Commission decided that the register should indicate the status of signatures, ratifications, accessions, date of entry into force, reservations and depositaries of the conventions, as well as the existence of explanatory notes.

CHAPTER VI TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW

64. A draft resolution sponsored by Argentina, Brazil, Chile, Colombia, Mexico and the United States (A/CN.9/L.4) on training and assistance in the field of international trade law, particularly in many of the developing countries, was submitted to the Commission at its 17th meeting. The draft resolution was the subject of discussion at the 18th and 19th meetings of the Commission.

65. At the 21st meeting of the Commission, the draft resolution was withdrawn by its sponsors and in its place a proposal was made for the inclusion of a paragraph on such training and assistance in the report of the Commission on the understanding that a consensus had been reached thereon. The United States in introducing the proposal stated that it had been prepared in light of the discussion of the subject in the Commission and of informal consultations between members of the Commission.

66. After certain amendments had been made, the Commission reached agreement, at its 22nd meeting, on the provisions of the paragraph to be included in the Commission's report. The text of the agreed provisions is contained in the following paragraph.

67. The Commission noted the special importance of increasing the opportunities for the training of experts in the field of international trade law, particularly in many of the developing countries. In this connexion, mindful of the activities being undertaken within the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, and of the work of the Advisory Committee on that Programme (General Assembly resolution 2204 (XXI)), the Commission considered that it should establish close and co-operative contact with the United Nations agencies, organizations and bodies, and with other inter-governmental and non-governmental organizations having responsibilities or concerns in the field of assistance related to international trade law, particularly training and research. It requested the Secretary-General to prepare a report with a view to establishing such co-operative relations, to be considered by the Commission at its second session.

68. The Secretary-General should, in the preparation of the report, pay due regard, in so far as appropriate, to the principal legal systems of the world.

CHAPTER VII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. *Legislation on shipping*

69. Considering the proposal of the delegation of Chile and the discussion in the Commission on maritime shipping, the representative of the Secretary-General informed the Commission that the Legal Office would draw up a paper on this topic for subsequent consideration by the Commission.⁹ The Commission took note with satisfaction of this information.

B. *Chairman's visit to the second session of the United Nations Conference on Trade and Development*

70. The Commission at its 23rd meeting decided to invite its Chairman, or if he was unable to go, another member of the bureau, at the end of the first session, to journey to New Delhi to participate in the meetings of the second session of the United Nations Conference on Trade and Development (UNCTAD).

71. It also decided that the purpose of the Chairman's visit would be:

(a) To convey to the Chairman of the second session of UNCTAD the expression of the Commission's desire to establish and maintain close collaboration with UNCTAD and its organs, in accordance with General Assembly resolution 2205 (XXI);

(b) To inform the second session of UNCTAD of the contents of the report of the Commission on its first session, and to inform in particular the Fourth Committee of the second session of UNCTAD of the course of discussion on the subject of transportation;

(c) To convey to the appropriate organs of UNCTAD the desire of the Commission to avoid duplication of work between UNCTAD and the Commission and their respective secretariats in the field of international trade law.

C. *Date of the second session*

72. The Commission decided, at its 23rd meeting, that its next session, which would be held in Geneva, should be convened on 3 March 1969 for a period of four to five weeks.

D. *Adoption of the report of the Commission*

73. At its 25th meeting, on 26 February 1968, the Commission adopted the report on its first session, and the Chairman declared the first session of the Commission closed.

ANNEX I

List of participants

A. *Members of the Commission*

ARGENTINA

Representative

Mr. Gervasio Ramón Carlos COLOMBRES, Professor at the Catholic Argentinian University Santa María of Buenos Aires and at the University of Buenos Aires

⁹ For the statement of the representative of the Secretary-General, see A/CN.9/SR.25.

AUSTRALIA

Representative

Mr. Anthony MASON, Q.C., Solicitor-General for the Commonwealth of Australia

Alternate Representative

Mr. Michael McKEOWN, First Secretary, Permanent Mission

BELGIUM

Representative

Mr. Albert LILAR, Professor at the Law Faculty and at the Faculty of Social, Political and Economic Sciences of the Free University of Brussels, former Minister, Senator

Alternate Representatives

Mr. Paul JENARD, Director, Ministry of Foreign Affairs and Foreign Trade

Mr. Erik BAL, First Secretary, Permanent Mission

BRAZIL

Representative

Mr. Nehemias DA SILVA GUEIROS, Professor of Civil Law, Recife Law School

CHILE

Representative

Mr. Eugenio CORNEJO FULLER, Professor at the Faculty of Juridical and Social Sciences, Catholic University of Valparaíso

Alternate Representative

Mr. Jose PIÑERA, Ambassador, Permanent Representative to the United Nations

COLOMBIA

Representative

Mr. Alvaro HERRAN MEDINA, Ambassador, Alternate Representative to the United Nations

CONGO (DEMOCRATIC REPUBLIC OF)

Representative

Mr. Vincent MUTUALE, First Secretary, Permanent Mission

Alternate Representative

Mr. Gérard BALANDA

CZECHOSLOVAKIA

Representative

Mr. Josef SMEJKAL, Ambassador, Head of Legal Department, Ministry of Foreign Affairs

Alternate Representative

Mr. Ludvik KOPAC, Legal Adviser, Ministry of Foreign Trade

Adviser

Mr. Jiří MLADEK, First Secretary, Permanent Mission

FRANCE

Representative

Mr. René DAVID, Professor at the Faculty of Law and Economic Sciences of Paris

Alternate Representative

Mr. Claude CHAYET, Deputy Permanent Representative to the United Nations

Advisers

Mr. Alain DEJAMMET, Secretary of Embassy, Permanent Mission

Miss Sylvie ALVAREZ, Secretary of Embassy, Permanent Mission

GHANA

Representative

Mr. Emmanuel Kodjoe DADZIE, Ambassador, Chief State Attorney, Office of the Attorney-General

Alternate Representative

Mr. Emmanuel SAM, First Secretary, Permanent Mission

Adviser

Mrs. Agnes Y. AGGREY-ORLEANS, Second Secretary, Permanent Mission

HUNGARY

Representative

Mr. László RÉCZEI, Ambassador, Professor of Law, Department of Economics, University of Budapest

Alternate Representatives

Mr. Iván SZÁSZ, Head of the Legal Department, Ministry of Foreign Trade

Mr. Ferenc Gyarmati, First Secretary, Permanent Mission

INDIA

Representative

Mr. K. Krishna RAO, Ambassador, Joint Secretary and Legal Adviser, Ministry of External Affairs

Alternate Representative

Mr. B. C. MISHRA, Deputy Permanent Representative, Permanent Mission

Adviser

Mr. D. A. KAMAT, Legal Adviser, Permanent Mission

IRAN

Representative

Mr. Mansour SAGHRI, Professor of Commercial Law, Faculty of Law of Teheran

ITALY

Representative

Mr. Giorgio BERNINI, Professor of Private Comparative Law, University of Ferrara

Adviser

Mr. Joseph NITTI, First Secretary, Permanent Mission

JAPAN

Representative

Mr. Shinichiro MICHIDA, Professor of Law, University of Kyoto

KENYA

Representative

Mr. Maluki Kitili MWENDWA, Solicitor-General of Kenya

Alternate Representative

Mr. Raphael Joseph OMBERE, Assistant Secretary (Legal), Ministry of Foreign Affairs

MEXICO

Representative

Mr. Jorge BARRERA GRAF, Professor of Commercial Law, National University of Mexico

NIGERIA

Representative

Mr. Adeitan Ayinde ADEDIRAN, Acting Solicitor-General and Permanent Secretary

Alternate Representative

Mr. B. Akporode CLARK, Counsellor, Permanent Mission

Adviser

Mr. O. B. AWOSIKA, Second Secretary, Permanent Mission

NORWAY

Representative

Mr. Stein ROGNLIEN, Head of Department of Legislation, Ministry of Justice

Alternate Representative

Mr. Per TRESSELT, First Secretary of Embassy, Permanent Mission

ROMANIA

Representative

Mr. Ion NESTOR, Scientific Secretary, Council for Juridical Research, Academy of Science of Romania

Alternate Representative

Mr. Vasile TILINCA, Second Secretary, Press Officer, Permanent Mission

SPAIN

Representative

Mr. Joaquín GARRIGUES, Professor of Commercial Law, University of Madrid

Alternate Representative

Mr. Santiago MARTINEZ CARO, Deputy Legal Counsellor, Ministry of Foreign Affairs

SYRIA

Representative

Mr. Kamal YABEQUOB, Legal and Financial Adviser, Ministry of Finance

Alternate Representatives

Mr. Rafic JOUEJATI, Counsellor, Permanent Mission

Mr. Dia-Allah EL-FATTAL, First Secretary, Permanent Mission

THAILAND

Representative

Mr. Arun PANUPONG, Counsellor, Royal Thai Embassy, Washington, D.C.

Alternate Representative

Mr. Wichian WATANAKUN, Royal Thai Embassy, Washington, D.C.

Adviser

Mr. Tongnoi TONGYAI, Permanent Mission

TUNISIA

Representative

Mr. Hichem AYOUB, Third Secretary of Embassy, Permanent Mission

UNION OF SOVIET SOCIALIST REPUBLICS

Representative

Mr. G. S. BURGUCHEV, Chief of the Treaty and Law Administration of the Ministry of Foreign Trade

Alternate Representative

Mr. E. T. USENKO, Doctor of Juridical Sciences, Professor at the All-Union Academy of Foreign Trade

Adviser

Mr. N. A. SHUPINDER, Expert of the Treaty and Law Administration of the Ministry of Foreign Trade

UNITED ARAB REPUBLIC

Representative

Mr. Mohsen SHAFIK, Professor of Trade Law, Faculty of Law, Cairo University

Alternate Representative

Mr. Nabil EL ARABY, First Secretary, Permanent Mission

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Representative

Mr. Anthony Gordon GUEST, Professor of English Law, University of London

Alternate Representatives

Mr. Henry Galton DARWIN, Legal Counsellor, Permanent Mission

Mr. Michael John WARE, Senior Legal Assistant, Board of Trade

Adviser

Mr. John Hedley CLEMENT, Board of Trade

UNITED REPUBLIC OF TANZANIA

Representative

Mr. M. N. RATTANSEY, Barrister-at-Law, Member of Parliament

UNITED STATES OF AMERICA

Representative

Mr. Seymour I. RUBIN, Attorney-at-Law, Adjunct Professor of Law, Georgetown University Law Center, Washington, D.C.

Alternate Representative

Mr. John L. HARGROVE, Senior Adviser, International Law, Permanent Mission

Adviser

Mr. Robert B. ROSENSTOCK, Adviser, Legal Affairs, Permanent Mission

B. Observers

1. UNITED NATIONS ORGANS

United Nations Conference on Trade and Development

Mr. Diego CORDOVEZ, Special Assistant to the Secretary-General of UNCTAD

Mr. Salvatore SCHIAVO-CAMPO, Economic Affairs Officer

2. SPECIALIZED AGENCIES

Food and Agriculture Organization of the United Nations

Mr. D. WOODWARD, Director, FAO Liaison Office with the United Nations

Mr. M. GREENE, Assistant Director

International Bank for Reconstruction and Development

Mr. A. BROCHES, General Counsel

Mr. D. SURATGAR, Member of the Legal Department

International Labour Organisation

Mr. F. F. JONKER, Deputy Director, Liaison Office with the United Nations

International Monetary Fund

Mr. Robert C. EFFROS, Member of the Legal Department

Mr. Gordon WILLIAMS, Special Representative to the United Nations

3. INTER-GOVERNMENTAL ORGANIZATIONS

Commission of European Communities

Mr. Friedrich ALBRECHT, Legal Counsellor

Council of Europe

Mr. Polys MODINOS, Deputy Secretary-General

Hague Conference on Private International Law

Mr. H. VAN HOOGSTATEN, Secretary-General

International Institute for the Unification of Private Law

Mr. Mario MATTEUCCI, Secretary-General

Organization of American States

Mr. Georges D. LANDAU, Member of the General Secretariat

United International Bureaux for the Protection of Intellectual Property

Mr. G. H. C. BODENHAUSEN, Director

Mr. Ross WOODLEY, Senior Counsellor for Relations with International Organizations

4. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS

International Chamber of Commerce

Mr. G. W. HAIGHT, Vice President, International Arbitration Commission of the ICC

Mr. Stephen P. LADAS, Honorary President, Commission for the International Protection of Industrial Property

Mr. Carl McDOWEL, Executive Vice President, Association of Marine Underwriters of the United States

International Juridical Organization for Developing Countries

Mr. Mario GUTTIERES, Chairman of the Executive Committee

Mr. George A. TESORO, United States representative of IJO

C. Secretariat

Mr. Constantin A. STAVROPOULOS, Representative of the Secretary-General, The Legal Counsel

Mr. F. Blaine SLOAN, Director of the General Legal Division, Office of Legal Affairs

Mr. Paolo CONTINI, Secretary of the Commission, Chief of the International Trade Law Branch, General Legal Division

Mr. Peter KATONA, Assistant Secretary of the Commission, Senior Legal Officer

Mr. John H. DE SARAM, Assistant Secretary of the Commission, Legal Officer

Mrs. Jelena VILUS, Assistant Secretary of the Commission, Legal Officer

ANNEX II

Resolution 2205 (XXI), adopted by the General Assembly at its 1497th plenary meeting on 17 December 1966

[Annex not reproduced; see part one, section II, E]

ANNEX III

List of documents of the first session of the Commission

[Annex not reproduced; see check list of UNCITRAL documents at the end of the volume]

B. Comments and action with respect to the report of the Commission**1. Extract from the report of the Trade and Development Board, United Nations Conference on Trade and Development, 10 September 1967-23 September 1968***

CHAPTER VII

PROGRESSIVE DEVELOPMENT OF THE LAW OF INTERNATIONAL TRADE: FIRST ANNUAL REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW¹

(Agenda item 9)

155. In connexion with this item, the representative of the Legal Counsel of the United Nations introduced the first annual report of the United Nations Commission on International Trade Law (UNCITRAL) (A/7216)² established by General Assembly resolution 2205 (XXI) of 17 December 1966. Under section II, paragraph 10, of that resolution, UNCITRAL is to "submit an annual report, including its recommendations, to the General Assembly, and the report shall be submitted simultaneously to the United Nations Conference on Trade and Development for comments". In introducing UNCITRAL's first report, the representative of the Legal

¹ This item was referred to the Sessional Committee for consideration and report.

² *Official Records of the General Assembly, Twenty-third session, Supplement No. 16*. See also the relevant note by the UNCTAD secretariat (TB/B/179).

Counsel described the origins, composition and terms of reference of UNCITRAL, gave particulars of the topics selected for treatment by UNCITRAL, of the order of priorities accorded to certain topics, and of the methods which UNCITRAL proposed to follow in its work. He stressed that the harmonization and unification of the law of international trade were conceived by UNCITRAL not as an academic exercise but as a contribution to facilitating the flow of international trade, a conception which explained the existence of a special relationship between UNCITRAL and UNCTAD. He explained that the first session of UNCITRAL had been devoted mainly to organizational matters and to the establishment of its programme of work. At its second session (scheduled to be held at Geneva in March 1969) UNCITRAL would begin consideration of the substance of the topics to which it had decided to give priority, and at that session, too, it would consider the advisability of appointing sub-committees or working groups to deal with specific matters in the interval between its own sessions.

156. In general, and subject to their comments on specific points, many representatives welcomed UNCITRAL's decisions concerning its programme of work (A/7216, chapter IV, para. 40), methods of work

* *Official Records of the General Assembly, Twenty-third Session, Supplement No. 14 (A/7214)*.

(para. 45), the establishment of a register of organizations and texts (chapter V) and the proposals concerning training and assistance in the field of international trade law (chapter VI).

157. A number of representatives stressed the value of close co-operation between UNCITRAL and UNCTAD. Representatives of some developing countries stated that the purpose of UNCITRAL should be not merely to recommend the removal of legal obstacles to the flow of international trade but to place at the disposal of the international community the juridical means of stimulating trade, particularly that of the developing countries. They considered that UNCITRAL should engage in the dynamic task of elaborating a new *lex mercatoria* in the formulation of which the developing countries should have a full say, as these countries had played little part in the past in the formulation of trade law. UNCITRAL should examine to what extent the existing rules applied in international trade were consistent with the principles already recommended in UNCTAD. In the consideration of the topics selected for study UNCITRAL should be guided by the criterion: In what way could its work contribute to the expansion of international trade and to the bridging of the gap between developing and developed countries? They stressed that UNCITRAL should take account of the realities of international trade and of its long-term prospects.

158. One of these representatives suggested that, in addition to co-operation at the secretariat level, co-operation between UNCITRAL and UNCTAD might take several forms. For example, he said, joint meetings of UNCTAD bodies with UNCITRAL might be organized to consider matters within the competence of the Committee on Invisibles and Financing related to Trade; and UNCTAD might perhaps suggest that some particular topic be placed on the agenda of UNCITRAL.

159. Another of these representatives welcomed the decision taken by UNCITRAL to proceed by consensus, for, he said, it would not be conducive to the formulation of a unified law if some provision or instrument were approved by a small majority.

160. The representative of one developing country stated that at the first session of UNCITRAL his country had proposed the inclusion, in UNCITRAL's programme of work, of the study of international legislation on shipping. In his opinion, the Board should instruct the Committee on Shipping to establish a working group on international legislation on shipping and thereafter the Committee might ask UNCITRAL to take up the drafting of new conventions on the subjects identified by the Working Group.

161. The representative of a developed market economy country stressed that any reference to the role of UNCITRAL in the field of shipping should not be discussed in connexion with agenda item 9, since there was

a separate item on the agenda dealing with international legislation on shipping.³

162. The representative of a socialist country of Eastern Europe stressed that the objective of co-operation between UNCTAD and UNCITRAL should be to eliminate discrimination in international trade and to give greater effect to the principles contained in the Final Act of the 1964 Conference, in particular General Principle Six.⁴ He pointed out that this subject should be given priority in the deliberations of UNCITRAL. He suggested that UNCITRAL might elaborate a draft convention for the elimination of discrimination and concerning the most-favoured-nation clause. He considered that the terms of reference of UNCITRAL should not be restrictive in the sense that UNCITRAL would be concerned only with the body of rules governing commercial relationships of a private law nature (A/7216, para. 23); in his opinion, matters within the domain of public law should be taken into consideration by UNCITRAL.

163. The representative of a developed market economy country, on the other hand, expressed the view that UNCITRAL should confine its attention to specific areas of international private law affecting trade, and not extend its activities into the sphere of public trade law or trade policy. In his opinion, UNCITRAL was primarily a technical body of legal experts whose task it was, where possible, to codify or consolidate in quasi-legislative form existing trade practices in appropriate fields of private international trade law and not to engage in substantive issues of policy. The representative of another developed market economy country suggested that reports of UNCITRAL might be distributed to interested UNCTAD bodies for comment. In particular, he considered that these reports should be transmitted to the Committee on Shipping as an annex to the secretariat's report on recent developments and long-term trends in the field of shipping.

164. The representative of one developing country suggested that UNCITRAL should put "transportation" on its priority list and to this end establish a working party to deal with the subject.

Action by the Board

165. At its 172nd meeting on 20 September 1968, the Board took note with appreciation of the first annual report of UNCITRAL (A/7216). It commended UNCITRAL on its programme of work and stressed that the needs of developing countries should receive adequate attention. It stressed the importance of co-operation between UNCTAD and UNCITRAL at the intergovernmental and secretariat levels.

³ See chapter II, paras. 62-75, of the Board's report.

⁴ See *Proceedings of the United Nations Conference on Trade and Development*, vol. I, *Final Act and Report* (United Nations publication, Sales No.: 64.II.B.11), p. 10.

2. Report of the Sixth Committee*

CONTENTS

	<i>Paragraphs</i>
I. INTRODUCTION	1-5
II. PROPOSALS	6
III. DEBATE	7-21
A. The role and the work of the United Nations Commission on International Trade Law in general	8-13
B. Programme of work of the United Nations Commission on International Trade Law	14-16
C. International shipping legislation	17
D. Establishment within the Secretariat of a register of organizations and a register of texts	18
E. Training and assistance in the field of international trade law	19
F. Collaboration with other organizations	20
G. Yearbook	21
IV. VOTING	22
V. RECOMMENDATION OF THE SIXTH COMMITTEE	<i>Page</i> 91

I. INTRODUCTION

1. At its 1676th plenary meeting, on 27 September 1968, the General Assembly included as item 88 in the agenda of its twenty-third session, and allocated to the Sixth Committee for consideration and report, the item entitled "Report of the United Nations Commission on International Trade Law on the work of its first session".

2. The Sixth Committee considered this item at its 1082nd to 1085th meetings, held from 27 November to 3 December 1968 and at its 1096th and 1097th meetings, held on 13 and 14 December 1968.

3. At the 1082nd meeting, on 27 November 1968, Mr. Dadzie (Ghana), Chairman of the United Nations Commission on International Trade Law at its first session, at the invitation of the Chairman, introduced the Commission's report on the work of that session (A/7216). At the 1096th meeting, on 13 December 1968, after hearing a statement by the representative of the Secretary-General on financial implications, the Committee decided that in the future the Commission's annual report should be introduced to the General Assembly by the Chairman of the Commission, or by another officer to be designated by him.

4. At the 1097th meeting, on 14 December 1968, the Rapporteur of the Sixth Committee raised the question whether the Committee wished to include in its report to the General Assembly a summary of the views expressed during the debate on agenda item 88. After referring to paragraph (f) of the annex to General Assembly resolution 2292 (XXII), the Rapporteur informed the Committee of the financial implications of the question. At the same meeting, the Committee decided that, in view of the nature of the subject-matter, the report on agenda item 88 should include a summary of the representative

trends of opinion and not of the individual views of all delegations.

5. The report of the United Nations Commission on International Trade Law on the work of its first session, which was before the Sixth Committee, is divided into seven chapters as follows:

- I. Establishment and terms of reference of the Commission;
- II. Organization of the first session;
- III. General debate;
- IV. Programme of work of the Commission;
- V. Establishment within the Secretariat of a register of organizations and a register of texts;
- VI. Training and assistance in the field of international trade law;
- VII. Other decisions and conclusions of the Commission.

II. PROPOSALS

6. At the 1096th meeting, on 13 December 1968, the representative of Ghana introduced a draft resolution sponsored by Argentina, Cameroon, Chile, Congo (Democratic Republic of), El Salvador, Ghana, Hungary, India, Japan, Netherlands, Nigeria, Pakistan, Romania, Spain, Syria, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and Zambia (A/C.6/L.738/Rev.1 and Add.1-3), which read as follows:

"The General Assembly,

"Having considered the report of the United Nations Commission on International Trade Law on the work of its first session (A/7216),

* Official Records of the General Assembly, Twenty-third Session, Annexes, agenda item 88, document A/7408.

"*Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law and defined its object and terms of reference,*

"*Noting the chapter of the report of the Trade and Development Board on its seventh session (A/7214, part two, chapter VII)¹ concerning the report of the United Nations Commission on International Trade Law on the work of its first session, and nothing further that the Board expressed its appreciation of the Commission's report and commended the Commission for its programme of work,*

"*Endorsing the statement of the Trade and Development Board (ibid., para. 165) emphasizing that the needs of developing countries should receive adequate attention in the programme of work of the United Nations Commission on International Trade Law and stressing the importance of co-operation between the United Nations Conference on Trade and Development and the Commission at the intergovernmental and secretariat levels,*

"*Bearing in mind the wish expressed by many members of the Trade and Development Board at its seventh session that the United Nations Commission on International Trade Law should add international shipping legislation to its list of priority topics (A/7214, para. 74), and bearing also in mind the activities of other agencies active in this field,*

"*Noting with satisfaction that the United Nations Commission on International Trade Law intends to carry out its work in co-operation with organs and organizations concerned with the progressive harmonization and unification of international trade law, and that such co-operation has already been initiated,*

"*Convinced that the harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, would significantly contribute to economic co-operation between countries and, thereby, to their well-being,*

"*Having considered the report of the Secretary-General concerning the financial and administrative implications of the establishment of a register of organizations and a register of texts in the field of international trade law (A/C.6/L.648 and Add.1),*

"1. *Takes note with appreciation of the report of the United Nations Commission on International Trade Law on the work of its first session;*

"2. *Notes with approval the programme of work established by the United Nations Commission on International Trade Law;*

"3. *Authorizes the Secretary-General to establish a register of organizations in accordance with directives laid down by the United Nations Commission on International Trade Law;*

"4. *Approves in principle the proposal to establish a register of the international instruments and other documents referred to in chapter V of the report of*

the United Nations Commission on International Trade Law, and requests that the Commission should consider further at its second session the precise nature and scope of such a register in the light of the report of the Secretary-General (*ibid.*) and the discussions at the twenty-third session of the General Assembly;

"5. *Authorizes the Secretary-General to establish the register referred to in paragraph 4 above in accordance with the further directives to be given by the United Nations Commission on International Trade Law at its second session;*

"6. *Recommends that the United Nations Commission on International Trade Law should:*

"(a) *Continue its work on the topics to which it decided to give priority, that is, the international sale of goods, international payments and international commercial arbitration;*

"(b) *Consider the inclusion of international shipping legislation among the priority topics in its work programme;*

"(c) *Consider opportunities for training and assistance in the field of international trade law in the light of relevant reports of the Secretary-General;*

"(d) *Keep its programme of work under constant review, bearing in mind the interests of all peoples, and particularly those of the developing countries, in the extensive development of international trade;*

"(e) *Consider at its second session ways and means of promoting co-ordination of the work of organizations active in the progressive harmonization and unification of international trade law and of encouraging co-operation among them;*

"(f) *Consider, when appropriate, the possibility of issuing a yearbook which would make its work more widely known and more readily available;*

"7. *Requests the Secretary-General to forward to the United Nations Commission on International Trade Law the records of the discussions on the Commission's report at the twenty-third session of the General Assembly."*

III. DEBATE

7. The main trends of the Sixth Committee's debate on agenda item 88 are summarized in the following seven sections. The first section concerns the observations which were made on the role and the work of the Commission in general. The other six sections contain a summary of the observations relating more particularly to the report of the Commission on the work of its first session and are set out under the following headings: programme of work of the Commission, international shipping legislation, establishment within the Secretariat of a register of organizations and a register of texts, training and assistance in the field of international trade law, collaboration with other organizations, and publication of a yearbook.

A. *The role and the work of the Commission in general*

8. Several representatives characterized the Commission as the principal organ responsible for the pro-

¹ See section B.1, above.

gressive development of international trade law and for the co-ordination of the unification activities of other governmental and non-governmental organizations. Some of those representatives expressed the opinion that the task of the Commission should not be merely to encourage and co-ordinate work carried out elsewhere, but also to undertake work of its own in order to reduce and remove legal obstacles to the flow of international trade. In doing so, the Commission should ensure the full participation of developing countries which, until now, had not taken an active part in the development and formulation of international trade law.

9. Many representatives commended the Commission for having obtained tangible results during its first session. It was noted with approval that it had decided to take its decisions as far as possible by consensus. This would permit the Commission, whose members were States with different social-economic systems, different levels of development, and different legal systems and historical traditions, to base its work on careful regard for proposals submitted and respect for mutual interests. Some representatives, while agreeing with the principle of consensus, nevertheless observed that consensus should not be ensured at all costs as if this were the essential objective of the Commission's discussions, nor should its purpose be merely to satisfy a disident minority. In appropriate circumstances, decisions should be made by vote.

10. A number of representatives stressed the importance of Governments during their utmost to support the Commission in its work, *inter alia*, by responding promptly to requests for information and comments on topics on its agenda and by seeing to it that it remained foremost a body of experts. The view was expressed that the Commission should also have invited States other than its own members to submit studies on certain subjects, so as to enable it to work on a sufficiently broad basis. According to another view, owing to the universal character of the Commission's work, documents and inquiries emanating from the Commission should be transmitted to all States, whether or not they were Members of the United Nations or members of its specialized agencies.

11. One representative observed that, in electing the members of the Commission, the General Assembly had regrettably neglected to ensure representation of the Chinese legal system.

12. A number of representatives expressed approval that the Commission had not felt it necessary, at this stage of its work, to formulate a definition of international trade law and were of the opinion that it had acted wisely in taking practical considerations into account when drawing up its programme. It was observed by others, however, that it was unfortunate that the Commission had been unable to agree on a definition of international trade law; the Commission should not limit its work to the consideration only of questions of private law, since a significant number of the questions of international trade law which were of cardinal importance to all countries would then lie outside its field of activity.

13. Some representatives stressed the particular importance of the Commission's work for the developing

countries. That work should fully reflect the principles governing international trade relations and trade policies conducive to development, adopted at the first session of the United Nations Conference on Trade and Development.² Other representatives, however, emphasized the community of interest which both developed and developing countries had in the work of the Commission and cautioned against introducing into that work notions of a dichotomy of interest drawn from related but different contexts.

B. Programme of work of the Commission

14. Most representatives commended the Commission for its selection of priority topics, which covered three important fields of international trade law, i.e., the international sale of goods, international payments and international commercial arbitration. Some representatives expressed the wish that the Commission maintain a certain degree of flexibility in its programme of work, which should be revised from time to time to meet the requirements of the international community.

15. One representative questioned the choice of international commercial arbitration as a priority topic and deemed it preferable first to make a census of existing international instruments on the subject. It was also observed that the Commission could derive great advantage from the establishment of a collection of important arbitral awards handed down in the field of international trade.

16. The suggestion was made that other items, such as the question of the most-favoured-nation clause, the promotion of participation in the Convention on Transit Trade of Land-locked States and, as a matter of priority, the elimination of discrimination in laws affecting international trade, should also be considered by the Commission. However, some representatives, referring to the political implications which the consideration of the question of discrimination in laws affecting international trade might possibly involve, questioned the expediency of suggesting to the Commission that it should take up that item.

C. International shipping legislation

17. With regard to international shipping legislation, reference was made to the recommendation made by many members of the Trade and Development Board at its seventh session to the effect that the United Nations Commission on International Trade Law should take the necessary measures to deal, as a matter of priority, with international shipping legislation (see A/7214, part two, para. 74). Most of the representatives who spoke on this subject favoured an active involvement on the part of the Commission and said that they would welcome the inclusion of shipping legislation among the priority items. Some representatives, while agreeing that the Commission should consider the law of shipping, deemed it nevertheless advisable for it to defer its work on that subject until the Committee on Shipping of the Trade and Development Board had considered the scope of

² See *Proceedings of the United Nations Conference on Trade and Development*, vol. 1, *Final Act and Report* (United Nations publication, Sales No.: 64.II.B.11), annex A.I.1, p. 18.

international shipping legislation and made its recommendations to the Commission. Other representatives drew attention to the activities of the United Nations Conference on Trade and Development and the Inter-Governmental Maritime Consultative Organization in the matter of international shipping legislation and emphasized, in this connexion, that it was of increasing importance that the Commission should co-ordinate the various efforts made in this field so as to avoid, as far as possible, duplication of work.

D. Establishment within the Secretariat of a register of organizations and a register of texts

18. There was general recognition of the importance of a register of organizations, containing a survey of their activities, and a register of international instruments in certain fields of international trade law. The view was expressed that this would permit the Commission to keep abreast of the latest developments and collect the information necessary for its work. It was also stated that such registers would no doubt be useful to Governments and other organizations. Several representatives, however, expressed their hesitation in view of the financial implications and were of the opinion that the Commission should consider further the scope of the register of texts at its second session, taking into account the report of the Secretary-General on the administrative and financial implications of the registers (A/C.6/L.648 and Add.1) and the observations made thereon during the debates in the Sixth Committee. Some representatives were of the opinion that the aim pursued by the Commission could perhaps also be achieved by other means, such as by publishing a list of the titles and sources of the various instruments and documents, without reproducing the texts thereof. One representative entered a strong protest at the omission of Chinese from the list of official languages in which the registers were to be published.

E. Training and assistance in the field of international trade law

19. Many representatives supported the Commission's proposals concerning training and assistance in the field of international trade law (see A/7216, chapter VI). It was noted with approval that the Advisory Committee on the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law had recommended that an appropriate place should be given to the activities concerning international trade law within the framework of the activities conducted under the Programme. It was suggested that the Commission, at its second session, should give careful consideration to training and assistance in international trade law on the basis of the report to be submitted by the Secretary-General. Some representatives urged that the Commission should take suitable steps to increase the opportunities for training experts, particular-

ly in the developing countries, and to place at the disposal of the international community the juridical means of stimulating trade.

F. Collaboration with other organizations

20. A number of representatives referred to the problem of the waste of effort and the confusion caused by the existence of competing agencies in the work of unification. It was stressed, in this connexion, that the remedy would seem to lie in the Commission's functioning as a rallying-ground for unificatory activities and in its co-ordination and supervision of such activities. Some representatives stressed that the Commission should be the main co-ordinating and law-making international organ in the field of international trade law and that it should maintain close co-operation with the specialized agencies and the intergovernmental and non-governmental organizations concerned. Other representatives emphasized that the work of the Commission should be complementary to the efforts that had been made and were being made by such organizations and that stimulating wider interest in, and particular work by, existing institutions was among the significant contributions that the Commission could make.

G. Yearbook

21. Several representatives deemed it desirable that the Commission should issue a yearbook similar to that of the International Law Commission. Most representatives, however, agreed that there was no need for the Sixth Committee to take a decision on the matter at this time and that it was for the United Nations Commission on International Trade Law to determine the desirability of such a step.

IV. VOTING

22. At the 1097th meeting of the Sixth Committee, held on 14 December 1968, it was decided, at the request of some representatives, to vote separately on paragraphs 4 and 5 of the draft resolution (A/C.6/L.738/Rev.1 and Add.1-3). Paragraph 4 was adopted by 70 votes to 1, with 8 abstentions. Paragraph 5 was adopted by 60 votes to 4, with 16 abstentions. The draft resolution as a whole was adopted by 77 votes to none, with 2 abstentions. Explanations of vote were given by the representatives of Australia, Bulgaria, Canada, China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

V. RECOMMENDATION OF THE SIXTH COMMITTEE

[The text of the recommendation, not included here, contained a draft resolution which was adopted by the General Assembly and appears in section 3 below.]

3. General Assembly resolution 2421 (XXIII) of 18 December 1968

2421 (XXIII). REPORT OF THE UNITED NATIONS
COMMISSION ON INTERNATIONAL TRADE LAW*The General Assembly,*

Having considered the report of the United Nations Commission on International Trade Law on the work of its first session,¹

Recalling its resolution 2205 (XXI) of 17 December 1966 by which it established the United Nations Commission on International Trade Law and defined its object and terms of reference,

Noting the chapter of the report of the Trade and Development Board on its seventh session² concerning the report of the United Nations Commission on International Trade Law on the work of its first session, and noting further that the Board expressed its appreciation of the Commission's report and commended the Commission for its programme of work,

Endorsing the statement in which the Trade and Development Board³ emphasized that the needs of developing countries should receive adequate attention in the programme of work of the United Nations Commission on International Trade Law and stressed the importance of co-operation between the United Nations Conference on Trade and Development and the Commission at the intergovernmental and secretariat levels,

Bearing in mind the wish expressed by many members of the Trade and Development Board at its seventh session that the United Nations Commission on International Trade Law should add international shipping legislation to its list of priority topics⁴ and also bearing in mind the activities of other agencies active in this field,

Noting with satisfaction that the United Nations Commission on International Trade Law intends to carry out its work in co-operation with organs and organizations concerned with the progressive harmonization and unification of international trade law and that such co-operation has already been initiated,

Convinced that the harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, would significantly contribute to economic co-operation between countries and, thereby, to their well-being.

Having considered the report of the Secretary-General concerning the financial and administrative implications of the establishment of a register of organizations and a register of texts in the field of international trade law,⁵

¹ *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216).*

² *Ibid.*, Supplement No. 14 (A/7214), part two, chapter VII.

³ *Ibid.*, para. 165.

⁴ *Ibid.*, para. 74.

⁵ *Ibid.*, Twenty-third Session, Annexes, agenda item 88, document A/C.6/L.648; A/C.648/Add.1.

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law on the work of its first session;

2. *Notes with approval* the programme of work established by the United Nations Commission on International Trade Law;

3. *Authorizes* the Secretary-General to establish a register of organizations in accordance with directives laid down by the United Nations Commission on International Trade Law;

4. *Approves* in principle the proposal to establish a register of the international instruments and other documents referred to in chapter V of the report of the United Nations Commission on International Trade Law and requests that the Commission should consider further at its second session the precise nature and scope of such a register in the light of the report of the Secretary-General and the discussions on the registers at the twenty-third session of the General Assembly;

5. *Authorizes* the Secretary-General to establish the register referred to in paragraph 4 above in accordance with the further directives to be given by the United Nations Commission on International Trade Law at its second session;

6. *Recommends* that the United Nations Commission on International Trade Law should:

(a) Continue its work on the topics to which it decided to give priority, that is, the international sale of goods, international payments and international commercial arbitration;

(b) Consider the inclusion of international shipping legislation among the priority topics in its work programme;

(c) Consider opportunities for training and assistance in the field of international trade law, in the light of relevant reports of the Secretary-General;

(d) Keep its programme of work under constant review, bearing in mind the interests of all peoples, and particularly those of the developing countries, in the extensive development of international trade;

(e) Consider at its second session ways and means of promoting co-ordination of the work of organizations active in the progressive harmonization and unification of international trade law and of encouraging co-operation among them;

(f) Consider, when appropriate, the possibility of issuing a yearbook which would make its work more readily available;

7. *Requests* the Secretary-General to forward to the United Nations Commission on International Trade Law the records of the discussions on the Commission's report at the twenty-third session of the General Assembly.

1746th plenary meeting,
18 December 1968.

C. List of relevant documents not reproduced in the present volume

<i>Titre or description</i>	<i>Document reference</i>
First session of the United Nations Commission on International Trade Law: note by the Secretariat	A/CN.9/1
Adoption of rules of procedure: note by the Secretary-General	A/CN.9/3
Comments by Member States, organs and organizations on the work programme of the Commission: note by the Secretary-General	A/CN.9/4 and Corr.1
Analysis of the comments submitted by Member States, organs and organizations on the work programme of the Commission: note by the Secretary-General	A/CN.9/4 and Add.1 and 2
Survey of activities of organizations concerned with the harmonization and unification of the law of international trade: note by the Secretary-General	A/CN.9/5
Organization and methods of work: note by the Secretary-General	A/CN.9/6 and Corr.1
Collaboration and working relationships with organs and organizations concerned with international trade law: note by the Secretary-General	A/CN.9/7
Methods of work for priority topics (Working paper submitted by the Working Group on agenda item 5 (a) and (b) as adopted, with amendments, by the Commission at its 19th meeting on 22 February 1968)	A/CN.9/9
Recommendation approved by the Commission at its 21st meeting, on 23 February 1968, for inclusion in the report.	A/CN.9/10
Working paper (accepted by the Commission as a working paper at its 13th meeting, on 14 February 1968)	A/CN.9/L.1/ Rev.1
Methods of work for priority topics: working paper submitted by the Working Group	A/CN.9/L.3 and Corr.1
Summary records of the first session of the Commission (1968)	A/CN.9/SR1-25

II. THE SECOND SESSION (1969)

A. Report of the Commission*

CONTENTS

	Page
INTRODUCTION	45
<i>Chapter</i>	<i>Paragraphs</i>
I. ORGANIZATION OF THE SESSION	
A. Opening and duration	1-2
B. Membership and attendance	3-5
C. Election of officers	6
D. Agenda	7
E. Establishment of two committees of the whole	8-12
F. General debate	13
G. Decisions of the Commission	14-15
II. INTERNATIONAL SALE OF GOODS	
A. The Hague Conventions	16-39
(1) General observations	16-17
(2) Hague Conventions of 1964	18-31
(3) Yague Convention of 1955	32-36
(4) Decision of the Commission	37-38
(5) Observations	39
B. Time-limits and limitations (prescription) in the field of the international sale of goods	40-47
C. General conditions of sale and standard contracts, Incoterms and other trade terms	48-60
D. Co-ordination of the activities of organizations in the field of the international sale of goods	61-62
III. INTERNATIONAL PAYMENTS	
A. Negotiable instruments	63-89
B. Bankers' commercial credits	90-95
C. Guarantees and securities	96-99
D. Co-ordination of the work of organizations in the field of international payments	100
IV. INTERNATIONAL COMMERCIAL ARBITRATION	101-113
V. INTERNATIONAL LEGISLATION ON SHIPPING	114-133
VI. A. Register of organizations and register of texts	134-141
B. Bibliography	142
VII. CO-ORDINATION OF THE WORK OF ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW; WORKING RELATIONSHIP AND COLLABORATION WITH OTHER BODIES	143-155
VIII. TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW	156-160
IX. YEARBOOK OF THE COMMISSION	161-167
X. SUGGESTIONS RELATING TO FUTURE ACTIVITIES OF THE COMMISSION	168-177
XI. ORGANIZATIONAL QUESTIONS RELATING TO FUTURE WORK	
A. Planning for future work	178-182
B. Establishment of working groups	183-184
C. Summary records of subsidiary bodies	185-187
D. Date of the third session	188
	<i>Page</i>
XII. RESOLUTIONS AND OTHER DECISIONS ADOPTED BY THE COMMISSION AT ITS SECOND SESSION	117

* Report of the United Nations Commission on International Trade Law on the work of its second session (1969), *Official Records of the General Assembly, Twenty-fourth Session Supplement, No. 18 (A/7618)*.

CONTENTS (*continued*)*Annexes*

	<i>Page</i>
I. Summary of the comments made during the second session on the 1964 Hague Conventions on the International Sale of Goods	117
II. Summary of the comments made during the second session on the 1955 Hague Convention on the law applicable to the international sale of goods	117
III. Representatives of members of the Commission	117
IV. Secretariat of the Commission	120
V. Observers	120
VI. Resolution 2205 (XXI) adopted by the General Assembly on 17 December 1966 ..	120
VII. List of documents of the second session	120

INTRODUCTION

The present report of the United Nations Commission on International Trade Law is submitted to the General Assembly in accordance with paragraph 10 of section II of General Assembly resolution 2205 (XXI) of 17 December 1966. As provided in the same paragraph, this report is submitted simultaneously to the United Nations Conference on Trade and Development (UNCTAD) for comments.

The Commission adopted the present report at its 49th meeting on 31 March 1969. The report covers the second session of the Commission, which was held at the United Nations Office in Geneva from 3 to 31 March 1969.

CHAPTER I

ORGANIZATION OF THE SESSION

A. *Opening and duration*

1. The United Nations Commission on International Trade Law (UNCITRAL), established by General Assembly resolution 2205 (XXI) of 17 December 1966, held its second session at the United Nations Office in Geneva from 3 to 31 March 1969. The session was opened, on behalf of the Secretary-General, by Mr. Blaine Sloan, Director of the General Legal Division, Office of Legal Affairs.

2. The Commission held twenty-four plenary meetings in the course of the session.

B. *Membership and attendance*

3. Under the terms of paragraph 1 of section II of General Assembly resolution 2205 (XXI) the Commission consists of twenty-nine States, elected by the General Assembly. The present members of the Commission, elected by the General Assembly at its twenty-second session on 30 October 1967, are the following States:¹

Argentina	Mexico
Australia	Nigeria*
Belgium	Norway*
Brazil	Romania
Chile*	Spain
Colombia*	Syria
Congo (Democratic Republic of)	Thailand*
Czechoslovakia*	Tunisia
France*	Union of Soviet Socialist Republics*
Ghana*	United Arab Republic*
Hungary	United Kingdom of Great Britain and Northern Ireland*
India	United Republic of Tanzania*
Iran	United States of America
Italy*	
Japan*	
Kenya	

4. With the exception of Colombia, Congo (Democratic Republic of), Nigeria and Thailand, all members were represented at the second session of the Commission.

5. The following United Nations organs, specialized agencies, intergovernmental and international non-governmental organizations were represented by observers:

(a) *United Nations organs:*

Economic Commission for Europe (ECE); United Nations Conference on Trade and Development (UNCTAD); United Nations Institute for Training and Research (UNITAR).

(b) *Specialized agencies:*

Food and Agriculture Organization of the United Nations (FAO); Inter-Governmental Maritime Consultative Organization (IMCO); International Monetary Fund (IMF).

(c) *Intergovernmental organizations:*

Commission of the European Communities; Council for Mutual Economic Assistance (CMEA); Council of Europe; Council of the European Communities; Hague Conference on Private International Law; Inter-American Juridical Committee; International Institute for the Unification of Private Law (UNIDROIT); Organization

¹ The term of office of all members began, in accordance with General Assembly resolution 2205 (XXI), on 1 January 1968. The fourteen members marked with an asterisk were selected by the President of the General Assembly to serve for a term of three years ending on 31 December 1970. The other fifteen members will serve for the full term of six years ending on 31 December 1973.

of American States (OAS); United International Bureaux for the Protection of Intellectual Property (BIRPI).

(d) *International non-governmental organizations*

International Bar Association; International Chamber of Commerce (ICC); International Chamber of Shipping (ICS); International Law Association (ILA); World Peace through Law Center.

C. *Election of officers*

6. At its 26th meeting on 3 March 1969, the Commission elected the following officers² by acclamation:

Chairman: Mr. László Réczei (Hungary);

Vice-Chairman: Mr. Gervasio Ramón Carlos Colombres (Argentina);

Vice-Chairman: Mr. Nagendra Singh (India);

Vice-Chairman: Mr. Mohsen Chafik (United Arab Republic);

Rapporteur: Mr. Stein Rognlien (Norway).

D. *Agenda*

7. The agenda of the session as adopted by the Commission at its 26th meeting, on 3 March 1969, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. International sale of goods:
 - (a) The Hague Conventions of 1964;
 - (b) The Hague Convention on Applicable Law of 1955;
 - (c) Time-limits and limitations (prescription) in the field of international sale of goods;
 - (d) General conditions of sale and standard contracts;
 - (e) Incoterms and other trade terms.
5. International payments:
 - (a) Negotiable instruments;
 - (b) Bankers' commercial credits;
 - (c) Guarantees and securities.
6. International commercial arbitration:
 - (a) Steps that might be taken with a view to promoting the harmonization and unification of law in this field;
 - (b) The United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.
7. Consideration of inclusion of international shipping legislation among the priority topics in the work programme.
8. (a) Register of organizations and register of texts;
- (b) Bibliography.
9. Consideration of ways and means of promoting co-ordination of the work of organizations active in the progressive harmonization and unification of international trade law and of encouraging co-operation among them.

² In accordance with a decision taken by the Commission at the second meeting of its first session, the Commission shall have three Vice-Chairmen, in order to secure representation of each of the five groups of States listed in paragraph 1 of section II of General Assembly resolution 2205 (XXI) on the bureau of the Commission.

10. Working relationship and collaboration with other bodies.
11. Consideration of opportunities for training and assistance in the field of international trade law.
12. Consideration of the possibility of issuing a Yearbook.
13. Programme of work until the end of 1972.
14. Date of third session.
15. Adoption of the report of the Commission.

E. *Establishment of two committees of the whole*

8. The Commission, at its 27th meeting on 4 March 1969, decided to establish two committees of the whole (Committee I and Committee II) which would meet simultaneously to consider the agenda items to be referred to them.

9. The Commission, at its 28th meeting, on 4 March 1969, decided to refer to Committees I and II for consideration the following items:

Committee I

Item 4. International sale of goods:

- (a) The Hague Conventions of 1964;
- (b) The Hague Convention on Applicable Law of 1955;
- (c) Time-limits and limitations (prescriptions) in the field of international sale of goods;
- (d) General conditions of sale and standard contracts;
- (e) Incoterms and other trade terms.

Item 6. International commercial arbitration:

- (a) Steps that might be taken with a view to promoting the harmonization and unification of law in this field;
- (b) The United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

Committee II

Item 5. International payments:

- (a) Negotiable instruments;
- (b) Bankers' commercial credits;
- (c) Guarantees and securities.

Item 8 (a) Register of organizations and register of texts;

(b) Bibliography.

Item 9. Consideration of ways and means of promoting co-ordination of the work of organizations active in the progressive harmonization and unification of international trade law and of encouraging co-operation among them.

The Commission also requested Committees I and II to consider the question of co-ordination in respect of subjects referred to them. At its 34th meeting, on 17 March 1969, the Commission further referred to Committee II the question concerning the publication of a Yearbook of the Commission (item 12 of the agenda).

10. Committee I met from 6 to 24 March 1969 and held fifteen meetings. Committee II met from 6 to 20 March 1969 and held twelve meetings.

11. At its 1st meeting on 6 March 1969, Committee I elected unanimously Mr. Nagendra Singh (India) as Chairman and Mr. Shinichiro Michida (Japan) and Mr. Ion Nestor (Romania) as Rapporteurs for item 4 and item 6 respectively. The Committee at its 11th meeting, following the departure from Geneva of Mr. Nagen-

dra Singh, elected Mr. Gervasio Ramón Carlos Colombres (Argentina) as Chairman. At its 1st meeting, on 6 March 1969, Committee II elected unanimously Mr. Nehemias Gueiros (Brazil) as Chairman and Mr. Kevin William Ryan (Australia) as Rapporteur.

12. The Commission considered the report of Committee II at its 38th and 39th meetings, on 21 March 1969, and the report of Committee I at its 43rd, 44th and 45th meetings, on 25 and 26 March 1969. The Commission decided to include the substance of the Committee's reports in its report on the work of its second session.

F. General debate

13. The Commission decided to have a general debate on the substantive items on its agenda before the committees of the whole began their work. A summary of the observations made by representatives during the general debate on a particular item is included in the chapter relating to that item.

G. Decisions of the Commission

14. At the 26th meeting of the Commission, on 3 March 1969, the Chairman recalled that the Commission, at its first session, had agreed that its decisions should, as far as possible, be reached by consensus, and that it was only in the absence of consensus that decisions should be taken by a vote as provided for in the rules of procedure relating to the procedure of Committees of the General Assembly.

15. The decisions taken by the Commission in the course of its second session were all reached by consensus. The decisions taken in respect of each substantive item are, for easy reference, set out in the final chapter of this report.

CHAPTER II INTERNATIONAL SALE OF GOODS

A. The Hague Conventions

(1) General observations

16. It was recalled that, as a matter of principle, the Commission had a clear mandate and was therefore entirely competent to take such steps as would, in its view, further the harmonization and unification of international trade law. In this connexion, many representatives pointed out that the decision of the Commission to consider the Hague Conventions of 1964 and 1955 in no way implied that the Commission should necessarily confine itself to merely giving an opinion whether their contents were or were not satisfactory.

17. A number of representatives expressed the wish that the Commission would not create any obstacles to the ratification of the Hague Conventions. Other representatives were of the opinion that the Commission, although it wished to take full account of the work already accomplished in the field, was at liberty to chart a new course if, upon examination, the Hague Conventions proved to be unacceptable to a substantial number of States. The view was also expressed that the Hague Conventions of 1964 and 1955 should be replaced by a

single instrument comprising both substantive and conflict rules of international sale. One representative stated that the unification of the law of the international sale of goods could only be effected by such a new international instrument.

(2) Hague Conventions of 1964

18. The Commission considered the Hague Conventions of 1964 relating to a Uniform Law on the International Sale of Goods and a Uniform Law on the Formation of Contracts for the International Sale of Goods (hereinafter referred to as the Hague Conventions of 1964), in the light of the note by the Secretary-General entitled "Replies and studies by States concerning the Hague Conventions of 1964" (A/CN.9/11, Corr.1 and Add.1 and 2) and a report of the Secretary-General containing an analysis of those replies and studies (A/CN.9/17). The Commission also had before it a proposal submitted by the delegation of the Union of Soviet Socialist Republics concerning the unification of rules of law regulating the international sale of goods (A/CN.9/L.9) and studies and comments on the Hague Conventions of 1964 submitted by the representatives of Hungary, Japan and the United Arab Republic.

19. The Commission considered the general aspects of the Hague Conventions of 1964 during a general debate held in the course of its 28th to 31st meetings, on 4, 5 and 6 March 1969. A summary of the observations made in the course of that debate is set out in paragraphs 21-30 below.

20. The text of the Hague Conventions of 1964 and of the uniform laws forming the annex to those Conventions were considered by Committee I in the course of its 1st to 6th and 10th meetings, held on 6, 7, 10 and 14 March 1969 (see A/CN.9/L.15, paragraphs 5-8). A summary of the comments made by members of the Commission and observers of organizations during those meetings is set out in annex I to the present report. Committee I also considered what course of action should be recommended to the Commission in respect of the Hague Conventions of 1964 and, in general, for the purpose of promoting the progressive harmonization and unification of the law relating to the international sale of goods.

21. In the course of the discussion two main trends of opinion emerged regarding the Hague Conventions of 1964.

22. In the view of some representatives, the Conventions were suitable and practicable instruments and a significant contribution towards the unification of law. Therefore, they should not be revised before they had been put to the test in actual practice and before it was reasonably certain that a better instrument could be drawn up; in this connexion, ratification of the Conventions, even if accompanied by the reservation in article V of the Convention providing a uniform law on the international sale of goods, would be desirable. Moreover, before revising the Conventions, one should first be more or less certain that it would be possible to draft a better instrument. The view was also expressed by some representatives that any action by the Commission, other than recommending to States that they accede, might

slow down the present trend towards ratification or accession. The observer of the International Institute for the Unification of Private Law (UNIDROIT) expressed the opinion that, in general, the objections to provisions of the Conventions had already been considered at the 1964 Diplomatic Conference and rejected.

23. In the view of other representatives, the Hague Conventions of 1964 did not correspond to present needs and realities and, in the interest of unification, it would be desirable to review the Conventions at an early date. Representatives sharing this view pointed out that the 1964 Hague Conference, at which the Conventions were adopted, had been attended by only twenty-eight States and that none of the developing countries had been represented.

24. Several representatives held the view that the Hague Conventions of 1964 had not taken into account the interests of developing countries. Other representatives also considered that it was essential that the legal systems and the interests of countries not represented at the Hague Conference of 1964 should from now on be taken into account.

25. Some representatives expressed the view that the Conventions embodied certain legal concepts of an artificial character which it would be difficult for some States to accept. Moreover, many provisions were aimed at facilitating trade between countries within the same region rather than between countries of different continents. Therefore, it would hardly serve a useful purpose for the Commission to recommend to States that they accede to the Convention.

26. The observer of UNIDROIT stated that, in his view, the legal position with regard to a revision of the Hague Conventions of 1964 was that such a revision could be undertaken only by the States which had drawn up these Conventions, and that while States which had not signed the Conventions could conclude a separate agreement they had no power to amend the Conventions. In his opinion, UNIDROIT could take action only if the Conventions themselves authorized it to do so.

27. The observer of the Hague Conference on Private International Law stressed the contradictions between the system laid down in article 2 of the uniform law on the international sale of goods of 1964 and the Hague Convention of 1955. He expressed the view that any future solution in the field of the international sale of goods had to establish a co-ordination of substantive rules and rules of conflicts. In fact, the latter could not be dispensed with as long as there were States which had not accepted the new uniform law.

28. Mr. H. Scheffer, who was Secretary-General of the 1964 Hague Diplomatic Conference on the Unification of Law governing the International Sale of Goods, in a statement on behalf of the Netherlands Government, made at the invitation of Committee I, stated that the Netherlands Government, being responsible for the 1964 Conference and bound by certain obligations laid down in the final clauses of the Hague Conventions of 1964, would always be ready to lend its further assistance in this field if requested by the United Nations or other organizations.

29. Some representatives referred to paragraph 2 of Recommendation II annexed to the Final Act of the Hague Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, in which the Conference recommended that UNIDROIT should establish a committee composed of representatives of the Governments of the interested States which should consider what further action should be taken to promote the unification of law on the international sale of goods. One representative also drew attention to article XIV of the Hague Convention of 1964 relating to a uniform law on the international sale of goods which provided that after the Convention had been in force for three years, any Contracting State might request the convening of a conference for the purpose of revision; that States invited to the Conference, other than Contracting States, should have the status of observers unless the Contracting States decided otherwise by a majority vote and that observers should have all rights of participation except voting rights.

30. Other representatives took the view that a new convention acceptable to all States, or at least to a majority of them, should be drawn up and opened for accession by all States which participated in international trade. The Commission should set up a body to prepare a draft of a new world-wide convention which would take account of the interests of all countries, and the United Nations should subsequently convene an international conference for the purpose of adopting such a convention.

31. In proposing that the unification of the law of the international sale of goods could only be achieved by a new convention, one representative suggested that the new convention should use, as preparatory documents, the decisions of the United Nations and its organs dealing with the normalization of trade relations and designed to eliminate colonialism and manifestations of neo-colonialism from international economic relations, the principles governing international trade relations and trade policies adopted in 1964 by UNCTAD, the general conditions of sale and model contracts prepared by the United Nations Economic Commission for Europe, the general conditions of delivery of the Council for Mutual Economic Assistance (1968), the text of the Hague Conventions of 1964 and 1955, and the acceptable rules of municipal law governing relations in respect of contracts of international sales.

(3) *Hague Convention of 1955*

32. The Commission considered the Hague Convention of 1955 on the Law Applicable to the International Sale of Goods (hereinafter referred to as the Hague Convention of 1955) in the light of a note by the Secretary-General containing the replies by States concerning that Convention, and the comments made by the Secretary-General of the Hague Conference on Private International Law (A/CN.9/12 and Add.1, 2 and 3). The Commission had also before it a proposal submitted by the delegation of the USSR concerning the unification of rules of law regulating the international sale of goods (A/CN.9/L.9).

33. The Commission considered the general aspects

of the Hague Convention of 1955 and what future action it should take in respect of that Convention during a general debate held in the course of its 28th to 31st meetings, on 4, 5 and 6 March 1969. A summary of the observations made on the Convention in the course of that debate is set out in paragraphs 35 and 36 below.

34. The provisions of the Hague Convention of 1955 were considered by Committee I in the course of its 7th and 10th meetings, held on 11 and 14 March 1969 (see A/CN.9/L.15, paragraph 9). A summary of the comments made by members of the Commission and observers of organizations during these meetings is set out in annex II to the present report.

35. A number of representatives stressed the importance of the Hague Convention of 1955 and were of the opinion that, at least at the present stage of development of the law of the international sale of goods, conflict rules were necessary, and that for this reason the Convention served a useful purpose. Some representatives who were in favour of the preparation of a new convention that would replace the Hague Conventions of 1964, expressed the view that conflict rules should form an integral part of a new Convention on the international sale of goods. The view was also expressed that the Convention had been drawn up by a limited number of States and that it should be examined in order to ascertain whether its provisions unduly favoured the exporting countries.

36. The Observer of the Hague Conference on Private International Law stated that the Conference would welcome the views of members of the Commission which were not States members of the Conference and that if the Commission were of the opinion that the Hague Convention of 1955 should be revised, the Conference would be willing to consider that possibility.

(4) *Decision of the Commission*

37. At the 10th meeting of Committee I, on 14 March 1969, the representative of Hungary submitted a draft resolution on behalf of Brazil, Ghana, Hungary, India and the United States of America (A/CN.9/L.10). At the same meeting, the representative of Kenya requested that Kenya be included among the sponsors of the draft resolution. After certain amendments had been made, the draft resolution was approved by Committee I for submission to the Commission.

38. The Commission, at its 43rd and 44th meetings on 25 and 26 March 1969, considered the draft resolution submitted by Committee I. At its 44th meeting the Commission unanimously adopted the following draft resolution:

"The United Nations Commission on International Trade Law,

"Recalling General Assembly resolution 2421 (XXIII) expressing the conviction that the harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, would significantly contribute to economic co-operation between countries and, thereby, to their well being,

"Convinced that the Hague Conventions of 1955

and 1964, as a result of many years of study and research under the auspices of the Hague Conference on Private International Law and UNIDROIT, respectively, constitute an important contribution to the harmonization and unification of the law of the international sale of goods,

"Having considered the written replies from Governments to the question addressed to them by the Secretary-General, whether they intend to ratify, or accede to, the Hague Conventions of 1955 and 1964 and the reasons for their position, as well as the oral and written comments regarding the provisions of the Conventions made by members of the Commission at its second session,

"Having further considered the studies submitted by Governments on the Hague Conventions of 1964,

"Bearing in mind that seven countries have ratified the Hague Convention of 1955 and three countries the Hague Conventions of 1964,

"Noting the statements made by a number of Governments regarding their intention to adhere to the Conventions, and not wishing to delay or prevent ratification of these Conventions by the countries who may desire to do so,

"Considering, at the same time, the views expressed by a number of Governments that the Conventions in their present text, are not suitable for worldwide acceptance,

"Being of the opinion that in the establishment of generally acceptable uniform rules governing the international sale of goods the work already done in the field should as far as possible be taken into account and that duplication of efforts should be avoided through collaboration, where appropriate, with the organizations operating in this field,

"Decides:

"1. To request the Secretary-General to complete the analysis of the replies received from States regarding the Hague Conventions of 1964 (A/CN.9/L.17) in the light of the replies and studies received since its preparation and of the written and oral comments by members of the Commission during its second session, and to submit the analysis to the Working Group established under paragraph 3;

"2. To request the Secretary-General to prepare an analysis of the replies received from States regarding the Hague Convention of 1955 as well as of the written and oral comments by members of the Commission during its second session, and to submit the analysis to the Working Group to be set up under paragraph 3;

"3. To establish a Working Group — composed of the following fourteen members of the Commission: Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America — which shall:

"(a) Consider the comments and suggestions by States as analysed in the documents to be prepared

by the Secretary-General under paragraphs 1 and 2 above, in order to ascertain which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose, or what other steps might be taken to further the harmonization or unification of the law of the international sale of goods;

"(b) Consider ways and means by which a more widely acceptable text might best be prepared and promoted, taking also into consideration the possibility of ascertaining whether States would be prepared to participate in a Conference;

"(c) Submit a progress report to the third session of the Commission;

"4. To recommend that the members of the Working Group should be represented by persons especially qualified in the law of the international sale of goods;

"5. To request the Secretary-General to invite members of the Commission not represented on the Working Group, UNIDROIT, the Hague Conference on Private International Law and other international organizations concerned, to attend the meetings of the Working Group and to recommend that they should be represented by persons especially qualified in the law of the international sale of goods.

(5) *Observations*

39. One representative recalled his previous statement that the unification of the law of the international sale of goods could only be effected by a new international instrument comprising both substantive and conflict rules.

B. *Time-limits and limitations (prescription) in the field of the international sale of goods*

40. The subject of the harmonization and unification of the law on time-limits and limitations (prescription) in the field of the international sale of goods was considered by the Commission at its 29th to 31st meetings on 5 and 6 March 1969 during the general debate and by Committee I in the course of four meetings on 17 to 19 and 24 March 1969. A summary of the observations made by members of the Commission during those meetings is set out in paragraphs 43 and 44 below.

41. The Commission had before it a note by the Secretary-General (A/CN.9/16 and Add.1 and 2) reproducing the studies on time-limits and limitations in connexion with the international sale of goods submitted by the Governments of Belgium, Czechoslovakia, Norway and the United Kingdom. In addition, the Secretariat of the Council of Europe had made available to the Commission a document of the European Committee on Legal Co-operation of that organization, entitled "Replies made by Governments of Member States to the Questionnaire on 'time-limits'".

42. The Commission expressed warm appreciation of the studies which had been submitted by the Governments of Belgium, Czechoslovakia, Norway and the

United Kingdom. These had been of considerable help in assisting the Commission in its work.

43. The view was expressed that the harmonization of rules prescribing time-limits for asserting claims in connexion with international sale transactions presented a complex problem and that the Commission should consider whether that problem could be solved by the harmonization of conflict rules or the adoption of uniform substantive rules. It was noted in this connexion that, generally, in civil law countries the rules relating to time-limits and limitations were part of substantive law, whereas in common law countries they were considered to be part of procedural law.

44. There was a general consensus that this topic was one which could profitably be the subject of immediate work by the Commission. The studies revealed numerous disparities between the rules of law of domestic legal systems and a fundamental difference of approach in the civil law and common law systems. A number of representatives referred to the work already done in this field in the draft elaborated in 1961 and the general conditions adopted in 1968 by the Council for Mutual Economic Assistance; in the draft rules elaborated within the framework of the European Committee on Legal Co-operation of the Council of Europe; and by Professor H. Trammer in his preliminary draft of a convention, annexed to the study submitted by the Government of Czechoslovakia.

Decision of the Commission

45. At the 12th meeting of Committee I, on 18 March 1969, the representatives of Hungary and the United Kingdom submitted a recommendation on time-limits and limitations (prescription) in the international sale of goods which the Committee had asked them to prepare. After certain amendments had been made, the proposal was approved by Committee I at its 15th meeting, on 24 March 1969, for submission to the Commission.

46. At its 44th meeting, on 26 March 1969, the Commission considered the recommendation of Committee I and unanimously adopted the following decision:

"1. The Commission decides to set up a Working Group consisting of seven members: Argentina, Belgium, Czechoslovakia, Japan, Norway, United Arab Republic and United Kingdom of Great Britain and Northern Ireland. The Working Group should be composed of persons specially qualified in the field of law referred to the Working Group for consideration.

"2. The Working Group shall:

"(a) Study the topic of time-limits and limitations (prescription) in the field of international sale of goods with a view to the preparation of a preliminary draft of an international convention;

"(b) Confine its work to consideration of the formulation of a general period of extinctive prescription by virtue of which the rights of a buyer or seller would be extinguished or become barred; the Working Group should not consider special time-limits

by virtue of which particular rights of the buyer or seller might be abrogated (e.g. to reject the goods, to refuse to deliver the goods or to claim damages for non-conformity with the terms of the contract of sale) since these could most conveniently be dealt with by the Working Group on the international sale of goods.

"3. The Working Group shall, in its work, pay special attention, *inter alia*, to the following points:

- (a) The moment from which time begins to run;
- (b) The duration of the period of prescription;
- (c) The circumstances in which the period may be suspended or interrupted;
- (d) The circumstances in which the period may be terminated;
- (e) To what extent, if any, the prescription period should be capable of variation by agreement of the parties;
- (f) Whether the issue of prescription should be raised by the court *suo officio* or only at the instance of the parties;
- (g) Whether the preliminary draft convention should take the form of a uniform or a model law;
- (h) Whether it would be necessary to state that the rules of preliminary draft convention would take effect as rules of substance or procedure;
- (i) To what extent it would still be necessary to have regard to the rules of conflict of laws.

"4. The Commission requests the Secretary-General to notify intergovernmental and international non-governmental organizations active in the field of the date of the meeting of the Working Group. The Secretary-General is also requested to send to the members of the Commission as well as to the foregoing organizations the studies referred to in paragraph 41 above for submission of their comments to the Working Group as soon as possible. The Secretary-General is further requested to transmit to the members of the Commission and the same organizations any drafts produced by the Working Group. It is envisaged that a preliminary draft of a convention can be completed in 1970 or 1971 and the Commission requests the Working Group to report its progress to the Commission at its third session.

47. With regard to the Working Group established under the above decision, several representatives stated that the composition of that Working Group which included the four members of the Commission which had submitted studies on the subject of time-limits and limitations (prescription), was a special arrangement and should not be considered as a precedent for the composition of future working groups that might be established by the Commission.

C. General conditions of sale and standard contracts, Incoterms and other trade terms

48. The subject of general conditions of sale and standard contracts, Incoterms and other trade terms, was considered by the Commission during a general

debate held in the course of its 28th to 31st meetings, on 4, 5 and 6 March 1969, and by Committee I in the course of its 8th meeting. At that meeting, Committee I decided that sub-items (d) (general conditions of sale and standard contracts) and (e) (Incoterms and other trade terms) of item 4 of the agenda should be considered together in view of their inter-relationship. The Commission concurred with this view and this report therefore deals with both these sub-items under one heading. A summary of the observations made by members of the Commission and observers of organizations is set out in paragraphs 50 to 58 below.

49. The Commission had before it, with regard to general conditions of sale and standard contracts, a report by the Secretary-General (A/CN.9/18) and a proposal submitted by the United States (A/CN.9/L.8) and, with regard to Incoterms and other trade terms, a note by the Secretary-General (A/CN.9/14), reproducing a report submitted by the International Chamber of Commerce (ICC) for the second session of the Commission. Several representatives expressed their appreciation for the report of ICC.

50. In discussing the possibilities of promoting the wider use of the existing general conditions of sale and standard contracts as well as of Incoterms, the Commission considered the role of these formulations in the process of the unification of the law of the international sale of goods. Several representatives were of the opinion that there was an interconnexion between general conditions and a uniform law on sale of goods, in view of the fact that the provisions of a uniform law should allow some room for the application of general conditions. The view was also expressed that even if there was no widely accepted uniform law on sales, general conditions of sale and standard contracts would still be useful.

51. One representative expressed the opinion that general conditions of sale offered the best prospects of unification, since they were essentially of a practical nature and were more readily and speedily accepted than conventions involving basic legal principles. Other representatives pointed out that the application of general conditions could help to eliminate international commercial disputes and might ultimately lead to the establishment of a uniform trade law.

52. Several representatives commented on the legal character of general conditions and standard contracts. It was pointed out that general conditions, such as those drawn up by the United Nations Economic Commission for Europe (ECE), are applicable only by agreement of the parties and that mandatory rules of the applicable municipal law prevailed over them in the event of conflict. The 1968 General Conditions of the Council for Mutual Economic Assistance (CMEA) on the other hand, being of a mandatory character and thus applicable independently of the will of the parties, prevailed over the whole body of domestic law, including its mandatory rules. Because of that difference, the CMEA General Conditions were considered as being closer in character to a uniform law than to general conditions.

53. The Commission was generally agreed that out of the great number of existing general conditions of

sale and standard contracts, the wider use of those prepared by the United Nations Economic Commission for Europe (ECE) should be promoted. It was considered whether the application outside Europe of these formulations in their present form could be extended. While some of the speakers were of the opinion that the application of the ECE general conditions would not encounter any legal obstacle in countries outside Europe, others expressed the view that some modifications might be needed in order to make these formulations more widely acceptable. One representative considered that some scope should be allowed to economically weaker countries to depart from the provisions of the above-mentioned general conditions for the purpose of protecting their interests.

54. It was also pointed out that the ECE general conditions were not well known outside Europe and this impeded their wider use. The Commission was unanimous in the opinion that the widespread dissemination of the ECE formulations would help in making them more widely known and in promoting their wider use. One representative expressed the view that although he favoured the widespread dissemination of the ECE general conditions, he did not favour recommending these texts as long as no agreement had been reached on the principles governing the international sale of goods.

55. It was generally considered that the method which was most likely to promote the wider use of the ECE general conditions of sale and standard contracts would be the establishment of a joint committee of the four United Nations regional economic commissions or the convening of a meeting of these organs for exploring the possibility of the use, in all regions, of these formulations and to consider any necessary revision of the texts. It was suggested by some representatives that the Organization of American States, the Organization of African Unity and the Economic Commission for Central America should also be invited to participate in such a meeting. At the same time it was emphasized that a considerable amount of preparatory work would be needed before the convening of a meeting of this kind and the financial implications would also have to be considered. In this connexion the Commission welcomed the generous offer made by the representative of Japan to contribute to its work by preparing for its use a comparative study of the ECE general conditions.

56. Several representatives suggested that information on the CMEA General Conditions should also be disseminated. The observer from CMEA said that the secretariat of CMEA would be prepared to supply an English translation of the CMEA general conditions for dissemination.

57. As regards Incoterms, it was generally considered that they should be retained in their present form and their wider use should be promoted. One representative pointed out some differences between interpretations in Incoterms and the definitions used in the United States Uniform Commercial Code.

58. Some representatives stressed the need for formulating new general conditions for tropical products and for use in exports from developing countries.

Decisions of the Commission

59. At its 12th meeting, on 18 March 1969, Committee I approved a recommendation for submission to the Commission.

60. At its 44th meeting, on 26 March 1969, the Commission considered the recommendation of Committee I and unanimously adopted the following decision:

"The Commission decides:

"With regard to general conditions of sale and standard contracts:

"1. (a) To request the Secretary-General to transmit the text of the ECE general conditions relating to plant, machinery, engineering goods and lumber to the Executive Secretaries of the Economic Commission for Africa (ECA), the Economic Commission for Asia and the Far East (ECAFE), and the Economic Commission for Latin America (ECLA), as well as to other regional organizations active in this field;

"(b) To request the Secretary-General to make the aforementioned general conditions available in adequate number of copies and in the appropriate languages; the general conditions should be accompanied by an explanatory note describing, *inter alia*, the purpose of the ECE general conditions, and the practical advantages of the use of general conditions in international commercial transactions;

"(c) To request the regional economic commissions, on receiving the above-mentioned ECE general conditions, to consult the Governments of the respective regions and/or interested trade circles for the purpose of obtaining their views and comments on: (i) the desirability of extending the use of the ECE general conditions to the regions concerned; (ii) whether there are gaps or shortcomings in the ECE general conditions from the point of view of the trade interests of the regions concerned and whether, in particular, it would be desirable to formulate other general conditions for products of special interest to those regions; (iii) whether it would be desirable to convene one or more committees or study groups, on a world-wide or more limited scale, whereby with the participation (if appropriate) of an expert appointed by the Secretary-General, matters raised at a regional level would be discussed and clarified;

"(d) To request the other organizations to which the ECE general conditions are transmitted to express their views on points (i), (ii) and (iii) of subparagraph (c) above;

"(e) The views and comments sought from the regional economic commissions and other organizations should be transmitted to the Secretary-General, if possible, by 31 October 1969;

"(f) To request the Secretary-General to submit, together with the relevant ECE general conditions, a report to the third session of the Commission which should contain (if appropriate) an analysis of the views and comments received from the regional economic commissions and other organizations concerned;

"(g) To give, at an appropriate time, consideration to the feasibility of developing general conditions embracing a wider scope of commodities than the existing specific formulations. Consideration of the feasibility of this work should be taken up after there has been an opportunity to study the views and comments requested under sub-paragraphs (c) and (d) above.

"(h) To welcome the generous offer made by the representative of Japan to contribute to the work of the Commission by preparing for its use a comparative study of the ECE general conditions;

"With regard to General Conditions of Delivery (GCD) of 1968 prepared by the Council of Mutual Economic Assistance (CMEA):

"2. (a) To request the Secretary-General to invite the CMEA to furnish an adequate number of copies of the General Conditions of Delivery (GCD) of 1968 in English, accompanied by an explanatory note;

"(b) To request the Secretary-General to transmit in the four languages of the Commission, as appropriate, the above-mentioned General Conditions of Delivery and explanatory note to members of the Commission and to the Economic Commission for Africa, the Economic Commission for Asia and the Far East, the Economic Commission for Europe and the Economic Commission for Latin America, for information.

"With regard to Incoterms 1953:

"3. (a) To request the Secretary-General to inform the International Chamber of Commerce that, in the view of the Commission, it would be desirable to give the widest possible dissemination to Incoterms 1953 in order to encourage their world-wide use in international trade.

"(b) To request the Secretary-General to bring the views of the Commission concerning Incoterms 1953 to the attention of the United Nations regional economic commissions in connexion with their consideration of the ECE general conditions.

D. Co-ordination of the activities of organizations in the field of international sale of goods

61. The Commission, at its 28th meeting, on 4 March 1969, requested Committee I to consider the question of co-ordination in respect of all the items under international sale of goods, i.e. the problems of the unification of norms governing the international sale of goods and the laws applicable to international sales, time-limits and limitations (prescription), general conditions of sale and standard contracts, and Incoterms and other trade terms.

62. The Commission was of the opinion that its decisions in respect of each of those items and the working methods contemplated therein would lead to a satisfactory co-ordination of the work of organizations in the field of international sale of goods and that, at the present stage of its work, no further action was required in respect of co-ordination of those items.

CHAPTER III

INTERNATIONAL PAYMENTS

A. Negotiable instruments

63. The subject of the harmonization and unification of the law of negotiable instruments was considered by the Commission during a general debate held in the course of its 29th to 31st meetings, on 5 and 6 March 1969, and by Committee II in the course of seven meetings, on 6, 7, 13 and 14 March 1969. A summary of the observations made by members of the Commission and observers of organizations during those meetings is set out in paragraphs 65 to 81 below.

64. The Commission had before it the "Preliminary Report on the Possibilities of Extending the Unification of the Law of Bills of Exchange and Cheques" (A/CN.9/19/annex 1) prepared by the International Institute for the Unification of Private Law (UNIDROIT) for the second session of the Commission. That report examines the solutions by which unification could, in principle, be promoted. Many representatives who spoke on the subject of negotiable instruments expressed their appreciation of the report by UNIDROIT which, although of a preliminary nature, significantly contributed to the work of the Commission.

65. One representative informed the Commission of the existence of a draft uniform law on negotiable instruments for Central America prepared under the auspices of the permanent secretariat of the Central American Treaty for Economic Integration. The observer of the Organization of American States (OAS) informed the Commission that a Draft Uniform Law on Negotiable Instruments for Latin America had been prepared under the auspices of the Inter-American Development Bank, and had been considered by the Inter-American Juridical Committee which decided to consider specific forms of negotiable instruments, starting with cheques and bills of exchange, both for international circulation only.

66. In evaluating the measures that could be adopted in the interest of unification, the Commission noted that there were two principal systems of negotiable instruments law, i.e. that represented by the Geneva Conventions of 1930 and 1931 and that represented by the English Bill of Exchange Act and the United States Negotiable Instruments Law (superseded by article 3 of the Uniform Commercial Code). The Commission recognized that even within these systems complete unification had not yet been achieved. With respect to the system of the Geneva Conventions, some important problems, such as *provision*, were not dealt with by the uniform laws forming the annex to those Conventions, while also the uniformity which those laws sought to establish had further been compromised by reservations. Similarly, divergencies did exist between the English and American acts and, consequently, in the laws of those countries which had modelled their legislation on one or the other of these acts. There was, however, general consensus that a parallel unification of the two main systems was to be regarded as a difficult and long-term task and that the work of unification should be concentrated on

finding a solution that would reduce the problems arising out of the coexistence of these systems.

67. The Commission also agreed that a mere comparative study of the legal differences between the systems would not suffice for the purpose of the work towards unification and that the listing and analysis of these differences would produce an oversimplified picture of the real degree of dissimilarity. For this reason, the Commission was of the opinion that seeking the views and active support of banking and trade institutions was a prerequisite to any final decision regarding the feasibility of unification and a necessary element of its work.

68. The Commission considered whether the problems that might arise from the coexistence of the Geneva and Anglo-American systems could adequately be met by conflict rules, such as those set forth in the Geneva Convention for the Settlement of Certain Conflicts of Laws in connexion with Bills of Exchange and Promissory Notes of 1930 and the Geneva Convention for the Settlement of Certain Conflicts of Laws in connexion with Cheques of 1931. It was observed, in this connexion, that conflict rules alone would not expedite the international circulation of negotiable instruments and that the uniform law approach, if it proved possible, was more likely to produce satisfactory results. The Commission was also informed by the Observer of the Hague Conference on Private International Law that the Conference had, in 1968, included in its future programme of work, but without giving it priority, an item entitled "The law applicable to negotiable instruments" and that, if the Commission should decide that a conflicts of law convention would contribute to solving existing problems, the Conference would be willing to prepare a draft of such a convention.

69. In the light of the decision taken by it at its first session³ and the preliminary report by UNIDROIT, the Commission considered the following methods that could, in principle, promote unification:

(a) Securing a wider acceptance of the Geneva Conventions of 1930 and 1931;

(b) Revising the Geneva Conventions of 1930 and 1931 with a view to making the conventions more acceptable to countries following the Anglo-American system;

(c) Creating a new negotiable instrument.

(a) *Securing a wider acceptance of the Geneva Conventions of 1930 and 1931*

70. The Commission concluded that this method would not offer a sufficient chance of success. The view was, however, expressed that efforts should be made to secure acceptance of the Geneva Conventions by those civil-law countries which had not yet ratified them or adapted their internal legislation to them, or which were studying proposals for uniform legislation in the field; under this view, acceptance of the Geneva Conventions was deemed preferable to maintaining a separate system or attempting to create a new system different from the existing ones.

³ Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), p. 22, para. 26.

71. It was pointed out by representatives of common law countries that, by reason, *inter alia*, of different banking practice and a different approach to formal requirements, the acceptance of the Geneva Conventions by countries following the Anglo-American system would inevitably require a drastic alteration of their domestic practices and legal institutions in the field and that, consequently, there was little or no hope that the governments of these countries could be persuaded to accede to those Conventions. In this connexion, it was emphasized by the representatives of common law countries that the Anglo-American law of negotiable instruments was to a considerable degree the outcome of the practices and usages of bankers and traders and represented, in a sense, the conversion of *lex non scripta* into *lex scripta*; that the development of the law still depended on commercial customs and practice and on decisions of the judiciary; that the rules of common law continued to apply where they were not incompatible with statutory provisions, as evidenced by the English Bill of Exchange Act in which such common law rules as those regarding sufficiency of consideration, limitation and the capacity of the parties were preserved; and that the way of legal thinking and of formulating and interpreting legal provisions in common law countries was different from that obtaining in civil law countries.

72. On their part, representatives of civil law countries stated that the Geneva Conventions could generally be deemed to represent a satisfactory system of negotiable instruments law which had given rise to few difficulties, but they recognized that the Conventions in their present form could not be recommended unreservedly for universal application. In this connexion, some representatives referred to the lack of completeness of the Geneva Conventions and to the fact that some of their provisions had given rise to divergent interpretations, particularly in the context of new practices which had been developed since the adoption of the Conventions.

(b) *Revision of the Geneva Conventions of 1930 and 1931*

73. Most representatives were of the opinion that a revision of the Geneva Conventions with a view to making them more acceptable to countries following the Anglo-American system would not be an effective method of securing international uniformity in the areas where such uniformity was desirable, i.e. international transactions. These representatives drew attention to the fact that the uniform laws annexed to the Geneva Conventions applied to both national and international transactions and that it would be unrealistic to expect States already party to the Conventions or the countries following the Anglo-American system to modify their domestic law and practice for the sole purpose of achieving a greater degree of uniformity where international transactions were concerned.

74. Some representatives, however, considered that the solution consisting of revising the Geneva Conventions should not be abandoned outright in view of the fact that the essential legal differences between the Conventions and the Anglo-American laws were few and that, in some cases, these differences were overcome in practice or led to similar results, as in the case of protest

and, to a lesser extent, in respect of forged endorsements. It was pointed out in this respect that although under English and American law, protest, as a condition to the right of recourse, need not be made where an inland bill had been dishonoured, it was essential in the case of a foreign bill. In the result, at least in so far as international transactions were concerned, the Anglo-American system coincided with the Geneva system under which protest for non-acceptance or non-payment was the general rule. As to the problem of forged signatures, it was emphasized that although under the common law a forged signature was inoperative and the English and American law preserved that rule, the English Bill of Exchange Act, in section 60, provided an exception in that in certain circumstances it protected bankers paying a bill with forged endorsement from the consequences of the bill being void. In this connexion, reference was also made to the concept of *abstraction*, in the civil law of countries following the Geneva system, by virtue of which the rights of the holder of a negotiable instrument were not dependent on the underlying transaction or *causa* which explained why, in the case of a forged endorsement, a good title could nevertheless be passed by the endorser to the holder.

(c) *A new negotiable instrument for international transactions*

75. It was generally considered that the method which was most likely to produce tangible results in the Commission's endeavours to secure uniformity would be the creation of a new negotiable instrument. In reaching this conclusion, many members stressed that their preference for this method should not be construed as the expression of a final opinion on the feasibility and desirability of a new instrument. Such an opinion, it was felt, could only be formed after a careful study of the issues involved had been made on the basis of a questionnaire to be addressed to banking and trade institutions.

76. Some representatives took the view that the scope of the new instrument should be restricted to matters regarded as indispensable for its issue and international circulation. They were also of the opinion that the question whether the new instrument should be usable both as a bill of exchange and a cheque should be left open until full evidence on the importance of each of these instruments in international transactions had been obtained.

77. The discussions in the Commission showed that most representatives favoured an instrument, the use of which would be optional. The view was however also expressed that the optional character of the new instrument would be one of the points which should be further clarified by research and that nothing would be gained by a premature decision in this respect.

78. One representative considered that the question whether the new instrument should be used in international transactions only, or also in domestic transactions, should not be decided now. It would, in his view, be possible to envisage a situation in which, in respect of internal transactions, the present domestic negotiable instruments law would subsist during a certain period,

after which the use of the new instrument would become mandatory.

79. In conformity with its earlier conclusion that any study of possible measures of unification should be made on the basis of an exhaustive survey of the views and suggestions of banking and trading institutions, the Commission took the view that a questionnaire regarding the creation of a new negotiable instrument should be drawn up and addressed to these institutions. The Commission, having heard statements by the observers of the International Monetary Fund (IMF, UNIDROIT and the International Chamber of Commerce (ICC) in which these organizations expressed their readiness to co-operate with the Commission, was of the opinion that the questionnaire should be drawn up by the Secretary-General in consultation with these organizations.

80. Some representatives considered that, for the purpose of drawing up the questionnaire, a preliminary study on the nature and characteristics of the projected instrument was indispensable. Other representatives suggested that the questionnaire should be accompanied by a brief explanatory memorandum, but that the relevant questions should be framed in such a way as to permit the addressees to state their views and suggestions freely.

81. One representative expressed the view that it would be useful to invite organizations such as UNIDROIT to prepare technical studies on certain questions relating to the circulation and effectiveness of negotiable instruments; the studies, which would show that in practice similar solutions were reached despite divergent legal rules, would facilitate the harmonization of legislation and judicial practice. Other representatives who shared this view pointed out that such studies would also assist the Commission in its work on a new negotiable instrument.

Decisions of the Commission

82. At the 6th meeting of Committee II, on 13 March 1969, the representative of Ghana submitted a proposal for a recommendation to the Commission on behalf of Ghana, India, Kenya, Tunisia, the United Arab Republic and the United Republic of Tanzania. After certain amendments had been made, the proposal was approved by Committee II at its 7th meeting, on 13 March 1969, for submission to the Commission.

83. At the 7th meeting of Committee II, on 13 March 1969, the representative of Chile submitted a proposal for a recommendation of the Commission which was approved by Committee II at its 8th meeting, on 14 March 1969.

84. The Commission, at its 38th and 39th meetings, on 21 March 1969, considered the two recommendations of Committee II and, at its 39th meeting, adopted unanimously the texts and decisions set out in paragraphs 85-89 below.

(a) *Creation of a new negotiable instrument for international transactions*

85. With regard to the three possible measures described in paragraph 69 above, which could in principle

be adopted in order to promote the harmonization and unification of the law relating to negotiable instruments, the Commission is of the opinion that the first measure, i.e. securing a wider acceptance of the Geneva Conventions of 1930 and 1931 on negotiable instruments, does not offer a sufficient chance of success in the context of a world-wide unification of negotiable instruments law. The Commission considers, however, that an attempt should be made to obtain acceptance of Geneva Conventions by those countries belonging to the civil law system which have not yet ratified them, or have not yet adapted their internal legislation to them, or else are studying proposals for uniform legislation in the field.

86. As regards the second possible solution, consisting in a revision of the Geneva Conventions with a view to making them more acceptable to countries following the common law system, the Commission is of the opinion that, while a revision of the Geneva Conventions could possibly lead towards unification or harmonization and that solution should therefore not be rejected outright, problems in international transactions arising out of the existence of two major systems of law on negotiable instruments might better be solved by the third solution, consisting of the creation of a new negotiable instrument. The main reason for this conclusion is that the uniform laws forming the annex to the Geneva Conventions apply to both national and international transactions and that it would not be practicable to ask countries to modify well established rules and practices that have been developed over a considerable period of time and which appear to give full satisfaction in domestic transactions.

87. The Commission therefore decides to study further the possibility of creating a new negotiable instrument to be used in international transactions only. To this end, the Commission requests the Secretary-General:

(a) To draw up a questionnaire in consultation with the International Monetary Fund, UNIDROIT, the International Chamber of Commerce and, as appropriate, with other international organizations concerned, taking into consideration the views expressed in the Commission;

(b) To address such a questionnaire to Governments and/or banking and trade institutions as appropriate;

(c) To make the replies to the questionnaire available to the Commission at its third session, together with an analysis thereof, prepared by the Secretary-General in consultation with the organizations mentioned in subparagraph (a) above.

(b) *Studies on negotiable instruments*

88. The Commission notes that, on certain concrete points related to the circulation and effectiveness of negotiable instruments, the commercial practices of the various countries have, in the face of specific difficulties, produced similar solutions despite the differences in legal systems. The Commission is therefore of the opinion that a comparative technical study of those questions on which it may seem possible to realize a substantial uniformity will make it possible to determine the reason

for differences in legislation and may, at the same time, indicate ways of reducing such differences. Moreover, such studies and their distribution could also facilitate the harmonization of judicial practice, including that of countries having similar legislation relating to negotiable instruments, and would undoubtedly be useful also in promoting the progressive harmonization of legislation, at any rate on certain specific questions.

89. The Commission therefore requests the Secretary-General to invite, at the appropriate time, the International Monetary Fund, UNIDROIT, the International Chamber of Commerce and the other organizations concerned to prepare studies on, *inter alia*, the following questions arising in the main legal systems, with a commentary on the solutions that have been adopted on those questions in both commercial and judicial practice:

(a) The problem of forged signatures and endorsements;

(b) The stipulation of protests and the effects of failure to advise in cases of non-payment;

(c) The extent of liability under signature and guarantee endorsement.

B. *Bankers' commercial credits*

90. The subject of bankers' commercial credits was considered by the Commission at its 29th and 31st meetings, on 5 and 6 March 1969, during the general debate and by Committee II in the course of four meetings, on 10, 13 and 14 March 1969. A summary of the observations made by members of the Commission and observers of organizations during those meetings is set out in paragraphs 92 and 93 below.

91. The Commission had before it a study entitled "Documentary credits" (A/CN.9/15, annex I), submitted by ICC for the second session of the Commission. Many representatives expressed their appreciation of the study of ICC and stated that the Uniform Customs and Practice of Documentary Credits (1962 revision), drawn up by ICC, gave full satisfaction in practice.

92. Some representatives drew attention to the fact that, in some instances, difficulties of interpretation in respect of certain articles of the Code had arisen, and suggested that future work in the field of documentary credits should be concentrated on improving the Code.

93. The Commission noted with satisfaction that ICC endeavoured to keep the Code under constant review and that the problem of uniform interpretation was considered, among other matters relating to the Code, at the half-yearly meetings of the ICC's Commission on Banking Techniques and Practice. The view was also expressed that the provisions of the Code should, in due course, take account of the problems that arose in the context of new forms of inter-modal transport, i.e. transport by containers. The Commission was informed by the Observer of ICC that that Organization was at present considering such problems and would be willing to submit a report to the Commission at the appropriate time.

Decision of the Commission

94. At the 7th meeting of Committee II, on 13 March 1969, the representative of the United Kingdom

submitted a recommendation for submission to the Commission which was approved by Committee II at the same meeting.

95. At its 38th and 39th meetings, on 21 March 1969, the Commission considered the recommendation of Committee II and, at its 39th meeting, unanimously adopted the following decision:

"The Commission notes with approval the valuable contribution to the development of international trade made by the "Uniform Customs and Practices for Documentary Credits" of the International Chamber of Commerce ("the Code") and expresses its satisfaction with the existing arrangements of the International Chamber of Commerce for reviewing the operation of, and when appropriate revising, the Code.

"The Commission requests the Secretary-General:

"(a) To draw the attention of Governments to the contribution which employment of the Code can make to facilitating international trade;

"(b) To draw the attention of such Governments to the desirability of informing the International Chamber of Commerce of difficulties which arise in connexion with the use of the Code either by reason of divergencies of interpretation or by reason of the inadequacy or unsuitability of any of its provisions in relation to commercial needs;

"(c) To inform such Governments that the Commission commends the use of the Code in relation to transactions involving the establishment of a documentary credit; and

"(d) To inform the third session of the Commission of the steps taken to implement the request set out in sub-paragraphs (a), (b) and (c) above and of any work, in progress or contemplated, on the part of the other organizations which may affect the procedures used in connexion with banker's commercial credits.

"The Commission decides, with a view to facilitating the dispatch of the work of the Commission's third session, that the subject of bankers' commercial credits shall be included in the work programme of that session only to the extent necessary to consider any report of the Secretary-General pursuant to sub-paragraph (d) above.

C. Guarantees and securities

96. The subject of guarantees and securities was considered by Committee II at its 4th and 5th meetings, on 10 March 1969, and at its 7th and 8th meetings, on 13 and 14 March 1969.

97. The Commission had before it the report of the Secretary-General on Guarantees and Securities as related to International Payments (A/CN.9/20 and Add.1). Owing to the fact that this report was not available for examination by Governments prior to the second session of the Commission, many representatives, while expressing appreciation for the report, felt that they could not give adequate consideration to it at this stage. The Commission also had before it a proposal submitted by Hungary concerning the preparation of

uniform rules and practice relating to bank guarantees (A/CN.9/L.13) to which, for the same reasons, the Commission was unable to give proper consideration. In addition, the Commission heard a statement by the observer of the International Chamber of Commerce (ICC) on the work of that organization in the field of bank guarantees.

Decision of the Commission

98. At its 8th meeting, on 14 March 1969, Committee II approved a proposal for a recommendation for submission to the Commission.

99. The Commission, at its 38th and 39th meetings, on 21 March 1969, considered the proposal of Committee II and, at its 14th meeting, unanimously adopted the following decision:

"The Commission:

"1. Decides to defer consideration of the subject of guarantees and securities until its third session;

"2. Requests the Secretary-General:

"(a) To invite members of the Commission to submit such observations as they might wish to make on the report of the Secretary-General on guarantees and securities (A/CN.9/20 and Add.1);

"(b) To supplement his report on guarantees and securities if additional material should be available which, in his opinion, would be useful to the Commission when it considers the subject at its third session;

"(c) To invite the International Chamber of Commerce to submit to the Commission at its third session a report on its work in the field of certain types of bank guarantees, such as performance guarantees, tender or bid bonds and guarantees for repayment of advances made on account in respect of international supply and construction contracts.

D. Co-ordination of the work of organizations in the field of international payments

100. The Commission, at its 28th meeting, on 4 March 1969, requested Committee II to consider the question of co-ordination in respect of each of the three items under international payments, i.e. negotiable instruments, bankers' commercial credits, and guarantees and securities. The Commission was of the opinion that its decisions in respect of each of those items and the working methods contemplated therein would lead to a satisfactory co-ordination of the work of organizations in the field of international payments and that, at the present stage of its work, no further action was required in respect of co-ordination of those items.

CHAPTER IV

INTERNATIONAL COMMERCIAL ARBITRATION

101. The subject of international commercial arbitration was considered by the Commission at its 29th to 31st meetings, on 5 and 6 March 1969, during the general debate and by Committee I in the course of three meetings, on 19, 20 and 21 March 1969.

102. The Commission had before it a report by the Secretary-General on international commercial arbitration (A/CN.9/21 and Corr.1), a bibliography on arbitration law (A/CN.9/24/Add.1 and 2), and a note on the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (A/CN.9/22 and Add.1) indicating the position in respect of ratifications of that Convention and the replies of certain States indicating whether or not they intended to accede to it.

103. The representatives who spoke on this question congratulated the Secretariat on its report which, as a detailed study in depth, was a valuable working document.

104. Most representatives considered that the Commission should not for the time being undertake to draft a new convention on international commercial arbitration since the preparation of an international convention on commercial arbitration involved considerable difficulties and, to judge from the pace of the work which had led to the adoption of the existing conventions, was bound to be a long-term undertaking.

105. For those same reasons, other representatives pointed out that, certain imperfections notwithstanding, it would be a mistake to tamper with the existing conventions, particularly the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 and the European Convention on International Commercial Arbitration of 21 April 1961, which had proved their value.

106. Almost all the representatives considered that the best course, for the time being, was to concentrate efforts on information and research with reference to the 1958 Convention and to try to obtain the largest possible number of ratifications or accessions to that Convention.

107. The general opinion was that the most effective course for the Commission would be to concern itself with problems of the practical application and interpretation of existing conventions, since those conventions were interpreted in various ways and it would be desirable to encourage a uniform interpretation as far as possible. Reference was made, in particular, to the difficulties in connexion with the interpretation of article 2 of the United Nations Convention of 1958. Some representatives considered that it would be helpful, in the efforts to arrive at a uniform interpretation of the conventions, to have a compendium, or at least an abstract, of commercial arbitral awards, when the parties had no objection to their publication.

108. That obviously did not mean that international commercial arbitration did not involve many other questions, and some representatives advocated setting up a small working party to consider those questions and submit practical suggestions at the next session.

109. Other representatives suggested the appointment of a special rapporteur to undertake a thorough study of the most important problems relating to the application and interpretation of the existing conventions and of other related problems.

110. One representative, while agreeing that a special rapporteur should be appointed, advocated sending a questionnaire to Governments and interested organizations with a view to obtaining information on: (a) the matters listed in chapter II of the Secretary-General's report (A/CN.9/21 and Corr.1); (b) the conventions, agreements and regulations or other instruments to which the addressee was a party; (c) the texts of relevant national laws, including any laws governing the application of international instruments; (d) any of those instruments which had, in particular, to be clarified by the texts of arbitral awards or judicial decisions along with the texts of these awards and decisions; (e) measures which the Commission might adopt with a view to the unification and harmonization of international commercial arbitration law. That representative considered that the special rapporteur could base his report on the replies to the questionnaire.

Decision of the Commission

111. At its 14th meeting, on 20 March 1969, Committee I approved a recommendation for submission to the Commission.

112. The Commission, at its 44th and 45th meetings, on 26 March 1969 considered the recommendation of Committee I and unanimously adopted the following decision:

"The Commission decides to appoint Mr. Ion Nestor (Romania) as Special Rapporteur on the most important problems concerning the application and interpretation of the existing conventions and other related problems. The Special Rapporteur should have the co-operation, for documentary material, of members of the Commission and various interested intergovernmental and international non-governmental organizations.

"The Commission expresses the opinion that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 should be adhered to by the largest possible number of States.

113. The Special Rapporteur stated that the preliminary report which he proposed to submit to the third session of the Commission would deal in particular with the interpretation and application of the United Nations Convention of 1958.

CHAPTER V

INTERNATIONAL LEGISLATION ON SHIPPING

114. The Commission discussed this question at its 33rd, 34th, 40th, 41st and 46th meetings, on 12, 24 and 27 March 1969. It had before it a note by the Secretary-General (A/CN.9/23) reviewing the consideration given to the question at the Commission's first session and reporting on the action taken by UNCTAD in the matter, including UNCTAD resolution 14 (II) of 25 March 1968, entitled "International shipping legislation", and resolution 46 (VII) adopted by the Trade and Development Board on 21 September 1968. The note also gave particulars of the action taken in the

matter by the General Assembly at its twenty-third session (resolution 2421 (XXIII) of 18 December 1968 and report of the Sixth Committee (A/7408, para. 17)) and referred to the establishment of a joint shipping legislation unit (UNCTAD secretariat/Office of Legal Affairs). A note on the role of the Commission in international legislation on shipping and the text of resolution C.44 (XXI) adopted by the Council of the Inter-Governmental Maritime Consultative Organization (IMCO) on 29 November 1968 were annexed to the note.

115. All the representatives who spoke on this item took the view that the Commission was competent to deal with the question of international legislation on shipping.

116. However, a difference of opinion arose with regard to the right time for the Commission to take up this question, the methods of work and the exact role which it should play in relation to the other organizations or bodies dealing with maritime law. A few representatives also raised the question of the subjects with which the Commission should deal.

117. Nearly all representatives were of the opinion that the Commission should give the item priority in view of the provisions of UNCTAD resolution 14 (II), Trade and Development Board resolution 46 (VII) and the recommendation made in General Assembly resolution 2421 (XXIII) that the Commission should consider the inclusion of international legislation on shipping among the priority topics in its work programme.

118. In the view of the Commission international legislation on shipping was an integral part of international trade law for whose unification and harmonization the Commission had been established; the Commission could hardly omit dealing with laws governing contracts for the delivery of goods to buyers in foreign countries, although that did not mean that it had an exclusive right to study such legislation. Other international bodies, especially the International Maritime Committee, had already made a useful contribution.

119. Some representatives expressed the view that the Trade and Development Board, in its resolution 46 (VII), had instructed the Committee on Shipping of UNCTAD to create a working group to review commercial and economic aspects of international legislation on shipping, but not its legal aspects. Many representatives argued that, if the Commission did not undertake to draft appropriate international conventions, it was to be thought that UNCTAD, which had asked the Commission to do so, would take other steps, as provided for in its resolution 14 (II), to finalize the drafting. In order to avoid any conflict with UNCTAD, which was not competent to undertake the codification and harmonization of international trade law, the Commission should co-operate with the UNCTAD working group while retaining complete freedom of action with regard to the legal aspects of international legislation on shipping.

120. Some representatives, while recognizing that the Commission was competent to deal with the subject, considered that the most important problem was that of co-ordinating its activities with those of IMCO, UNCTAD and the International Maritime Committee.

Any overlapping of activities should be avoided, for it would inevitably lead to chaos. They took the view that international legislation on shipping was a vast and complex topic requiring very specialized expert knowledge for which the Commission was unprepared. Since UNCTAD had already taken up the question, it would be advisable to wait until the UNCTAD working group had reviewed the economic and commercial aspects of such legislation; the results of its work would help to identify the areas in which action by legal bodies was required.

121. Some representatives considered that the Commission should not wait until the UNCTAD working group was set up before deciding to begin its work on the subject. Furthermore, while the Commission could act in a co-ordinating capacity, its terms of reference as laid down in General Assembly resolution 2205 (XXI), authorized it to do original work and prepare draft conventions. These representatives considered that the subjects to be recommended for priority consideration should include the question of freighting and the charter-party, the contract of carriage, the maritime insurance contract and the bill of lading.

122. Certain representatives proposed that the Secretariat should be requested to carry out a study with a view to classifying the topics and allocating them among the bodies concerned, to maintain and strengthen liaison with those bodies, and to widen the field of operations of the joint unit. The relevant report by the Secretariat would enable the Commission to determine more precisely, and with a fuller understanding of the difficulties, to what questions it should give priority.

123. Other representatives recommended that a small permanent liaison committee should be set up to study any suggestions that might be put forward by the working group on international shipping legislation whose establishment the UNCTAD Committee on Shipping was to consider at its next session. Some objected that a small committee, apart from duplicating the work of the UNCTAD committee, would be insufficiently representative and that its composition would be difficult to decide. They preferred to entrust the function of liaison to the Secretariat, while keeping in mind the role of the joint unit of the UNCTAD secretariat and the United Nations Office of Legal Affairs.

124. In the course of the discussion, IMCO and the International Maritime Committee announced that they were ready to co-operate with the Commission on that point.

Decision of the Commission

125. A draft resolution was submitted by Ghana and India (A/CN.9/L.17).

126. Another draft resolution was submitted by Belgium and Italy (A/CN.9/L.18).

127. Later Argentina, Brazil, Chile, Ghana, India, Iran, Kenya, Mexico, Tunisia, the United Arab Republic and the United Republic of Tanzania submitted a revised version (A/CN.9/L.17/Rev.1) of the draft resolution previously submitted by Ghana and India, the preamble to which reproduced most of the preamble to the Belgian-Italian draft.

128. Informal consultations were held between various regional groups and resulted in the submission at the Commission's 46th meeting, on 27 March 1969, of a draft resolution sponsored now by the original eleven States, together with Belgium and Spain (A/CN.9/L.17/Rev.2). Accordingly, the draft resolution submitted by Belgium and Italy was not formally introduced.

129. The sponsors, during the discussion on the draft resolution, stressed the efforts that had been made to arrive at a solution acceptable to all and paid a tribute to the spirit of co-operation which had prevailed in the informal consultations.

130. Certain representatives, while expressing support for the joint draft resolution, said that they did so in a spirit of compromise but made observations with regard to the financial and technical aspects of the establishment of the working group proposed in the draft resolution.

131. Several representatives expressed the view that the establishment of such a working group might greatly facilitate the discussion of the question at the Commission's third session.

132. One representative said that the terms of reference of the working group should be consistent with the terms of resolution 14 (II) of 25 March 1968 and be based on the recommendations of the UNCTAD Committee on Shipping.

133. At its 46th meeting, on 27 March 1969, the Commission unanimously adopted draft resolution A/CN.9/L.17/Rev.2, which reads as follows:

"The United Nations Commission on International Trade Law,

"Recalling resolution 2421 (XXIII), by which the General Assembly recommended the Commission to consider adding international legislation on shipping to its list of priority topics,

"Noting that in the same resolution the General Assembly took note with satisfaction of the Commission's intention to carry out its work in co-operation with organs and organizations concerned with the progressive harmonization and unification of international trade law,

"Having taken note of the Secretary-General's note on consideration of inclusion of international legislation on shipping among the priority topics in its work programme (A/CN.9/23), in which the developments in this field since the Commission's first session are described,

"Aware of the importance of the question of international shipping and of the desirability of close collaboration with the organs and organizations already working in this field,

"Expressing gratification at the full co-operation offered by the Inter-Governmental Maritime Consultative Organization and the International Maritime Committee, to whose work it pays tribute,

"Taking account, in particular, of resolution 14 (II) adopted at the second session of the United Nations Conference on Trade and Development on 25 March 1968, by which the Conference requested its

Committee on Shipping to create a working group on international shipping legislation, and resolution 46 (VII) adopted in this connexion on 21 September 1968 by the Trade and Development Board,

"Confirming its wish to see close co-operation established between the Commission and UNCTAD in accordance with the hope expressed by the Chairman of its first session, to whom it expresses its appreciation, when at the Commission's request he apprised the UNCTAD Conference at its second session of the Commission's views,

"Considering that a duplication of work should be avoided,

"Noting that the UNCTAD Committee on Shipping will hold its next session at Geneva in April 1969,

"Having considered the item "International Legislation on Shipping" at its second session:

"1. Decides to include international legislation on shipping among the priority items in its programme of work;

"2. Requests the Secretary-General to prepare a study in depth giving inter alia a survey of work in the field of international legislation on shipping done or planned in the organs of the United Nations, or in intergovernmental or non-governmental organizations, and to submit it to the Commission at its third session;

"3. Decides to set up a Working Group consisting of representatives of Chile, Ghana, India, Italy, the United Arab Republic, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland, which may be convened by the Secretary-General, either on his own initiative or at the request of the Chairman, to meet some time before — and preferably shortly before — the commencement of the third session of the Commission to indicate the topics and method of work on the subject, taking into consideration the study prepared by the Secretary-General, if it is ready, and giving full regard to the recommendations of UNCTAD and any of its organs, and to submit its report to the Commission at its third session;

"4. Invites the Chairman of its second session and, if he is unable to attend, his nominee from among the members of the Commission to attend the session of the UNCTAD Committee on Shipping to be held at Geneva in April 1969 and to inform that Committee of the course of the discussion in the Commission at its second session and the Commission's desire to strengthen the close co-operation and effective co-ordination between the Commission and UNCTAD;

"5. Requests the Secretary-General, should it be decided to convene the Working Group referred to in paragraph 3 above, to invite States members of the Commission and intergovernmental and non-governmental organizations active in the field to be present at the meeting of the Working Group, if they choose to do so."

CHAPTER VI

A. REGISTER OF ORGANIZATIONS AND REGISTER OF TEXTS

134. The Commission noted with satisfaction that the General Assembly, by its resolution 2421 (XXIII) of 18 December 1968, authorized the establishment by the Secretary-General of a register of organizations and a register of texts. The Commission also noted that, with regard to the register of texts, the General Assembly requested that "the Commission should consider further at its second session the precise nature and scope of such a register in the light of the report of the Secretary-General and the discussions on the registers" at the twenty-third session of the General Assembly and that the register should be established "in accordance with the further directives to be given by the United Nations Commission on International Trade Law at its second session". Accordingly, the Commission, at its 29th meeting, on 5 March 1969, during the general debate, and Committee II in the course of three meetings on 14, 17 and 18 March 1969, reconsidered in detail the nature and scope of the registers taking particular account of the financial implications and of the views which had been expressed at the General Assembly's twenty-third session. The Commission had before it a note by the Secretary-General on this question (A/CN.9/24) prepared for the second session of the Commission, as well as a report of the Secretary-General on the financial and administrative implications of the registers which had been submitted to the General Assembly at its twenty-third session (A/C.6/L.648).

135. The Commission considered possible ways in which the registers could be established to achieve their purpose fully in the most economical way. The Commission was given by the Representative of the Secretary-General detailed information in amplification of the statement of financial implications contained in A/C.6/L.648.

Nature of the registers

136. There was general agreement that the registers should serve the dual purpose of assisting the Commission in its own work and of providing the outside world (e.g. Governments, universities, organizations, commercial circles) with readily accessible texts of international legal instruments and related material. Several representatives expressed the view that the register of texts should in the initial stage only list the titles of international instruments and their sources and that the Commission should take a decision on the publication of the full texts of the instruments at its third session, taking into account possible economies in the publication of the full texts. Most representatives were of the opinion that the register of texts, in order to serve its purpose fully, should at the outset include the texts of international instruments and not merely their title and source, and should be published in the English, French, Russian and Spanish languages.

Scope of the registers

137. Most representatives took the view that the fields to be covered by the registers should, in principle,

coincide with the priority topics included, or to be included, in the Commission's programme of work.

138. As to the register of organizations, the view was expressed that this register should also contain information on the work of the Commission itself.

139. As to the register of texts, since for financial and practical reasons it would not seem possible to publish the register immediately in its entirety, most representatives were of the opinion that work on the register should be done in stages. Some representatives were of the opinion that the register should, in the first stage, cover the international sale of goods (corporeal moveables) and negotiable instruments. Other representatives, while agreeing with this approach, suggested that priority should also be given to bankers' commercial credits and to guarantees and securities in view of the great importance of these instruments in international trade. Another representative suggested that the Commission should only set forth broad guidelines regarding the establishment of a register of texts in successive stages, and that it should be left to the Secretary-General to consider whether, in the first stage, material should be included on guarantees and securities, in addition to the material on the international sale of goods and on negotiable instruments. It was further suggested that the first stage should also include a list of titles and sources of international instruments in the fields to be covered by the register and the status of these instruments.

Decision of the Commission

140. At its 12th meeting, on 20 March 1969, Committee II approved recommendations for submission to the Commission.

141. At its 38th and 39th meetings, on 21 March 1969, the Commission considered the recommendations of Committee II and, at its 39th meeting, unanimously adopted the following decision:

"1. The Commission confirms its earlier view, expressed in chapter V of the report on the work of its first session, namely, that the registers should reproduce the full text of existing international instruments and should be published in English, French, Russian and Spanish. It considers that two specific steps should be taken to reduce expenditure: (a) so far as possible, when there is no official translation of an international instrument, existing unofficial translations should be used so as to minimize translation costs which are a major element of the cost estimates; members of the Commission should be encouraged to make such translations available to the Secretary-General; and (b) the registers should follow a form which would make them suitable for commercial sale;

"2. The Commission decides to add to the fields already indicated in paragraph 5 of chapter V of the report on its first session the fields of guarantees and securities and international shipping legislation;

"3. The Commission requests the Secretary-General to include information on the work of the Commission in the register of organizations;

"4. The Commission requests the Secretary-General to commence work on the register of texts by publishing, as the first stage, the relevant material on the international sale of goods, on negotiable instruments, on bankers' commercial credits and on guarantees and securities. It considers that the register of texts, as established in the first stage, should, in addition, to the texts of international instruments in the fields mentioned above list the title and sources of instruments in all fields to be covered by the register, so as to increase immediately the usefulness of the register of texts. It also considers that the list of instruments set out in annex II of the report of the Secretary-General on the financial and administrative implications of the establishment of the register (A/C.6/L.648) should be complemented as follows:

"(a) As regards the law on sale of goods (annex II, I, 1), the register should also reproduce the text of the "General Conditions of the Technical Servicing of Machinery, Equipment and other Commodities included in Deliveries by CMEA Countries' Foreign Trade Organizations" (CMEA General Conditions of Technical Servicing of 1962);

"(b) As regards the law of negotiable instruments (annex II, I, 4), the register should also reproduce the text of the uniform regulation formulated at the Hague Conference of 1912.

"5. The Commission decides to review at its third session the progress made in establishing the register and to take any necessary further decision, taking account of the financial implications of the project and of the views expressed in the General Assembly."

B. BIBLIOGRAPHY

142. The Commission noted with satisfaction the progress made by the Secretary-General towards the compilation of a bibliography of published books, articles and commentaries on international conventions, model and uniform laws, customs and usages of a multilateral nature in fields covered by the register of organizations and the register of texts. The Commission was of the opinion that the bibliography would prove to be of great assistance to the work of the Commission and that it should also prove to be useful to the outside world. The view was expressed that its value would be enhanced if it included material from a wider number of countries. In this respect, the Commission took note of a statement by the representative of the Secretary-General that work was being done to extend the bibliography to cover materials from other countries. The Commission was not in a position to consider the sample of the bibliography concerning arbitration law in detail and refrained, therefore, from making specific suggestions regarding the scope and concept of that sample. The Commission expressed its appreciation for the assistance rendered by the Parker School of Foreign and Comparative Law of Columbia University and for the work accomplished by Professor P. Herzog of Syracuse University (New York) in the preparation of the bibliography.

CHAPTER VII

CO-ORDINATION OF THE WORK OF ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW; WORKING RELATIONSHIP AND COLLABORATION WITH OTHER BODIES

143. At its 32nd meeting, on 11 March 1968, the Commission decided to consider the question of co-ordination (item 9) and the question of working relationship and collaboration with other bodies (item 10) together, in view of the close inter-relationship of these questions. The questions were considered by the Commission in the course of its 32nd meeting and by Committee II in the course of two meetings on 20 and 21 March 1969. A summary of the discussions is set out in paragraphs 146-153 below.

Co-ordination of the work of organizations in the field of international trade law

144. The Commission noted that the General Assembly, in paragraph 6 (e) of its resolution 2421 (XXIII) on the report of the United Nations Commission on International Trade Law, recommended that the Commission should "consider at its second session ways and means of promoting co-ordination of the work of organizations active in the progressive harmonization and unification of international trade law and of encouraging co-operation among them".

145. The Commission had before it a report of the Secretary-General entitled "Co-ordination of the work of organizations active in international trade law" (A/CN.9/25), setting out the background of the question of co-ordination in general, a summary of views expressed by Member States and international organizations on the ways and means by which co-ordination could be promoted and general observations and suggestions on this point. In addition, the Secretary-General's report set out a number of specific questions which, in the opinion of the Secretary-General, arose in the context of co-ordination.

146. Many representatives recognized that to secure a greater measure of co-ordination of the work of organizations active in the field of international trade law was an important task to which the Commission should continue to give full attention. At the same time, the view was expressed by a number of representatives that the Commission should not concern itself solely with co-ordination, however desirable co-ordination might be, but should engage in unification work of its own, including the actual preparation of draft conventions, enlisting the help of interested organizations as appropriate.

147. Several representatives took the view that the Commission's approach to the question of co-ordination should above all be pragmatic and flexible; they emphasized that the present practice of inviting intergovernmental and non-governmental organizations to send observers to the sessions of the Commission and to examine with them the division of work on priority topics should be continued and further developed over the years to come. These representatives also stressed the fact that the very existence of the Commission creat-

ed a greater awareness among organizations of the necessity to develop the law of international trade in a co-ordinated way. One representative expressed the opinion that the register of organizations would be helpful to other organizations in co-ordinating their work among themselves. The view was also expressed that the task of co-ordination should not be conceived as representing the static side of the Commission's work but should rather be considered as constituting a dynamic process which in itself shaped the development of international trade law.

148. The Commission also considered the questions set out in the report of the Secretary-General on co-ordination (A/CN.9/25, para. 18). As regards the collection of information on activities of organizations active in the field of international trade law for purposes of co-ordination, most representatives took the view that such information was necessary for purposes of co-ordination and should relate only to the priority topics included in the work programme of the Commission. One representative was of the opinion, however, that the information to be obtained should relate to all aspects of international trade law. As to the question whether the information so obtained should be disseminated, most representatives replied in the affirmative and considered that the information should be made available to the Commission in the form of background papers to be prepared from time to time by the Secretary-General.

149. The report of the Secretary-General also raised the question whether the information so given would duplicate the register of organizations and their work to the extent that both publications would include information on the same topics. The Commission was of the opinion that the register of organizations should be a register listing the work, main interests and future programme of work in a general way, whereas the information to be given to the Commission for purposes of co-ordination would supply information on certain specific subject matters in greater detail. The Commission accordingly expressed the view that there would not be any danger of duplication.

150. The Commission noted the questions raised in paragraph 19 of the Secretary-General's report on co-ordination concerning appropriate methods and procedures for achieving co-ordination. The Commission was of the opinion that the pragmatic approach and practice followed so far had proved satisfactory and could therefore be deemed to constitute a proper basis for the further development of such methods and procedures. The Commission further took the view that it should be left to the discretion of the Secretary-General to place before the Commission, in the light of experience gained, further recommendations concerning the action of the Commission in the matter of co-ordination.

Working relationship and collaboration with other bodies

151. The Commission considered the question of working relationship and collaboration with other bodies in the light of the note by the Secretary-General (A/CN.9/26) which provided the Commission with information on collaboration established since the end of the first session with United Nations organs and other or-

ganizations on arrangements made for observers of international organizations to attend the second session, and on organizations placed on the mailing list for documents relating to the Commission's activities. The Commission had also before it the earlier note of the Secretary-General on this question, prepared for its first session, which it had not been able to consider in detail at the time (A/CN.9/7).

152. There was general recognition that the collaboration and working relations that had been established between the Commission and the United Nations organs and other organizations since the inception of the Commission's work had proved satisfactory. It was noted in particular that collaboration in matters relating to the priority topics on the Commission's agenda was an essential element in achieving co-ordination. It was also pointed out that co-operation with such bodies as the Hague Conference on Private International Law and the International Institute for the Unification of Private Law (UNIDROIT) had not been impeded in any way by the fact that special agreements specifically relating to the Commission had not been concluded with those organizations and that it was unlikely that co-operation would be hampered in the future by the absence of such agreements. *Ad hoc* procedures had worked well so far and the question of special agreements with other organizations should only be considered if the necessity for such agreements became apparent.

153. The observers of organizations represented at the second session indicated their willingness to collaborate with the Commission in the unification of international trade law. In this connexion the Observer of the United International Bureaux for the Protection of Intellectual Property stated that, for purposes of co-ordination, it would probably be necessary to identify the particular needs in the field which would then have to be met in appropriate arrangements, in particular if the Commission wished to rely on other organizations to provide consultant services for its own work. The Observer of the Hague Conference on Private International Law stated that the Conference was satisfied with the current practice of the Commission which allowed observers from other organizations to participate on an equal footing with delegations, but without the right to vote; this in itself considerably facilitated collaboration and co-ordination.

Decision of the Commission

154. At its 12th meeting, on 20 March 1969, Committee II approved a recommendation on the question of co-ordination for submission to the Commission.

155. The Commission, at its 39th meeting, on 21 March 1969, considered the recommendation submitted by Committee II and at its 48th meeting on 31 March 1969, taking into account the opinions expressed by Committees I and II on the co-ordination of the work of organizations in the fields of the law of the international sale of goods and of the law of international payments, respectively, adopted unanimously the following decisions:

"The Commission is of the opinion that the pragmatic approach and practice followed so far in mat-

ters of co-ordination, collaboration and working relationship have proved satisfactory and can therefore be deemed to constitute an appropriate basis for future developments in those matters.

"With particular regard to the question of co-ordination the Commission is of the opinion that co-operation and exchange of information between organizations on their work would facilitate co-ordination. To this end, it requests the Secretary-General to keep other organizations fully informed about the Commission's work and to develop with those organizations contacts on an inter-secretariat level. The Commission also requests the Secretary-General to collect information on the activities of organizations pertaining to the priority topics included in its programme of work and to make such information available to the Commission on the occasion of its annual sessions.

With particular regard to the question of collaboration and working relationship with other organizations, the Commission is of the opinion that the present methods and arrangements have produced satisfactory results and should therefore be continued. In this connexion, the Commission requests the Secretary-General to make arrangements for the attendance by observers of international organizations at the third session of the Commission, similar to those made at its second session. As to working agreements with other organizations, the Commission is of the opinion that, at this stage, no formal working agreements are necessary; the present practice of the Commission is in its view sufficiently flexible to permit the establishment and further development of working relationships and collaboration, and arrangements for specific cases, if needed, can better be made on an *ad hoc* basis."

CHAPTER VIII TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW

156. The Commission considered the question of training and assistance in the field of international trade law at its 36th to 38th meetings on 18, 19 and 21 March 1969.

157. The Commission recalled that at its first session it had noted the special importance of increasing the opportunities for the training of experts in the field of international trade law, particularly in many of the developing countries. In considering this subject again at its second session, the Commission had before it the report of the Secretary-General (A/CN.9/27).

158. The Commission noted with satisfaction that the Advisory Committee on the United Nations Programme of Assistance on the Teaching, Study, Dissemination and Wider Appreciation of International Law had recommended at its third session, in October 1968, that an appropriate place should be given to the activities concerning international trade law within the framework of the activities conducted under the Programme. The Commission was also pleased to note that a number of United Nations organs and international organiza-

tions had undertaken training and assistance activities in the field of international trade law and that most of these organizations had expressed their willingness to co-operate with the Commission in their particular fields of specializations.

159. The Commission reviewed the helpful observations and suggestions of the Secretary-General set forth in paragraph 36 of his report as to what further action it could usefully take. The Commission also took note of the useful suggestions of several of its members, particularly the representative of the United Republic of Tanzania, who submitted a written proposal for the Commission's consideration.

Decisions of the Commission

160. At the 38th meeting of the Commission, on 21 March 1969, the representative of the United States submitted a proposal on behalf of Brazil, Ghana, the United Republic of Tanzania and the United States of America. The Commission considered the proposal at the same meeting and unanimously adopted the following decision:

"In an effort to help meet the need for developing local expertise in international trade law, particularly in the developing countries, and for intensifying and co-ordinating the existing programmes, the Commission requests the Secretary-General:

"(a) To recommend to the bodies concerned that regional seminars and training courses under the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law should continue to include topics relating to international trade law;

"(b) To recommend that some of the fellowships to be granted under the Programme of Assistance referred to in sub-paragraph (a) above be awarded to candidates having a special interest in international trade law;

"(c) To take the necessary steps to add the names and relevant particulars of experts in international trade law for inclusion in a supplement to the *Register of Experts and Scholars in International Law*, as described in paragraph 36 (ii) (a) of the report of the Secretary-General (A/CN.9/27);

"(d) To complete the information thus far obtained in respect of activities of international organizations in the field of training and assistance in matters of international trade law, as described in paragraph 36 (i) of the report of the Secretary-General;

"(e) To consult with the Advisory Committee on the United Nations Programme of Assistance referred to in sub-paragraph (a) above and with United Nations organs, specialized agencies and other organizations and institutions active in the field of international trade law concerning the feasibility of establishing within their programmes at selected universities or other institutions in developing countries:

"(i) Regional institutes or chairs for training in the field of international trade law;

"(ii) Seminars or courses for students, teachers,

lawyers and government officials interested or active in this field;

"(f) To report to the third session of the Commission the results of his consultations and the extent to which it has been possible to achieve the foregoing objectives and to inform the Commission of what further measures may be appropriate in the light of this experience."

CHAPTER IX YEARBOOK OF THE COMMISSION

161. In accordance with operative paragraph 6 (f) of General Assembly resolution 2421 (XXIII) the Commission, at its 35th meeting on 17 March 1969, and Committee II, in the course of its 9th to 11th meetings on 17 to 19 March 1969, considered the question of establishing a Yearbook of the Commission. The Commission had before it a Note by the Secretary-General (A/CN.9/28) to which were annexed preliminary outlines of the contents of yearbooks of the Commission for 1968 and 1969.

162. The Commission was of the opinion that it was desirable to establish an UNCITRAL Yearbook to make the Commission's contribution in the field of international trade law more widely known and more readily available beyond the forum of the United Nations.

163. Some representatives considered that it would be premature to start publication of a Yearbook. Other representatives considered that the situation which arose in the case of the International Law Commission should be avoided where additional difficulties and expense resulted from delay in publishing that Commission's first Yearbook. There was also support for the ideas that, at least in respect of the Commission's earlier sessions, it would be enough to envisage an expanded report to the General Assembly (perhaps with the word "Yearbook" added to its title) or else an amendment to the plans concerning the register of organizations to cover the work of the Commission itself.

164. The Commission considered the question of the relationship of the proposed Yearbook to the proposed registers of organizations and texts. The Commission took the view that the two projects were separate although in a sense complementary. Each should be considered on its own merits. However, the Commission was of the view that the establishment of the registers should not, for financial or other reasons, be put in jeopardy or delayed by the publication of the Yearbook.

165. As to the contents of the Yearbook, the Commission noted the draft outlines contained in the annex to document A/CN.9/28. Some representatives considered that it was a wasteful duplication (particularly in respect of the Commission's first few sessions) merely to reproduce *in extenso* all the Commission's documentation, especially summary records. Other representatives considered that the Yearbook should be designed as a complete source-book of the Commission's work which would show in detail the Commission's contribution to the development of international trade law and remain as a permanent record of its work.

Decision of the Commission

166. At its 11th meeting, on 19 March 1969, Committee II approved a recommendation for submission to the Commission.

167. The Commission, at its 38th and 39th meetings, on 21 March 1969, considered the recommendation of Committee II and, at its 39th meeting, unanimously adopted the following decision:

"The Commission requests the Secretary-General:

"(a) To make a study containing proposals for alternative forms of a Yearbook, taking into account relevant precedents, (International Law Commission, International Court of Justice, UNIDROIT, etc.) with the detailed financial implications of each, including a general indication of any revenue from sales which might be expected;

"(b) To complete the study before the beginning of the twenty-fourth session of the General Assembly and to make copies of the study available to the General Assembly.

"The Commission will take, at its third session, its final decisions and recommendations on the timing and content of the Yearbook in the light of the Secretary-General's study and of the debates and decisions at the twenty-fourth session of the General Assembly."

CHAPTER X SUGGESTIONS RELATING TO FUTURE ACTIVITIES OF THE COMMISSION

168. In its discussion of the agenda item on the programme of work until the end of 1972 the Commission, at its 42nd and 43rd meetings, on 25 March 1969, had before it a proposal submitted by France (A/CN.9/L.7).

169. In introducing the proposal (A/CN.9/L.7), the representative of France stated that a method should be devised to bring about a change in the situation which had prevailed until now whereby international conventions, the preparation of which often took many years, tended to be ratified by only a few States. In the view of the representative of France, only a fundamental methodological change would have a chance to reduce the gap between the slow pace of international legislation and the requirements of the modern world, especially in the field of international trade.

170. The representative of France proposed therefore that States, by means of a general convention, should agree to accept the rules established by the Commission or, under its auspices, by other organizations, as a body of common law (*droit commun*). The rules embodied in the new "common law" would apply only to international transactions and would be binding upon States, unless they expressly declined to accept them; in that case, States would be required to indicate which rules they would apply to subject-matter covered by the "common law". Thus, the instruments adopted by the Commission, and recommended by it to the General Assembly, would come into force without requiring ratification by States, except in cases where a State

had notified the competent international organization of its refusal to apply all or part of the provisions of such instruments.

171. If the suggested method were adopted it would result, in effect, in the elaboration of model codes governing different aspects of international trade.

172. According to the representative of France, another method might be developed along the lines of that already applied by the International Labour Organisation, whereby Governments were required to submit conventions for ratification, according to their own constitutional procedures, within a fixed period of time.

173. The Commission was unanimous in appreciating the importance and significance of the French proposal. There was, however, general agreement that a detailed study on all aspects of the proposal would be needed before a more definite opinion on the proposal could be formed.

174. Several representatives supported the idea contained in the French proposal that consideration should be given to using model laws for achieving unification. One representative recalled General Assembly resolution 2205 (XXI) which assigned to the Commission not only the task of unification, but also that of progressive harmonization of the law of international trade. The form of a model law was best suitable for the work of harmonization. Another representative recalled that the International Law Commission had also been faced with the choice between model rules and international conventions and had adopted a pragmatic approach, deciding on the value of either technique in the light of the subject at issue.

175. Some representatives expressed the view that the new method suggested by the French delegation would give rise to many difficulties, and might raise constitutional problems. In the view of one representative the idea that rules would become obligatory only after the adoption of a convention was a contradiction *per se*, because it was the very system of the adoption of conventions which was at issue. Another representative considered that the proposal might conflict with the provision of Article 2, paragraph 7 of the Charter of the United Nations. A few representatives stated that in view of the heavy work programme of the Commission it would be inadvisable, for the present moment, to place any further topics on the future work programme of the Commission.

176. Many representatives suggested that the French delegation should elaborate its proposal in more detail for the third session of the Commission. The representative of France expressed his willingness to submit a working paper on the subject.

177. The representative of the Soviet Union suggested that elimination of the Commission's future programme of work. He observed that a great number of representatives had considered, at the first session of the Commission, that this question should be included in the future work programme of the Commission. In his view, the Commission would not be fulfilling its tasks if it confined itself to the consideration of the private-law problems of international trade and did not concern itself

with questions of international public law which were closely related to those problems and were of major importance for the normalization of international trade. In that connexion, he proposed that at its third session the Commission should begin the preparation of a draft convention on the elimination of discrimination in laws affecting international trade and thereby carry out the task entrusted to it by the General Assembly (resolution 2205 (XXI)). The proposal was opposed by another representative on the ground that it would lead the Commission into new areas in which economic and political, and not merely legal, problems were involved.

CHAPTER XI

ORGANIZATIONAL QUESTIONS RELATING TO FUTURE WORK

A. Planning for future work

178. In its discussion of the agenda item on the programme of work until the end of 1972, the Commission, at its 41st meeting, on 24 March 1969, had before it the annotations of the Secretary-General to this item (A/CN.9/13/Add.1, item 13).

179. At the opening of the debate on the item, the representative of the Secretary-General suggested that the Commission should consider, as far as possible, its anticipated activities until the end of 1972 in order to enable the Secretariat of the Commission to prepare the budget estimates, planning estimates and calendar of meetings for that period. He noted that the Secretariat's estimates would necessarily be based on the work programme envisaged by the Commission and could not take into consideration items which the Commission might include in its programme at future sessions.

180. It was recalled in this connexion that the General Assembly, in resolution 2205 (XXI) by which the Commission was established, had expressed its conviction that "the process of harmonization and unification of the law of international trade should be substantially co-ordinated, systematized and accelerated and that a broader participation should be secured in furthering progress in this area", and that the United Nations should "play a more active role towards reducing or removing legal obstacles to the flow of international trade". The Commission agreed that in order to implement the mandate entrusted to it by the General Assembly, it was desirable that there should be the widest possible participation by members of the Commission also in the preparatory work to be done by inter-sessional sub-committees, working groups or special rapporteurs, which the Commission might decide to establish or appoint. It was also considered desirable that provisions should be made, where necessary, to obtain the services of consultants or organizations with special expertise in technical matters dealt with by the Commission. The Commission agreed that this would be the normal pattern of work during the coming years.

181. The Commission also agreed that it was necessary that the Secretariat should be adequately staffed to cope with the increased workload involved in servicing the Commission.

182. The Commission further considered that it could establish a detailed programme of work for the

coming year only and agreed that the Secretariat should prepare the necessary budget and planning estimates for subsequent years in order to enable the Commission to carry out its work in the light of the considerations set forth in paragraph 180 above.

B. *Establishment of working groups*

183. The Commission in the course of its second session established the following three inter-sessional subsidiary bodies.

(1) Working Group on uniform rules governing the international sale of goods and the law applicable thereto (see paragraph 38 above);

(2) Working Group on time-limits and limitations (prescription) in the international sale of goods (see paragraph 46 above); and

(3) Working Group on International Legislation on Shipping (see paragraph 133 above).

184. At its 45th meeting, on 26 March 1969, the Commission decided that the term "Working Group" would be used for the present for all inter-sessional bodies set up at its second session on the understanding that the adoption of this term would in no way prevent the organ from having summary records of its discussions and other services necessary for its work. This decision was taken after receiving an opinion from the Legal Counsel of the United Nations that it is the decision of a particular organ and not its name which determines whether summary records would be issued and that full assurances could therefore be given that the question of summary records and other services would not be prejudiced if the subsidiary body was called a working group rather than a committee or sub-committee.

C. *Summary records of subsidiary bodies*

185. During the course of the second session a request was made for summary records for the two sessional Committees of the Whole which the Commission established at its 27th meeting, on 4 March 1969, in order that the discussion of legal issues and texts under consideration in the Committees might be available to assist the Commission in its future work. As the establishment of Committees of the Whole and the request for summary records had not been foreseen, it was not practicable in the time available to provide summary records for these committees. Special arrangements were, however, made in order to afford as complete a record as possible of the discussion of certain items in the committees. The representative of the Secretary-General informed the Commission that these special arrangements had been made only for the present session and could not be made for future sessional or inter-sessional committees or working groups.

186. On 27 March 1969 during its 46th meeting the Commission's attention was drawn to paragraph 11 of General Assembly resolution 2478 (XXIII) of 21 December 1968, by which the Assembly requested all organs other than those listed in paragraph 35 of the report of the Committee on Conferences⁴ to consider, in re-

sponse to General Assembly resolution 2292 (XXII) of 8 December 1967, dispensing with summary records for their meetings, and to report to their parent organs as appropriate, so as to enable them to make their decisions available to the Committee on Conferences in time for the latter to present its relevant conclusions to the Assembly at its twenty-fourth session.

187. It was noted that the Commission was among those organs listed in paragraph 35 of the report of the Committee on Conferences as a body which should be provided with summary records. There was no decision, however, with respect to its subsidiary bodies. Having noted the statement of the Legal Counsel referred to in paragraph 184 above, the Commission decided not to dispense with summary records for its subsidiary bodies, but to leave it to these bodies to decide if summary records were needed in the circumstances of each case.

D. *Date of the third session*

188. The Commission decided, at its 46th plenary meeting, on 27 March 1969, that its third session, to be held in New York, should be convened from 6 to 30 April 1970 and, in the case of an extension, should not continue beyond 2 May 1970.

CHAPTER XII

RESOLUTIONS AND OTHER DECISIONS ADOPTED BY THE COMMISSION AT ITS SECOND SESSION

[These resolutions and decisions appear above in the body of the report and consequently are not reproduced here.]

ANNEX I

Summary of the comments made during the second session on the 1964 Hague Convention on the International Sale of Goods

[Annex not reproduced; see summary records of the second session of the Commission (A/CN.9/SR.26-49).]

ANNEX II

Summary of the comments made during the second session on the 1955 Hague Convention on the Law Applicable to the International Sale of Goods

[Annex not reproduced; see summary records of the second session of the Commission (A/CN.9/SR.26-49).]

ANNEX III

Representatives of members of the Commission^a

ARGENTINA

Representative

Sr. Gervasio Ramón Carlos COLOMBRES, Professeur à la Faculté de Droit Université de Buenos Aires.

^a The members of the Commission are: Argentina, Australia, Belgium, Brazil, Chile, Colombia, Congo (Democratic Republic of), Czechoslovakia, France, Ghana, Hungary, India, Iran, Italy, Japan, Kenya, Mexico, Nigeria, Norway, Romania, Spain, Syria, Thailand, Tunisia, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America.

⁴ Official Records of the General Assembly, Twenty-third Session, agenda item 75, document A/7361.

Alternate

Mr. Luis Reyna CORVALAN, Attaché, Mission Permanente de la République Argentine auprès des Nations Unies, Genève.

AUSTRALIA

Representative

Mr. Anthony MASON, Q.C., Solicitor-General for the Commonwealth of Australia.

Alternates

Mr. Kevin William RYAN, Senior Trade Commissioner, Permanent Mission of Australia, Geneva;

Mr. K. DE ROSSIGNOL, Trade Commissioner, Australian Embassy Paris.

Adviser

Mr. P. PATERSON, Third Secretary, Australian Embassy, Vienna.

BELGIUM

Representative

Monsieur le Ministre Albert LILAR, Professeur à la Faculté de Droit et à la Faculté des Sciences économiques et sociales à l'Université de Bruxelles.

Alternates

Mr. P. JENARD, Directeur d'administration au Ministère des Affaires étrangères et au commerce extérieur;

Madame Suzanne OSCHINSKY, Premier Conseiller, Ministère de la Justice.

Advisers

Mr. LEONARD, Magistrat délégué au Ministère de la Justice;
Mr. DEBRULLE, Secrétaire d'administration, Ministère de la Justice.

BRAZIL

Representative

Mr. Nehemias GUEIROS, Professeur de droit civil à la Faculté de Droit, Recife, Président de la Fédération Interaméricaine des Avocats (Washington D.C.).

CHILE

Representative

Mr. Eugenio CORNEJO FULLER, Decano de la Facultad de Ciencias Jurídicas y Sociales de la Universidad Católica de Valparaíso.

Alternate

Mr. Carlos DE COSTA-NORA, Segundo Secretario de la Misión Permanente en Ginebra.

COLOMBIA

...

CONGO (DEMOCRATIC REPUBLIC OF)

...

CZECHOSLOVAKIA

Representative

Mr. Rudolf BYSTRICKY, Faculté de droit, université Charles, Prague.

Alternate

Mr. Ludek KOPAC, Conseiller juridique, Ministère de Commerce étranger, Prague.

Advisers

Mr. Zdenek KUCERA, Professeur agrégé, Université Charles, Prague;

Mr. Jiri PLETICHA, Second Secretary, Ministry of Foreign Affairs.

FRANCE

Representative

Mr. René DAVID, Professeur à la Faculté de droit et des Sciences économiques de Paris.

Alternate b

Mr. Jacques BAUDOIN, Sous-directeur des Affaires civiles et du Sceau au Ministère de la Justice.

Advisers

Mr. Jacques LEMONTEY, Magistrat au Bureau du Droit européen et international, Ministère de la Justice;

Mr. J. P. PLANTARD, Magistrat au Bureau du Droit européen et international, Ministère de la Justice;

Mr. Philippe PETIT, Secrétaire des Affaires étrangères, Service Juridique, Ministère des Affaires étrangères.

GHANA

Representative

Mr. Emmanuel Kodjoe DADZIE, Ambassador, Ministry of External Affairs.

Alternate

Mr. Uriel Valentine CAMPBELL, Solicitor General, Ghana.

Advisers

Mr. W. W. K. VANDERPUE, Director, Legal and Consular Division, Ministry of External Affairs;

Mr. A. K. DUAH, First Secretary, Permanent Mission of Ghana to the United Nations, Geneva.

HUNGARY

Representative

Mr. László RECZEI, Ambassador, Professor of Law, Department of Economics, University of Budapest.

Alternate

Mr. Ferenc KRESKAY, Doyen, Faculté de Commerce, Université des sciences économiques, Budapest.

Advisers

Mr. Iván MEZNERICS, Chef, Section juridique, Banque Nationale Hongroise, Budapest;

Mr. Ivan SZASZ, Chef, Département juridique, Ministère de commerce extérieur, Budapest.

INDIA

Representative

Mr. Nagendra SINGH, Secretary to the President of India.

Alternates

Mr. N. KRISHNAN, Permanent Representative to United Nations Office, Geneva;

Mr. JAGOTA, Director, Legal and Treaties Division, Ministry of External Affairs.

IRAN

Representative

Mr. Mansour SAGHI, Professeur de droit commercial à la Faculté de Droit de l'Université de Téhéran.

^b Representative of France from 3 to 9 March and 17 to 23 March during the absence of Mr. René David.

ITALY

Representative

Mr. Giorgio BERNINI, Professeur ordinaire de l'Université de Padoue, Directeur de l'Institut d'Etudes anglo-américaines.

Advisers

Mr. Andrea G. MOCHI ONORY DI SALUZZO, Contentieux Diplomatique, Ministère des Affaires étrangères;
Mr. Piero ASLAN, Mission Permanente de l'Italie auprès des Nations Unies, Genève.

JAPAN

Representative

Mr. Shinichiro MICHIDA, Professor of Law, University of Kyoto.

KENYA

Representative

Mr. Raphael Joseph OMBERE, Assistant Legal Secretary, Ministry of Foreign Affairs.

MEXICO

Representative

Mr. Jorge BARRERA GRAF, Professor of Law, University of Mexico.

NIGERIA

...

NORWAY

Representative

Mr. Stein ROGNLIEN, Director-General, Ministry of Justice, Oslo.

Alternate

Mr. Magne REED, Counsellor of Embassy, Permanent Mission of Norway to the United Nations, Geneva.

Special Adviser

Mr. Heikki Juhani IMMONEN, Counsellor of Legislation, Ministry of Justice, Helsinki.

ROMANIA

Representative

Mr. Ion NESTOR, Chef du Secteur de droit international privé, Institut de Recherches juridiques, Académie de la République Socialiste de Roumanie.

Advisers

Mr. Ion BACALU, Conseiller juridique, Ministère du Commerce extérieur;
Mr. Gheorghe BACIU, Conseiller juridique, Banque pour le Commerce extérieur;
Mr. Nicolae DINU, Second Secretary, Permanent Mission of Romania to the United Nations, Geneva.

SPAIN

Representative

Mr. Joaquin GARRIGUES, Profesor de Derecho Mercantil, Universidad de Madrid.

Alternates

Mr. Raimondo PEREZ-HERNANDEZ, Ministro Plenipotenciario, Ministerio de asuntos exteriores;
Mr. Santiago MARTINEZ-CARO, Directeur, Conseil Juridique International, Ministère des Affaires étrangères;
Mr. Roberto BERMUDEZ, Secretario de Embajada.

SYRIA

Representative

Mr. Mowaffak ALLAF, Permanent Representative of the United Nations, Geneva.

Alternates

Mlle Siba NASSER, Attaché, Mission Permanente de la République Arabe Syrienne, Genève;
Mr. Loufti EL-ATRACHE, Attaché, Mission Permanente de la République Arabe Syrienne, Genève.

THAILAND

...

TUNISIA

Representative

Mr. Abdelmajid BEN MESSAOUDA, Chef, Service Juridique, Secrétariat d'Etat aux Affaires étrangères, Tunis.

Alternate

Mr. Ali DRIDI, Attaché, Mission Permanente de Tunisie auprès des Nations Unies.

UNION OF SOVIET SOCIALIST REPUBLICS

Representative

Mr. G. S. BURGUCHEV, Chief, Treaty and Law Administration of the USSR, Ministry of Foreign Trade.

Alternates

Mr. Michail ROSENBERG, Associate Professor, All-Union Academy of Foreign Trade;
Mr. P. H. EVSEEV, Counsellor of the Treaty and Legal Department, Ministry of Foreign Affairs;
Mrs. H. A. KAZAKOWA, Senior Consultant, Bank of Foreign Trade;
Mr. Albert V. MELNIKOV, First Secretary, Permanent Mission of the Union of Socialist Republics to the United Nations, Geneva.

UNITED ARAB REPUBLIC

Representative

Mr. Mohsen CHAFIK, Professor of Trade Law, Cairo University.

Alternate

Mr. Esmat HAMMAM, Counsellor, Ministry of Foreign Affairs, Cairo.

Adviser

Mr. Hassan S. ABDEL-AAL, First Secretary, Permanent Mission of the United Arab Republic to the United Nations, Geneva.

UNITED KINGDOM

Representative

Mr. Anthony Gordon GUEST, Professor of English Law, University of London.

Alternates

Mr. Michael John WARE, Senior Legal Assistant, Board of Trade;
Mr. Philip James ALLOTT, Assistant Legal Adviser, Foreign and Commonwealth Office, London;
Mr. Lawrence GRETTON, Legal Assistant, Board of Trade.

UNITED REPUBLIC OF TANZANIA

Representative

Mr. Sosthenes Thomas MALITI, Senior State Attorney, Attorney General's Chambers.

Alternate

Mr. V. N. CARVALHO, Legal Counsel, National Development Corporation.

UNITED STATES OF AMERICA

Representatives

Mr. Seymour J. RUBIN, Attorney at Law, Adjunct Professor of Law, Georgetown University Law Center, Washington D.C.;

Mr. John HONNOLD, Professor of Law, University of Pennsylvania.

Alternate

Mr. Lawrence H. HOOVER Jr., Legal Adviser, Permanent Mission of the United States of America to the United Nations, Geneva.

ANNEX IV

Secretariat of the Commission

Mr. Blaine Sloan, Representative of the Secretary-General, Director of the General Legal Division, Office of Legal Affairs;

Mr. Paolo Contini, Secretary of the Commission, Chief, International Trade Law Branch;

Mr. Peter Katona, Assistant Secretary of the Commission, Senior Legal Officer;

Mr. P. Raton, Legal Affairs Liaison Officer, Geneva;

Mr. Willem Vis, Assistant Secretary of the Commission, Senior Legal Officer;

Mrs. Jelena Vilus, Assistant Secretary of the Commission, Legal Officer.

ANNEX V

Observers

A. UNITED NATIONS ORGANS

Economic Commission for Europe

Mr. Henri CORNIL, General Economic Research Division.

United Nations Conference on Trade and Development

Mr. W. W. MALINOWSKI, Director, Division for Invisibles;

Mr. Karel V. SVEC, Deputy Director, Trade Policies Division;

Mr. Samuel OKUMIRIDO, Senior Legal Officer.

United Nations Institute for Training and Research

Mr. Ahmed BOUMENDJEL, Officer-in-Charge of UNITAR at Geneva.

B. SPECIALIZED AGENCIES

Food and Agriculture Organization of the United Nations

Mr. Lamartine YATES, Regional Representative, Europe.

Inter-Governmental Maritime Consultative Organization

Mr. Thomas A. MENSAH, Head of the Legal Division;

Viscount DUNROSSIL, External Relations Officer.

International Monetary Fund

Mr. Robert EFFROS, Counsellor for Legislation in the Legal Department.

C. INTERGOVERNMENTAL ORGANIZATIONS

Commission des Communautés Européennes

Mr. HOUSCHILD, Chef de Division, Direction générale du Marché intérieur et du Rapprochement des Législations;

Mr. Thierry CATHALA, Administrateur Principal, Direction générale du Marché intérieur et du Rapprochement des Législations.

Council for Mutual Economic Assistance

Mr. Michael KOUDRIASHEV, Chief, Legal Office;

Mr. Peter GRABA, Expert of the Foreign Trade Department.

Council of Europe

Mr. R. MULLER, Head of Service, Directorate of Legal Affairs.

Council of European Communities

Mr. Daniel VIGNES, Conseiller au Service Juridique;

Mr. Antonio SACCHETTINI, Conseiller adjoint, Service Juridique.

Hague Conference on Private International Law

Mr. M. H. VAN HOOGBRATEN, Secretary-General.

Inter-American Juridical Committee

Mr. José Joaquín Caicedo CASTILLA, Acting Chairman.

International Institute for the Unification of Private Law

Mr. Mario MATTEUCCI, Secretary-General;

Professor Otto RIESE, Chairman, International Sales Committee.

Organization of American States

Mr. Raúl C. MIGONE, European Representative;

Mr. Georges D. LANDAU, Representative of the Secretary-General.

United International Bureaux for the Protection of Intellectual Property

Mr. Roger HARBEN, Assistant, External Relations Service;

Mr. Ibrahima THIAM, Assistant, External Relations Service.

D. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS

International Chamber of Commerce

Mr. Bernard S. WHEBLE, Président, Commission de Technique et Pratiques Bancaires;

Mr. Lars A. E. HJERNER, Rapporteur, Commission des Pratiques Commerciales Internationales.

International Chamber of Shipping

Mr. S. A. COTTON, Secretary of the Maritime Committee.

International Law Association

Mr. Michael BRANDON, Representative to the United Nations.

International Bar Association

Mr. Michael BRANDON, Representative to the United Nations.

ANNEX VI

Resolution 2205 (XXI) adopted by the General Assembly on 17 December 1966

[Annex not reproduced; see part one, section II, E above.]

ANNEX VII

List of documents of the second session

[Annex not reproduced; see check list of UNCITRAL documents at the end of this volume.]

B. Comments and action with respect to the report of the Commission

1. Extract from the report of the Trade and Development Board, United Nations Conference on Trade and Development, 24 September 1968-23 September 1969*

F. PROGRESSIVE DEVELOPMENT OF THE LAW OF INTERNATIONAL TRADE

(Agenda item 16)¹

186. The document before the Board in connexion with this item was the report of the United Nations Commission on International Trade Law on its second session.² As explained in a note by the UNCTAD secretariat (TD/B/268), the report was submitted to the Board in conformity with paragraph 10 of section II of General Assembly resolution 2205 (XXI) of 17 December 1966.

187. In this connexion, special reference was made to the desire expressed by the United Nations Commission on International Trade Law in its resolution

¹ This item was considered by a sessional committee.

² *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618).*

concerning international legislation on shipping, for the strengthening of co-operation with UNCTAD in this field, and some delegations expressed satisfaction with the establishment of an UNCTAD/Office of Legal Affairs Joint Shipping Legislation Unit. The representative of a developing country expressed the hope that an early start would be made in the drafting of international legislation on shipping.

Action by the Board

188. At the Board's 27th meeting, on 12 September 1969, it was agreed to take note with appreciation of the report of the United Nations Commission on International Trade Law on its second session and of its decision to include international legislation on shipping among the priority items in its programme of work. It was recommended that there should be continued close co-operation between UNCTAD and the Commission in the field of international legislation on shipping.

2. Report of the Sixth Committee*

CONTENTS

	<i>Paragraphs</i>
I. INTRODUCTION	1-5
II. PROPOSALS	6-7
III. DEBATE	8-33
A. The role of the United Nations Commission on International Trade Law in general	9
B. The working methods of the Commission	10-12
C. Programme of work of the Commission	13-15
D. International sale of goods	16-19
E. International payments	20-21
F. International commercial arbitration	22-23
G. International legislation on shipping	24-27
H. Register of organizations and register of texts	28-29
I. Establishment of a yearbook of the Commission	30-31
J. Training and assistance in the field of international trade law	32-33
IV. VOTING	34-37
RECOMMENDATION OF THE SIXTH COMMITTEE	<i>Page</i> 126

I. INTRODUCTION

1. At its 1758th plenary meeting, on 20 September 1969, the General Assembly included as item 90 of the agenda of its twenty-fourth session, and allocated to the Sixth Committee, the item entitled "Report of the United Nations Commission on International Trade Law on the work of its second session".

2. The Sixth Committee considered this item at its 1111th to 1118th meetings, held from 1 to 7 October 1969 and at its 1120th and 1121st meetings, held on 9 and 10 October 1969.

3. At the 1111th meeting, on 1 October 1969, Mr. László Réczei (Hungary), Chairman of the United Nations Commission on International Trade Law at

* *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 16 (A/7616, part three, chapter III, F).*

* *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda item 90, document A/7747.*

its second session, introduced the Commission's report on the work of that session (A/7618).¹

4. At the 1121st meeting, on 10 October 1969, the Rapporteur of the Sixth Committee raised the question whether the Committee wished to include in its report to the General Assembly a summary of views expressed during the debate on agenda item 90. After referring to paragraph (f) of the annex to General Assembly resolution 2292 (XXII) of 8 December 1967, the Rapporteur informed the Committee of the financial implications of the question. At the same meeting, the Committee decided that, in view of the nature of the subject-matter, the report on agenda item 90 should include a summary of the representative trends of opinion and not of the individual views of all delegations.

5. The report of the Commission on the work of its second session, which was before the Sixth Committee, is divided into twelve chapters as follows:

- I. Organization of the session;
- II. International sale of goods;
- III. International payments;
- IV. International commercial arbitration;
- V. International legislation on shipping;
- VI. A. Register of organizations and register of texts;
B. Bibliography;
- VII. Co-ordination of the work of organizations in the field of international trade law; working relationship and collaboration with other bodies;
- VIII. Training and assistance in the field of international trade law;
- IX. Yearbook of the Commission;
- X. Suggestions relating to future activities of the Commission;
- XI. Organizational questions relating to future work;
- XII. Resolutions and other decisions adopted by the Commission at its second session.

II. PROPOSALS

6. At the 1120th meeting, on 9 October 1969, the representative of India introduced a draft resolution sponsored by Australia, Brazil, Cameroon, Congo (Democratic Republic of), Ghana, India, Japan, Kenya, New Zealand, Nigeria, Romania, Spain and United Republic of Tanzania (A/C.6/L.748 and Add.1 and 2), which read as follows:

"The General Assembly,

"Having considered the report of the United Nations Commission on International Trade Law on the work of its second session (A/7618),

"Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the Commission

and defined its object and terms of reference, and its resolution 2421 (XXIII) on the report of the Commission on the work of its first session,

"Noting the comments by the Trade and Development Board at its ninth session expressing its appreciation of the report of the United Nations Commission on International Trade Law (see A/C.6/L.744),

"Taking into consideration the report of the Secretary-General concerning the establishment of a yearbook of the United Nations Commission on International Trade Law and the financial implications of alternative proposals for such a yearbook,"

"1. Takes note with appreciation of the report of the United Nations Commission on International Trade Law on the work of its second session;

"2. Endorses the inclusion by the Commission, on the basis indicated in its report, of international legislation on shipping among the priority topics in its work programme;

"3. Notes with appreciation the progress made in the implementation of the Commission's programme of work, including the establishment of working groups on uniform rules governing the international sale of goods and the law applicable thereto, on time-limits and limitations (prescription) in the field of the international sale of goods, and on international legislation on shipping;

"4. Takes note of the view expressed by the United Nations Commission on International Trade Law in its report that, in order to implement the mandate entrusted to the Commission by the General Assembly, it is desirable that there be the widest possible participation by the members of the Commission in the preparatory work to be done by working groups or Special Rapporteurs;

"5. Endorses the Commission's desire, where necessary, to obtain the services of consultants or organizations with special expertise in technical matters dealt with by the Commission;

"6. Emphasizes the need for full co-operation with the Commission in the performance of its task to promote the progressive harmonization and unification of the law of international trade;

"7. Approves in principle the establishment of a Yearbook of the United Nations Commission on International Trade Law which would make the Commission's work more widely known and readily available, and requests the Commission to consider at its third session the timing and content of the Yearbook, in the light of the report of the Secretary-General² and of the discussions at the twenty-fourth session of the General Assembly;

"8. Authorizes the Secretary-General to establish the Yearbook referred to in paragraph 7 above in accordance with the decisions and recommendations to be adopted by the Commission at its third session;

¹ This presentation was pursuant to a decision taken by the Sixth Committee at its 1096th meeting, on 13 December 1968. See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 88, document A/7408, para. 3.

² A/CN.9/32.

³ *Ibid.*

"9. *Endorses* the decisions and recommendations of the Commission concerning the registers of organizations and texts and requests the Secretary-General to continue the work of preparing and publishing the registers in accordance with those decisions and recommendations:

"10. *Recommends* that the United Nations Commission on International Trade Law should:

"(a) Continue its work on the topics to which it decided to give priority, i.e. the international sale of goods, international payments, international commercial arbitration, and international legislation on shipping;

"(b) Continue to give attention to the ways and means which would effectively promote training and assistance in the field of international trade law;

"(c) Keep its programme of work under constant review, bearing in mind the important contribution which the progressive harmonization and unification of international trade law can make to economic co-operation among all peoples and, thereby, to their well-being;

"11. *Recommends further* that the Commission should continue to collaborate fully with international organizations active in the field of international trade law;

"12. *Requests* the Secretary-General to forward to the Commission the records of the discussions at the twenty-fourth session of the General Assembly on the Commission's report."

7. At the same meeting, the representative of Afghanistan proposed an oral amendment to the draft resolution and subsequently accepted a modification of that amendment proposed by the representative of the Netherlands. As modified, the amendment read as follows:

"Add to paragraph 10 of the resolution the following additional sub-paragraph:

"(d) In promoting the harmonization and unification of international trade law, give special consideration to the interests of developing and landlocked countries."

III. DEBATE

8. The main trends of the Sixth Committee's debate on agenda item 90 are summarized in the following ten sections. The first three sections concern the observations which were made on the role of the United Nations Commission on International Trade Law in general, its working methods and its programme of work. The other seven sections contain a summary of the observations relating more particularly to the report of the Commission on the work of its second session. They are set out under the following headings: international sale of goods, international payments, international commercial arbitration, international legislation on shipping, register of organizations and register of texts, establishment of a yearbook of the Commission, and training and assistance in the field of international trade law.

A. *The role of the United Nations Commission on International Trade Law in general*

9. Most representatives expressed satisfaction at the work of the Commission's second session and congratulated the Commission on the practical and businesslike way in which it had set about its substantive work. Several representatives called attention to the field of competence conferred on the Commission by General Assembly resolution 2205 (XXI), and expressed the opinion that limitations should not be imposed on the Commission's work which would be contrary to its terms of reference. These representatives observed that the Commission, as an organ representing the international community, should take positive steps to reduce discrepancies between the needs of present-day international trade and the often obsolete legal institutions which sought to regulate it; the Commission should, therefore, go beyond the tasks of providing information on existing legislation of an international character, and of merely co-ordinating the work of other organizations in the field of international trade law. Representatives of developing countries expressed the hope that the Commission would be instrumental in establishing equitable conditions for international trade by eliminating from existing international instruments provisions which failed to give fair recognition to their interests. Consequently, the Commission should not limit itself to the compilation of customs and norms of international trade which would necessarily imply the maintenance of an unsatisfactory *status quo*. Other representatives took the view that the primary responsibility of the Commission was to co-ordinate the activities of other organizations, to review existing instruments where necessary and to disseminate information, rather than to undertake the preparation of new legal instruments. They emphasized the need for such co-ordination and the unique contribution that the Commission could make in drawing on the specialized expertise of existing agencies and in developing means to secure the wider acceptance of suitable conventions.

B. *The working methods of the Commission*

10. Several representatives stressed the importance of careful preparatory work so that the results could be generally accepted and successfully implemented, rather than the mere production of rapid results. Many representatives were of the opinion that the establishment by the Commission of inter-sessional working groups had been a wise and appropriate decision. The difficulties involved in the unification and harmonization of international trade law were considerable; therefore a sustained effort which would enable the Commission to advance its work between its yearly sessions was required. On the other hand, caution was expressed about the possible proliferation and permanence of inter-sessional working groups, lest the cost exceed the benefits from such work.

11. It was suggested by some representatives that the Commission should secure wider participation and collaboration in its work than could be provided by those States which were members of the Commission, that it should, when necessary, obtain the services of

consultants to assist it in its preparatory work, and that it should expand its co-operation with organizations concerned with international trade law by including economic and commercial circles engaged in trade law and interested in its work, so that the studies and the work undertaken would reflect the needs that were actually experienced in international trade.

12. Several representatives noted that the success of the Commission's work depended on the selection by Member States of skilled experts for the sessions of the Commission and the meetings of its working groups. The view was, however, expressed that this requirement would be difficult to meet if such sessions and meetings were permitted to last too long.

C. Programme of work of the Commission

13. Most representatives who expressed their views on the programme of work of the Commission observed that the programme entailed a heavy workload for the Commission and its secretariat and therefore should not be further expanded for the time being. The opinion was also expressed that, in view of this workload, the International Trade Law Branch should develop as a unified operation in close relationship with the rest of the Office of Legal Affairs.

14. Some representatives declared that the Commission should not confine itself to harmonizing and unifying private law norms in the international sphere, but should also concern itself with the removal of discriminatory rules which adversely affected international trade. Other representatives held the view that questions of public international law and questions affecting trade policy could best be dealt with in organs other than the Commission, and that the Commission should accordingly confine its attention to the norms governing commercial relationships of a private law nature and should avoid considering political questions.

15. One representative suggested that, in accordance with paragraph 8 (d) of section II of General Assembly resolution 2205 (XXI), the Commission should consider by what practical means it could ensure the uniform interpretation and application of international instruments, particularly in the field of international shipping.

D. International sale of goods

16. Various trends of opinion were expressed regarding the unification of substantive rules governing the international sale of goods.

17. Some representatives expressed the opinion that the Hague Conventions of 1964 relating to a Uniform Law on the International Sale of Goods and a Uniform Law on the Formation of Contracts for the International Sale of Goods, which were the outcome of over thirty years of work, should constitute the basis for further work by the Commission in the field, that it would not be possible to form a considered opinion of the effectiveness of these Conventions until they had been put to the test by a sufficiently large number of States, and that, consequently, no changes should be proposed which might impede their ratification. The

Conventions, it was further observed, were modern, practical legal instruments and represented the established practice of merchants of both the common law and civil law systems, modified to the extent necessary to achieve a single, harmonious and unified system. Under this view, repudiation of the Conventions would amount to a repudiation of the established law of both systems concerning not only international, but also internal commercial dealings. These representatives also stressed that the Hague Conventions were not designed to favour the interests of either developing or developed countries, but to establish a proper balance between sellers and buyers.

18. Other representatives questioned the need for the Commission to base its work on the rules of the Hague Conventions of 1964. These representatives noted that the Conventions had emerged from a diplomatic conference attended by only twenty-eight States, and that these States were not representative of the present membership of the United Nations. Attention was also directed to inconsistencies between the rules on choice of law in the Hague Convention of 1955 on the Law Applicable to the International Sale of Goods and provisions governing the applicability of the Hague Conventions of 1964. It was suggested that the Hague Conventions of 1964, as well as the Hague Convention of 1955, could not form the basis of a unified law and that it would accordingly be advisable to formulate a new instrument which would take full account of the interests of different legal, social and economic systems, including those of both the developed and developing countries.

19. However, most representatives who spoke on the question were agreed that the Commission had acted wisely in establishing a Working Group to consider closely by what means and procedures the unification of the rules governing the international sale of goods could best be promoted, and that it was appropriate and desirable for the Commission to examine the Hague Conventions of 1955 and 1964 in order to determine what modifications might be needed to render them more widely acceptable. It was observed that consideration should be given to uniting the two conventions in a single text which might be drafted in simpler language comprehensible to both traders and lawyers.

E. International payments

20. Many representatives welcomed the decision of the Commission to investigate the possibility of preparing rules applicable to a new form of negotiable instruments for optional use in international transactions. These representatives commended the Commission on the procedure it was following, namely, of assessing the existing legal and practical difficulties in the use internationally of negotiable instruments by means of a detailed questionnaire addressed to Governments and to competent banking and trade institutions. In this connexion, the view was expressed that, where appropriate, a similar approach should be employed by the Commission in its preparatory work on other priority topics. Some representatives pointed out

that new economic and legal problems had arisen which were not covered by the Geneva Conventions of 1930 and 1931 providing a Uniform Law on Cheques, Bills of Exchange and Promissory Notes, and that unification of domestic legislation in this area would not be feasible. Therefore the best way of securing uniformity was the Commission's project, which was confined to the consideration of a new negotiable instrument in international transactions; any other approach would lead to insurmountable difficulties, at least in some countries.

21. Several representatives referred favourably to the Commission's decision to draw the attention of Governments to the contribution which employment of the "Uniform Customs and Practice for Documentary Credits", drawn up by the International Chamber of Commerce ("the Code"), could make to facilitating international trade. Some representatives also commended the decision to ask Governments to inform the International Chamber of Commerce concerning any difficulties arising in connexion with the use of the Code.

F. International commercial arbitration

22. There was general endorsement of the opinion expressed by the Commission that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 should be adhered to by the largest possible number of States. One representative declared that the Commission should also encourage States to accede to the European Convention on International Commercial Arbitration of 1961, provided that accession to that Convention was not limited to States members of the Economic Commission for Europe.

23. Several representatives expressed agreement with the conclusion reached by the Commission that, with regard to international commercial arbitration, the best course, for the time being, was for the Commission to concern itself with problems of the international interpretation and application of existing conventions and welcomed, in this respect, the Commission's decision to appoint Mr. Ion Nestor (Romania) as Special Rapporteur on the most important problems arising in that connexion.

G. International legislation on shipping

24. Most representatives who commented on the decision of the Commission to include international legislation on shipping among the priority topics in its programme of work, recognized that the Commission was competent to consider such legislation and to decide on topics and methods of work in that connexion. Many drew attention, however, to the need for the Commission to take account of the work of other organizations in the field, so as to avoid wasteful duplication or unnecessary expenditure. It was also observed that collaboration in this particular field had been helped by the creation of the Joint Shipping Legislation Unit of the United Nations Office of Legal Affairs and the secretariat of the United Nations Conference on Trade and Development.

25. Some representatives, while accepting the competence of the Commission in the field of international legislation on shipping, doubted the wisdom of its decision to include the subject in its working programme at the present stage. These representatives took the view that it would be preferable for the Commission not to commence considering the substance of the question until the other international organizations concerned had considered its economic and other aspects. Those holding this view believed that the Commission should, for the time being, confine its task to that of co-ordination.

26. Representatives of developing countries stressed that the Commission's work in this field was of importance for the economy of these countries and expressed the hope that their countries would be equitably represented in the bodies responsible for drafting new legislation or modifying existing legislation. These representatives stated that present-day legislation in the field reflected, in many respects, an earlier economic phase of society, as well as attitudes and practices which seemed unduly to favour ship-owners at the expense of shippers. They also observed that the developing countries were particularly interested in legislation on freight rates, charter parties, standard clauses in bills of lading, and the limitations on the ship-owner's liability resulting from exemption clauses. Some delegations expressed the opinion that international shipping legislation was a priority topic that provided the Commission with the best opportunity of contributing to a change in the *status quo* and the creation of more just and equitable conditions for the developing nations in the field of international trade.

27. One representative suggested that, in dealing with international legislation on shipping, the Commission should take account of the Treaties of Montevideo of 1889, as revised in 1940 and 1944, which had greatly benefited private international law.

H. Register of organizations and register of texts

28. Several representatives commended the Commission for the work which was at present being carried out in regard to the establishment of a register of organizations and a register of texts, and expressed confidence that the measures taken by the Commission to publish the registers in stages and make arrangements for their sale would reduce their cost.

29. Representatives of developing countries declared that the establishment of the registers was of special importance to their countries, in that the registers permitted access to information and documentation on international trade law which was not otherwise readily available. It was further stated that, in view of the potential value of the registers in countries which often lacked highly trained personnel and did not have the extensive archives of the developed countries, the cost of establishing the registers was fully justified.

I. Establishment of a yearbook of the Commission

30. There was general support among representatives in the Sixth Committee for the view that a yearbook of the United Nations Commission on Inter-

national Trade Law would make the Commission's work more widely known and generally available, and that the publication of the yearbook was in principle desirable.

31. Some representatives, however, expressed hesitation as to the timeliness of publishing a yearbook, since the results of the Commission's work had not yet become visible. These representatives doubted whether the advantage of having a yearbook would, for the time being, justify its cost. The view was expressed that the establishment of a yearbook was not necessarily the best way of attaining the ends which the yearbook purported to achieve, and that other means — such as the annual report of the Commission possibly with certain modifications, and access to available documentation — could provide acceptable alternatives. These representatives expressed the hope that the decision could be postponed until the next session of the General Assembly, when the Assembly would be in possession of the final views of the Commission. However, a majority of the representatives who spoke on the subject supported the publication of the yearbook without unnecessary delay, while expressing their preference for an approach along the lines of alternative A as set forth in the report of the Secretary-General.⁴ One representative observed that alternative A did not enumerate all relevant documents necessary to become fully acquainted with the work of the Commission, such as those dealing with time-limits and limitations.

J. Training and assistance in the field of international trade law

32. Many representatives stressed that it was important for the Commission to promote the development of local expertise in the field of international trade law, particularly in the developing countries, and welcomed the decision of the Commission to encourage intensification of the existing programmes.

33. It was suggested that the Commission should contemplate organizing a seminar on international trade law similar to that in international public law held in connexion with the sessions of the International Law Commission at Geneva. It was also suggested that the Commission should consider providing developing countries with training facilities in developed countries, particularly in the fields of banking, insurance and transport.

IV. VOTING

34. At the 1120th meeting, on 9 October 1969, the Sixth Committee, at the request of the representative

⁴ *Ibid.*

of Afghanistan, took a roll-call vote on the proposed amendment to paragraph 10 of the draft resolution (A/C.6/L.748 and Add.1 and 2), referred to in paragraph 7 above. The amendment was adopted by 57 votes to 4, with 25 abstentions. The voting was as follows:

In favour: Afghanistan, Algeria, Argentina, Austria, Bolivia, Burma, Chile, Colombia, Congo (Democratic Republic of), Cuba, Cyprus, Dahomey, Ecuador, Ethiopia, Guatemala, Haiti, Indonesia, Iran, Iraq, Ireland, Jamaica, Jordan, Kenya, Kuwait, Lebanon, Liberia, Libya, Madagascar, Malaysia, Mali, Mauritania, Mexico, Mongolia, Morocco, Netherlands, Niger, Nigeria, Peru, Philippines, Poland, Portugal, Romania, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Syria, Thailand, Togo, Trinidad and Tobago, Turkey, Uganda, United Arab Republic, Uruguay, Venezuela, Yugoslavia, Zambia.

Against: Australia, New Zealand, United Kingdom of Great Britain and Northern Ireland, United States of America.

Abstaining: Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Czechoslovakia, Denmark, Finland, France, Ghana, Greece, Hungary, India, Israel, Italy, Japan, Luxembourg, Norway, Pakistan, South Africa, Spain, Sweden, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Republic of Tanzania.

35. At the 1121st meeting, on 10 October 1969, the representative of Israel declared that, subsequent to the above vote, he received instructions from his Government which would have enabled him to vote in favour of the amendment.

36. At the 1120th meeting, on 9 October 1969, at the request of the representative of Liberia, a separate vote was taken on paragraph 8 of the draft resolution. Paragraph 8 was adopted by 53 votes to 15, with 14 abstentions.

37. The draft resolution as a whole, as amended, was adopted by 84 votes to none, with 2 abstentions. Explanations of vote were given by the representatives of Afghanistan, Australia, Belgium, Canada, Congo (Democratic Republic of), France, Ghana, India, Israel, Liberia, Peru, Philippines, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and United States of America.

RECOMMENDATION OF THE SIXTH COMMITTEE

[The text of the recommendation, not included here, contained a draft resolution which was adopted by the General Assembly and appears in sub-section 3 below.]

GHANA

Représentant

M. Emmanuel Kodjoe DADZIE, Ambassadeur, Ministère des affaires étrangères.

Représentant suppléant

M. Uriel Valentine CAMPBELL, *Solicitor General* du Ghana.

Conseillers

M. W. W. K. VANDERPUYE, Directeur de la Division des affaires juridiques et consulaires du Ministère des affaires étrangères;
M. A. K. DUAH, Premier secrétaire à la Mission permanente du Ghana à Genève.

HONGRIE

Représentant

M. László RECZEI, Ambassadeur, Professeur de droit à la Faculté des sciences économiques de l'Université de Budapest.

Représentant suppléant

M. Ferenc KRESKAY, Doyen de la Faculté de commerce de l'Université des sciences économiques de Budapest.

Conseillers

M. Iván MEZNERICS, Chef de la Section juridique de la Banque nationale hongroise;
M. Iván SZASZ, Chef du Département juridique du Ministère du commerce extérieur.

INDE

Représentant

M. Nagendra SINGH, Secrétaire à la Présidence de l'Inde.

Représentants suppléants

M. N. KIRSHNAN, Représentant permanent auprès de l'Office des Nations Unies à Genève;
M. Jagota, Directeur de la Division des affaires juridiques et des traités du Ministère des affaires étrangères.

IRAN

Représentant

M. Mansour SAGHRI, Professeur de droit commercial à la Faculté de droit de l'Université de Téhéran.

ITALIE

Représentant

M. Giorgio BERNINI, Professeur ordinaire de l'Université de Padoue, Directeur de l'Institut d'études anglo-américaines.

Conseillers

M. Andrea G. MOCHI ONORY DI SALUZZO, Contentieux diplomatique du Ministère des affaires étrangères;
M. Ptero ASLAN, Mission permanente de l'Italie à Genève.

JAPON

Représentant

M. Shinichiro MICHIDA, Professeur de droit à l'Université de Kyoto.

KENYA

Représentant

M. Raphael Joseph OMBERE, Secrétaire adjoint pour les affaires juridiques au Ministère des affaires étrangères.

MEXIQUE

Représentant

M. Jorge BARRERA GRAF, Professeur de droit à l'Université de Mexico.

NIGÉRIA

NORVÈGE

Représentant

M. Stein ROGNLIEN, Directeur général au Ministère de la justice.

Représentant suppléant

M. Magne REED, Conseiller d'ambassade à la Mission permanente de la Norvège à Genève.

Conseiller spécial

M. Heikki Juhani IMMONEN, Conseiller pour les questions législatives au Ministère de la justice (Helsinki).

RÉPUBLIQUE ARABE UNIE

Représentant

M. Mohsen CHAFIK, Professeur de droit commercial à l'Université du Caire.

Représentant suppléant

M. Esmat HAMMAM, Conseiller au Ministère des affaires étrangères.

Conseiller

M. Hassan S. ABDEL-AAL, Premier secrétaire à la Mission permanente de la République arabe unie à Genève.

RÉPUBLIQUE-UNIE DE TANZANIE

Représentant

M. Sosthenes Thomas MALITI, *Senior State Attorney, Attorney General's Chambers*.

Représentant suppléant

M. V. N. CARVALHO, Conseiller juridique de la National Development Corporation.

ROUMANIE

Représentant

M. Ion NESTOR, Chef du secteur de droit international privé de l'Institut de recherches juridiques de l'Académie de la République socialiste de Roumanie.

Conseillers

M. Ion BACALU, Conseiller juridique au Ministère du commerce extérieur;
M. Gheorghe BACIU, Conseiller juridique à la Banque pour le commerce extérieur;
M. Nicolae DINU, Deuxième Secrétaire à la Mission permanente de la Roumanie à Genève.

ROYAUME-UNI DE GRANDE-BRETAGNE
ET D'IRLANDE DU NORD

Représentant

M. Anthony Gordon GUEST, Professeur de droit anglais à l'Université de Londres.

Représentants suppléants

M. Michael John WARE, Assistant principal pour les affaires juridiques au Ministère du commerce;
M. Philip James ALLOTT, Conseiller adjoint pour les questions juridiques au Ministère des affaires étrangères et des affaires du Commonwealth;
M. Lawrence GRETTON, Assistant pour les affaires juridiques au Ministère du commerce.

SYRIE

Représentant

M. Mowaffak ALLAF, Représentant permanent de la Syrie auprès de l'Office des Nations Unies à Genève.

Représentants suppléants

M^{lle} Siba NASSER, Attachée à la Mission permanente de la République arabe syrienne à Genève;
M. Loufti EL ATRACHE, Attaché à la Mission permanente de la République arabe syrienne à Genève.

TCHÉCOSLOVAQUIE

Représentant

M. Rudolf BYSTRICKY, Faculté de droit de l'Université Charles de Prague.

Représentant suppléant

M. Ludek KOPAC, Conseiller juridique au Ministère du commerce extérieur.

Conseillers

M. Zdenek KUCERA, Professeur agrégé à l'Université Charles de Prague;
M. Jiri PLETICHA, Deuxième secrétaire au Ministère des affaires étrangères.

THAÏLANDE

TUNISIE

Représentant

M. Abdelmajid BEN MESSAOUDA, Chef du service juridique du Secrétariat d'État aux affaires étrangères.

tinue to collaborate fully with international organizations active in the field of international trade law;

12. *Requests* the Secretary-General to forward to the United Nations Commission on International Trade

Law the records of the discussions on the Commission's report at the twenty-fourth session of the General Assembly.

1809th plenary meeting,
12 November 1969.

C. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Register of organizations and register of texts: note by the Secretary-General	A/CN.9/24, Add.1 and 2
Co-ordination of the work of organizations active in international trade law: report of the Secretary-General	A/CN.9/25
Working relationships and collaboration with other bodies: note by the Secretary-General	A/CN.9/26
Training and assistance in the field of international trade Law: report of the Secretary-General	A/CN.9/27
Consideration of the possibility of issuing a Yearbook: note by the Secretary-General	A/CN.9/28
Summary records of the second session of the Commission (1969)	A/CN.9/SR. 26-49
International sale of goods. The Hague Convention of 1964 and the Hague Convention on the Applicable law of 1955: draft resolution proposed by the delegations of Brazil, Ghana, Hungary, India and United States	A/CN.9/L.10
International sale of goods. The Hague Convention of 1964 and the Hague Convention on the Applicable Law of 1955: draft resolution approved by Committee I at its 10th meeting	A/CN.9/L.11
Report of Committee II to the Commission	A/CN.9/L.12
Time-limits and limitations (prescription) in the field of international sale of goods: draft report of Committee I	A/CN.9/L.14
Report of Committee I to the Commission	A/CN.9/L.15, Corr.1 and Add.1
Draft report of the Commission on the work of its second session	A/CN.9/L.16, Corr.1,2,3 and Add.1, Corr.1; Add. 2,3,4,5,6, Rev.1,7,8,9,10, 11,12, and 13
Consideration of inclusion of international shipping legislation among the priority topics in the work programme: draft resolutions proposed by Ghana and India	A/CN.9/L.13
Consideration of inclusion of international shipping legislation among the priority topics in the work programme: draft resolution proposed by Argentina, Brazil, Chile, Ghana, India, Iran, Kenya, Mexico, the United Republic of Tanzania, Tunisia, and the United Arab Republic	A/CN.9/L.17/ Rev.1
Consideration of inclusion of international shipping legislation among the priority topics in the work programme: draft resolutions proposed by Argentina, Belgium, Brazil, Chile, Ghana, India, Iran, Kenya, Mexico, Spain, United Republic of Tanzania, Tunisia and United Arab Republic	A/CN.9/L.17/ Rev.2
Consideration of inclusion of international shipping legislation among the priority topic in the work programme: draft resolutions proposed by Belgium and Italy	A/CN.9/L.18

III. THE THIRD SESSION (1970)

A. Report of the Commission*

CONTENTS

	<i>Page</i>
INTRODUCTION	130
<i>Chapter</i>	<i>Paragraphs</i>
I. ORGANIZATION OF THE SESSION	1-16
A. Opening	1
B. Membership and attendance	2-4
C. Election of officers	5
D. Agenda	6
E. Establishment of committees of the whole	7-14
F. Decisions of the Commission	15-16
II. INTERNATIONAL SALE OF GOODS	17-102
A. Uniform rules governing the international sale of goods	17-72
1. General remarks	19-21
2. Principles on choice of law in international legislation on sales (ULIS article 2)	22-32
3. The relationship between uniform rules for international sales of goods and the proposed convention on time-limits and limitations (prescription) (ULIS article 49)	33-34
4. The binding effect of usages (ULIS art. 9)	35-42
5. Cancellation of a sales contract without notice to the other party: "ipso facto" avoidance and ULIS article 62	43-46
6. Time and place for inspection: time for notification of defects in delivered goods (ULIS, articles 38 and 39)	47-49
7. The definition of international sale of goods for the purpose of prescribing the scope of a uniform law (ULIS article 1)	50-51
8. Use of general principles in interpretation (ULIS article 17)	52-55
9. The concept of "delivery" (<i>délivrance</i>) and the definition of the seller's obligations	56-59
10. Mandatory or regulatory rules of national law with respect to consumer protection (ULIS article 5-2P)	60-64
11. The relationship between the uniform law and national rules that contracts must be in writing (ULIS article 15)	65-67
12. Future work on international sales	68-72
B. Time-limits and limitations (prescription)	73-97
1. Working methods and general approach	75-76
2. Scope of the convention: the definition of international sales	77-78
3. Types of claims; third parties	79-80
4. Commencement of the period of prescription: the discovery of defects or the occurrence of damage subsequent to delivery of the goods	81-84
5. Length of the prescriptive period: the basic rule	85-89
6. Effect of a guarantee for a specified time	90-93
7. Interruption of the period by acknowledgement of the debt	94
8. General comments on the report of the Working Group	95
9. Programme for completion of the work	96-97
C. General conditions of sale and standard contracts	98-102
III. INTERNATIONAL PAYMENTS	103-145
A. Negotiable instruments	103-118
B. Bankers' commercial credits	119-126
C. Guarantees and securities	127-145

* Report of the United Nations Commission on International Trade Law on the work of its third session (1970), *Official records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017)*.

CONTENS (continued)

Chapter	Paragraphs
IV. INTERNATIONAL COMMERCIAL ARBITRATION	146-156
V. INTERNATIONAL LEGISLATION ON SHIPPING	157-166
VI. REGISTERS AND BIBLIOGRAPHY	167-186
A. Register of organizations	167-172
B. Register of texts	173-178
C. Bibliography on international trade law	179-186
VII. CO-ORDINATION OF THE WORK OF ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW AND COLLABORATION WITH THOSE ORGANIZATIONS	187-190
VIII. TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW	191-200
IX. YEARBOOK OF THE COMMISSION	201-209
X. QUESTIONS RELATING TO FUTURE WORK	210-222
A. Basic convention establishing a common body of international trade law	212-217
B. Progressive codification of the law of international trade	218
C. Planning for future work	219-221
D. Date of fourth session	222

Annexes

	Page
I. Representatives of members of the Commission	152
II. Secretariat of the Commission	154
III. Observers	154
IV. List of documents considered by the Commission	155

INTRODUCTION

The present report of the United Nations Commission on International Trade Law covers the Commission's third session held at United Nations Headquarters from 6 to 30 April 1970.

Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, by which the Commission was established, this report is submitted to the General Assembly and also is submitted for comments to the United Nations Conference for Trade and Development.

CHAPTER I ORGANIZATION OF THE SESSION

A. Opening

1. The United Nations Commission on International Trade Law (UNCITRAL) opened its third session at United Nations Headquarters in New York on 6 April 1970. The session was opened on behalf of the Secretary-General by Mr. Constantin A. Stavropoulos, the Legal Counsel of the United Nations.

B. Membership and attendance

2. Under General Assembly resolution 2205 (XXI), by which UNCITRAL was established, the Commission consists of twenty-nine States, elected by the Assembly. The present members of the Commission, elected by the Assembly on 30 October 1967, are the following States:¹

Argentina	Mexico
Australia	Nigeria*
Belgium	Norway*
Brazil	Romania
Chile*	Spain
Colombia*	Syria
Congo (Democratic Republic of)	Thailand*
Czechoslovakia*	Tunisia
France*	Union of Soviet Socialist Republics
Ghana*	United Arab Republic*
Hungary	United Kingdom of Great Britain and Northern Ireland*
India	United Republic of Tanzania*
Iran	United States of America
Italy*	
Japan*	
Kenya	

3. All the States members of the Commission were represented at the session.

4. The following United Nations organs, specialized agencies, intergovernmental and international non-governmental organizations were represented by observers:

(a) United Nations organs

United Nations Conference on Trade and Development (UNCTAD)

(b) Specialized agencies

International Bank for Reconstruction and Development

selected by the President of the General Assembly to serve for a term of three years, ending on 31 December 1970. The other fifteen members will serve for the full term of six years, ending on 31 December 1973.

¹ The term of office of all members began, in accordance with General Assembly resolution 2205 (XXI), on 1 January 1968. The fourteen members marked with an asterisk were

(IBRD); International Monetary Fund (IMF); Inter-Governmental Maritime Consultative Organization (IMCO).

(c) *Intergovernmental organizations*

Commission of the European Communities; Council of the European Communities; Council for Mutual Economic Assistance (CMEA); Hague Conference on Private International Law; Inter-American Juridical Committee; International Institute for the Unification of Private Law (UNIDROIT); Organization of African Unity (OAU); Organization of American States (OAS); United International Bureaux for the Protection of Intellectual Property (BIRPI).

(d) *International non-governmental organizations*

International Chamber of Commerce (ICC); International Chamber of Shipping (ICS); International Law Association (ILA); World Peace Through Law Center.

C. Election of officers

5. At its 50th and 51st meetings, on 6 and 7 April 1970, the Commission elected the following officers² by acclamation:

Chairman: Mr. Albert Lilar (Belgium);

Vice-Chairman: Mr. Eugenio Cornejo Fuller (Chile);

Vice-Chairman: Mr. Abdelmajid Ben Messaouda (Tunisia);

Vice-Chairman: Mr. Ion Nestor (Romania);

Rapporteur: Mr. Shinichiro Michida (Japan).

D. Agenda

6. The agenda of the session as adopted by the Commission at its 51st meeting, on 7 April 1970, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. International sale of goods:
 - (a) Uniform rules governing the international sale of goods;
 - (b) Time-limits and limitations (prescription) in the field of international sale of goods;
 - (c) General conditions of sale and standard contracts.
5. International payments:
 - (a) Negotiable instruments;
 - (b) Banker's commercial credits;
 - (c) Guarantees and securities.
6. International commercial arbitration.
7. International legislation on shipping.
8. (a) Register of organizations;
- (b) Register of texts;
- (c) Bibliography.
9. Co-ordination of the work of organizations in the field of international trade law and collaboration with those organizations.
10. Training and assistance in the field of international trade law.

11. Publication of a Yearbook.
12. Programme of work through 1973.
13. Date of the fourth session.
14. Adoption of the report of the Commission.

E. Establishment of committees of the whole

7. The Commission held twelve plenary meetings in the course of the session.

8. At its 51st meeting, on 7 April 1970, the Commission decided to establish two committees of the whole (Committee I and Committee II), which would meet simultaneously to consider the agenda items to be referred to them.

9. The Commission referred the following items to Committees I and II:

Committee I

Item 4. International sale of goods:

- (a) Uniform rules governing the international sale of goods;
- (b) Time-limits and limitations (prescription) in the field of international sale of goods;
- (c) General conditions of sale and standard contracts.

Committee II

Item 5. International payments:

- (a) Negotiable instruments;
- (b) Bankers' commercial credits;
- (c) Guarantees and securities.

Item 7. International legislation on shipping.

Item 8. Register of organizations, register of texts; bibliography.

Item 11. Publication of a Yearbook.

10. Committee I met from 7 to 27 April 1970 and held twenty-two meetings. Committee II met from 8 to 27 April 1970 and held fifteen meetings.

11. At its first meeting, on 7 April 1970, Committee I elected unanimously Mr. Jorge Barrera Graf (Mexico) as Chairman and Mr. Emmanuel Sam (Ghana) as Rapporteur. At its first meeting, on 8 April 1970, Committee II elected unanimously Mr. Iván Meznerics (Hungary) as Chairman and Mr. Stephen F. Parsons (Australia) as Rapporteur.

12. At its third meeting, on 8 April 1970, Committee I decided to establish a sessional working party on the scope of application of the uniform rules governing the international sale of goods. The working party consisted of the representatives of Argentina, Ghana, Hungary, India, Norway and the United Kingdom of Great Britain and Northern Ireland. At its fifth meeting, on 9 April 1970, Committee I decided to establish a sessional working party on the application of usages in the international sale of goods. That working party consisted of the representatives of Australia, the Democratic Republic of the Congo, the Union of Soviet Socialist Republics and the United States of America.

13. In accordance with the decision taken by the Commission at its 51st meeting on 7 April 1970, according to which it was left to each Committee to decide if summary records of its discussions were

² In accordance with a decision taken by the Commission at the second meeting of its first session, the Commission shall have three Vice-Chairmen, in order that each of the five groups of States listed in General Assembly resolution 2205 (XXI), section II, para. 1, will be included among the officers of the Commission.

needed,³ Committee I decided that summary records of its discussions should be issued. Committee II decided that summary records of its discussions relating to negotiable instruments (item 5 (a) of the agenda) and international legislation on shipping (item 7 of the agenda) should be issued.

14. The Commission, after having considered the reports of Committee I and Committee II, decided to include the substance thereof in its report on the work of its third session. The Commission adopted the present report at its 62nd meeting, on 30 April 1970.

F. Decisions of the Commission

15. At the 50th meeting of the Commission, on 6 April 1970, the Chairman recalled that the Commission, at its first session, had agreed that its decisions should, as far as possible, be reached by consensus, and that it was only in the absence of consensus that decisions should be taken by a vote as provided for in the rules of procedure relating to the procedure of Committees of the General Assembly.

16. The decisions taken by the Commission in the course of its third session were all reached by consensus.

CHAPTER II INTERNATIONAL SALE OF GOODS

A. Uniform rules governing the international sale of goods

17. Committee I considered this item in the course of its 1st to 13th, 20th and 21st meetings, held on 7 to 10, 13 to 15, 23 and 24 April 1970. The Commission considered the item at its 54th, 59th and 60th meetings, on 22, 29 and 30 April 1970.

18. The Commission had before it the report of the Working Group on the International Sale of Goods ("Working Group on Sales") on its session held at New York from 5 to 16 January 1970 (A/CN.9/35) and a note by the Secretariat suggesting alternative approaches for consideration of that report. The Commission also had before it an analysis by the Secretary-General of studies and comments by Governments on the Hague Conventions of 1964, the Uniform Law on the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (A/CN.9/31), an analysis by the Secretary-General of replies and comments by Governments on the Hague Convention on the Law Applicable to the International Sale of Goods of 1955 (A/CN.9/33), and a proposal submitted by Spain concerning the Commission's future work on international sales.

(1) General remarks

19. One representative proposed that the Commission should establish a programme for the drafting of a new text of a uniform law on the international sale of goods. This new text should be prepared to achieve

greater brevity and clarity than that of the Uniform Law on the International Sale of Goods annexed to the Hague Convention of 1964, although the existing instruments should be used as a basis. It was suggested that the new text should include not only the basic rules of sales law, but also rules on the formation of contracts and on prescription. A small drafting group should be established which would work continuously on the preparation of the new text with the assistance of the Secretariat and the International Institute for the Unification of Private Law (UNIDROIT). Some representatives supported the objective of this proposal. Other representatives opposed this proposal on the ground that it did not give adequate consideration and effect to the existing Uniform Law. Several representatives suggested that until the basic issues with respect to the Uniform Law had been discussed, it was not possible to decide whether to attempt to draft a new instrument or revise the present text. Most representatives were of the view that, if a new text should be drafted, this work would be aided by the guidance on basic questions that could be provided by the consideration of the report of the Working Group on Sales.⁴

20. It was suggested by one representative that until new rules had been drafted or the existing ones amended, States should be recommended to ratify the Hague Conventions of 1964. Several representatives expressed their disagreement with that proposal.

21. The Commission decided to consider the recommendations set forth in the report of the Working Group on Sales, without prejudice to the renewal of the proposal for the drafting of a new text.

(2) Principles on choice of law in international legislation on sales (ULIS article 2)

22. The Commission considered the recommendations set forth in the report of the Working Group on Sales⁵ on the sphere of application of a uniform law. One of the issues was the following: To what extent should a uniform law govern an international sales transaction when the State of the seller or buyer (or the States of both the seller and buyer) had not adopted the uniform law? More specifically, attention was given to article 2 of ULIS. The report of the Working Group noted that this article (in conjunction with ULIS article 1-1 (a)) directed the tribunals of contracting States to apply the Law to international sales without regard to the relationship (or lack of relationship) between the transaction and a contracting State. The Working Group recommended (in paragraph 23 of its report) that the present language of article 2 be supplanted by a new provision, as set forth in paragraph 19 of its report.

23. It was suggested during the debate that the following main approaches to the sphere of application of a uniform law might be employed: (a) the universalist system, whereby the uniform law would be applicable without regard to the relationship between the transaction and the *forum*; (b) the system whereby the uniform

³ Report of the United Nations Commission on International Trade Law on the work of its second session, *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)*, paras. 185-187.

⁴ For the Commission's further consideration of this proposal, and related matters with respect to the programme of work on this subject, see paras. 68 to 72 below.

⁵ A/CN.9/35, part II-A, paras. 10-29.

law would apply only when the places of business of both parties were in the territories of contracting States; and (c) a system which would subordinate the application of the uniform law to the rules of private international law. It was also suggested that the uniform law need not decide on a single approach, but could allow each State to choose one of various approaches to applicability.

24. The following concrete proposals were made with respect to article 2 of ULIS: (a) the retention of the present text of article 2; (b) the retention of the present text of article 2 and the expanding of the possibilities for reservations provided in article IV of the Convention; (c) the retention of the present text of article 2 and recommending the use of the reservation permitted by article III of the Convention; (d) the deletion of article 2; and (e) the formulation of a new article 2 in the light of the recommendation of the Working Group in paragraph 19 of its report.

25. After discussion of the alternatives set out in paragraph 24 above, the problem was referred to a working party (Working Party I) composed of the representatives of Argentina, Ghana, Hungary, India, Norway and the United Kingdom of Great Britain and Northern Ireland; representatives of other members of the Commission and interested international organizations, including the Hague Conference on Private International Law, were invited to attend as observers.

26. Working Party I thereafter reported that it recommended that article 2 of ULIS be revised to read as follows:

"The present Law is applicable (a) irrespective of any rules of private international law when the place of business of each of the contracting parties is in the territory of a Contracting State which has adopted the present Law without any reservation which would preclude its application to the contract; (b) when the rules of private international law indicate that the applicable law is the law of a Contracting State which has adopted the present Law without any reservation which would preclude its application to the contract."

27. The Working Party also reported that the Convention providing for a uniform law should include the following:

"Any State may, at the time of the deposit of its instrument of ratification of, or accession to, the present Convention or, having become a party to the Convention, at any time after the Convention has entered into force, declare, by a notification addressed to the Government of . . . that, notwithstanding the provisions contained in article 2 of the Uniform Law, it will apply the Uniform Law to all contracts of sale of goods covered by the Uniform Law.

"If the declaration has been made at the time of the deposit of its instrument of ratification of or accession to the present Convention, it shall be effective from the date on which the Convention enters into force for that State.

"If the declaration has been made at any time after the Convention has entered into force, it shall

be effective six months after the date of notification of such declaration."

28. The Working Party also reported its position with respect to the provisions for reservations set forth in articles II through IV of the Hague Conventions of 1964. In this regard, the Working Party recommended that: (1) article II should be retained; (2) article III should be deleted if the Working Party's above two recommendations (revision of ULIS article 2 (paragraph 26 above) and provision for a declaration (paragraph 27 above)) should be adopted; (3) action on article IV should be postponed until it is seen whether and to what extent the uniform law would conflict with the 1955 Hague Convention. The Working Party noted that it had reached no conclusion as to the retention of article V of the Convention.

29. Some representatives stated that they preferred the approach of the present article 2 of ULIS. Most of the representatives stated that they agreed with the substance of the revision of article 2 proposed by the Working Party as a compromise among varying views. Some representatives also suggested that a decision on this question of scope should be postponed until after the substantive provisions of the uniform law had been decided.

30. The Commission *agreed* that the substance of the proposed revision of article 2 should be the basis for further work by the Working Group on Sales. It was understood that decisions as to specific provisions could be re-examined at a later stage in the work on a uniform law.

31. In the discussion of the proposed revision of article 2 of ULIS, suggestions for modifications were made. These included: (a) reversing the positions of articles 1 and 2, with the possible conversion of the present article 1 of ULIS into a definition of the term "international sale" as used in the uniform law; this definition would follow and explain the use of that term in an article based on the Working Party's revision of article 2; (b) clarifying the applicability of the uniform law when one party has two or more places of business located in different States or no place of business at all; (c) drafting paragraph (b) of the text referred to in paragraph 26 above in such a way that it would be clear from the text that it only applied in cases not covered by paragraph (a); (d) certain other detailed suggestions with respect to drafting.

32. Most of the representatives who spoke on the question supported the approach to reservations in the Convention proposed by Working Party I. One representative stated that the opportunity for the reservation provided by article III of the Convention should be retained. Several representatives suggested that, if a reservation like that provided in article IV should be retained, modifications of the present language would be necessary with respect to future adherence to conventions on private international law. One representative submitted a proposal for other modifications in article IV. It was agreed that these suggestions could be renewed if a provision along the lines of the present article IV should come under consideration.

(3) *The relationship between uniform rules for international sales of goods and the proposed convention on time-limits and limitations (prescription) (ULIS article 49)*

33. The Commission took up the section of the report of the Working Group on Sales concerning the relationship between a uniform law on international sales and the proposed convention on prescription.⁶ The Commission, at its second session, had created a Working Group to take steps towards the preparation of an international convention on time-limits and limitations (prescription) in the field of international sale of goods.⁷ The Working Group on Prescription, in the report on its meeting in August 1969, noted that article 49 of the Uniform Law on Sales might be construed to provide a prescriptive limit of one year for claims by buyers based on lack of conformity of the goods⁸ and that this special provision presented a problem in view of the decision to prepare a convention with unified rules on prescription applicable to all claims by sellers and buyers arising from an international sale. The Working Group on Sales recommended (in paragraphs 52-53 of its report) that article 49 of ULIS should be deleted. In connexion with this recommendation, representatives discussed the possible interpretation that might be given to articles 39 and 49 of ULIS and the interrelation between those articles. With respect to the above recommendation for the deletion of article 49, it was agreed that this question should be considered in connexion with the report of the Working Group on Prescription.

34. The Commission decided that the subject-matter of article 49 of ULIS would come within the scope of a convention on prescription and should be omitted from the Uniform Law on Sales.

(4) *The binding effect of usages (ULIS article 9)*

35. Under this heading, the Commission considered the recommendation of the report of the Working Group on Sales, which examined the rules on the effect of usages.⁹

36. The report of the Working Group is concerned with article 9 of ULIS (paragraphs 74-90). The Working Group recommended (in paragraph 83 of its report) that paragraph 2 of article 9 of ULIS be revised, and proposed substitute language.¹⁰

37. After discussion of the problem, the Commission established a working party (Working Party II) to prepare a recommendation. Working Party II was thereupon constituted; the representatives of Australia, the Democratic Republic of the Congo, the Union of Soviet Socialist Republics and the United States of America were appointed as members; representatives of other members and of interested international organizations were invited to attend as observers.

⁶ *Ibid.*, part II-C-2, paras. 48-53.

⁷ Report of the United Nations Commission on International Trade Law on the work of its second session, 3-31 March 1969 (*Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)*, note 3, para. 46.)

⁸ A/CN.9/30, paras. 46 and 47.

⁹ A/CN.9/35, part II-E, paras. 73-90.

¹⁰ *Ibid.*, paras. 85 and 86.

38. Working Party II thereafter reported that it recommended that paragraphs 2 and 3 of article 9 of ULIS be revised to read as follows:

"2. The usages which the parties shall be considered to have impliedly made applicable to their contract shall include any usage of which the parties are or should be aware and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved.

"3. Where terms, clauses or standard forms of contracts commonly used in commercial practice are employed, they shall be interpreted according to the meaning intended to be given to them by the parties. In the absence of any such intention, they shall be interpreted according to usage as provided in the preceding paragraph."

39. Many representatives stated that they agreed with the revised text of article 9 as recommended by Working Party II. Other representatives suggested modifications with respect to paragraph 2 of article 9.

40. It was proposed that paragraph 2 of article 9 be revised to read as follows:

"The usages which the parties shall be considered to have impliedly made applicable to their contract shall include any usage which is widely known in international trade and regularly [and generally] observed by parties to contracts of the type involved and of which the parties to the contract either are aware or should, because it is so widely known and regularly [generally] observed, be [have been] aware."

One representative noted that the criterion set forth in article 9 of ULIS, regarding the knowledge that the parties should have of usages, was preferable to the criterion proposed in the revised text. Other representatives proposed that the words "even if of local origin" be inserted in the revised text after the words "shall include any usage".

41. One representative proposed the following wording of article 9, paragraph 2:

"It is considered that the parties are impliedly bound by any usage which is widely known in international trade and which is regularly observed by parties to contracts of the type involved."

42. The Commission decided to refer the proposals referred to in paragraphs 38, 40 and 41 above, and other drafting suggestions made during the session, to the Working Group on Sales.

(5) *Cancellation of a sales contract without notice to the other party: "ipso facto" avoidance and ULIS article 62*

43. The Commission considered the recommendation of the Working Group on Sales with respect to whether (or when) rights under a sales contract should be terminated automatically without notice by one party to the other. The report of the Working Group was concerned primarily with the rules on this subject in article 62 of ULIS.¹¹ The Working Group recommended (in paragraph 103 of its report) that article 62 should be

¹¹ *Ibid.*, part II-G, paras. 92-104.

revised to make this provision on avoidance by the seller correspond with the provisions of ULIS article 26 on avoidance by the buyer and proposed a revised text designed to achieve this objective (paragraphs 98-99 of its report). The Working Group also recommended some drafting changes.

44. The Commission approved the recommendation of the Working Group (a) that the rules on avoidance by the seller (article 62) and avoidance by the buyer (article 26) should be brought into conformity, and (b) that further attention should be given to the rules and terminology with respect to avoidance of the contract.

45. In connexion with part (b) of the above recommendation, representatives expressed opinions on the following issues: (1) whether paragraph 1 of article 62 of ULIS, and the corresponding provision of article 26, are in error in providing for automatic cancellation without notification to the other party; (2) whether automatic cancellation should be excluded when the goods have been delivered to the buyer, as suggested in the proposal reported by the Working Group (paragraph 100); (3) the suitability of the expression "*ipso facto* avoidance" for avoidance without notification to the other party instead of "*ipso jure* avoidance" and the possible substitution in the English text of that first expression by "automatic cancellation" or "automatic avoidance"; (4) the clarity and practicability of the definition of "fundamental" breach of contract in article 10 of ULIS; (5) the compatibility of the rules of law on avoidance and prevailing contract practices including the relevant provisions of the ECE General Conditions as analysed in the study recently prepared by the representative of Japan.

46. The Commission approved the recommendation of the Working Group on Sales in paragraph 103 of its report and decided as follows:

"The Commission:

"1. Requests the Secretary-General to prepare a study of the concept of "*ipso facto* avoidance" for later consideration at a subsequent session of the Working Group on the International Sale of Goods;

"2. Requests States members of the Commission to submit their proposals with respect to the concept of "*ipso facto* avoidance" to the Secretariat for consideration in the study to in the preceding paragraph.

(6) *Time and place for inspection: time for notification of defects in delivered goods (ULIS, articles 38 and 39)*

47. The Commission considered the report of the Working Group on the time and place for inspection of goods by the buyer.¹² In this connexion, the Working Group gave principal attention in its report (paragraph 107) to the rules of article 38 of ULIS specifying the time and place for inspection, and noted that these rules are implemented in article 39 of ULIS which, in part, provides that the buyer "shall lose the right to rely on a lack of conformity of the goods if he has not given

the seller notice thereof promptly after he has discovered the lack of conformity or ought to have discovered it" (ULIS article 39-1). The Working Group recommended the revision of article 38 of ULIS in accordance with language (see paragraph 109 of its report) which was designed to make the rules more flexible and compatible with shipping practices, including new conditions presented by the development of containerized shipment (paragraphs 110-111 of its report).

48. The representatives who spoke on the point expressed the view that the text recommended by the Working Group on Sales would constitute an improvement in the language of article 38 of ULIS. Some representatives were of the view that further steps should be taken to make these rules more simple and flexible. One representative recommended the merger of articles 38 and 39 of ULIS in a single simplified provision. Another representative submitted a proposal for the merger of paragraphs 1 and 2 of article 38 into a single, flexible rule on the time for inspection. Another representative suggested that in paragraph 3 of article 38, the words "if otherwise is not agreed by the parties" be substituted for the words "the seller knew or ought to have known". He also suggested that paragraph 4 of that article should be amended to state that in the absence of agreement between the parties to the contract as to the methods of examination of the goods, the examination must be carried out in conformity with the law and, in the absence of such law, in conformity with the usages of the seller's country; attention was directed to the relevant provisions of paragraph 26 of the General Conditions of Delivery of 1968 of the Council for Mutual Economic Assistance.

49. The Commission decided to refer these proposals to the Working Group on Sales.

(7) *The definition of international sale of goods for the purpose of prescribing the scope of a uniform law (ULIS article 1)*

50. The Commission considered the report of the Working Group on the definition of international sale of goods, with special reference to article 1 of ULIS.¹³ The Working Group concluded that in general this definition was satisfactory (paragraph 41 of its report), although several delegations expressed reservations to that text (paragraph 42). One representative proposed the extension of the applicability of ULIS (article 1-1) to the sale of goods which, at the time of the conclusion of the contract, are already on the territory of the buyer. The Working Group noted further that the English text of article 1-1 (a) of ULIS ("the contract involves goods which . . .") might not clearly require that the contract contemplate an international shipment at the time of the making of the contract to meet this problem. The report recommended that, to conform to the French version, article 1-1 (a), in the English text, should read:

"(a) Where the contract contemplates that the goods are, at the time of the conclusion of the contract, or will be the subject of transport from the territory of one State to the territory of another,"

¹² *Ibid.*, part II-H, paras. 105-111.

¹³ *Ibid.*, part II-B, paras. 30-44.

51. The Commission *approved* the report of the Working Group in so far as the Group approved the structure of article 1 of ULIS. The Commission further *decided* to refer recommendations for improvements in the drafting of article 1 to the Working Group on Sales.

(8) *Use of general principles in interpretation (ULIS article 17)*

52. Consideration was given to the report of the Working Group on Sales with regard to article 17 of ULIS,¹⁴ which provides that:

"Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

53. It was noted in the report that the Working Group had considered the following approaches: (a) approval of the present text of article 17 (paragraph 59); (b) revision to emphasize that the law should be interpreted to promote "uniformity in the law of international sales" (paragraph 63); (c) supplanting article 17 with the following: "Private international law shall apply to questions not settled by ULIS" (paragraph 66); (d) combining the rules stated in (b) and (c) above (paragraph 70).

54. Several representatives supported the retention of article 17 in its present form or with minor clarifying amendments. Some of these representatives stressed that such a provision was needed to emphasize that the uniform law was an international instrument, and indicated that it was not difficult to ascertain the "general principles" on which the law was based. Other representatives supported the revision indicated in paragraph 53 (b) above, pointing to the objective of uniformity, and mentioned that this provision might be useful to encourage reference to the interpretation given the uniform law in other States. One representative suggested that the general principles be rendered explicitly in the preamble of a future convention on the uniform law. Others suggested that reference to private international law should be added, at the end of a general rule on interpretation, to deal with the problem of gaps in the law. One representative proposed the deletion of article 17, and noted that the uniform law would be incorporated into the municipal legal system.

55. The Commission *decided* that the question should be referred to the Working Group on Sales for further consideration in the light of the above views and proposals.

(9) *The concept of "delivery" (délivrance) and the definition of the seller's obligations*

56. Consideration was given to the report of the Working Group on Sales with respect to the use of the concept of "delivery" (*délivrance*) in various articles of the Uniform Law on Sales.¹⁵

57. One representative noted that, under article 18 of ULIS, the seller "shall effect delivery of the goods", and that in article 19, paragraph 1, "delivery" (*déli-*

vrance) is defined as "the handing over of goods". The seller could not be under an unqualified obligation to "hand over" the goods, since transfer of possession required the co-operation of the buyer; the seller's obligation should be limited to making the goods available to the buyer under the contract. Another representative noted, in this regard, that the study of certain of the ECE General Conditions showed that the seller's obligation was described, in the French text, in terms of the physical act of *livraison* rather than the legal concept of *délivrance*. It was also noted that, under the uniform law, even if the goods were handed over to the buyer, this might not constitute "delivery" (*délivrance*) if the goods did not conform to the contract.

58. Most of the representatives who spoke on the issue indicated that the concept of "delivery" (*délivrance*) as used in the uniform law was unduly complex and artificial and, consequently, was difficult to apply. One representative, however, was of the view that "delivery" (*délivrance*) was useful to avoid reference to the rules of local law.

59. The Commission *approved* the recommendation of the Working Group in paragraph 116 of its report and *decided* as follows:

"The Commission:

"1. *Requests* the Secretary-General to prepare an analysis of the use of the concept of "delivery" (*délivrance*) in the Uniform Law on the International Sale of Goods annexed to the Hague Convention of 1964 and to present the study to the next session of the Working Group on Sales, together with a study, being prepared by the International Institute for the Unification of Private Law, on the historical background of the use of this term in the drafts that led to the version adopted at the Hague Conference of 1964;

"2. *Requests* the Working Group on the International Sale of Goods to give further consideration to the problems connected with the concept of "delivery" in the light of the studies referred to in the preceding paragraph, any materials submitted by members of the Commission and the observations made by representatives at the third session of the Commission."

(10) *Mandatory or regulatory rules of national law with respect to consumer protection (ULIS article 5-2)*

60. Consideration was given to the report of the Working Group on Sales on the extent to which ULIS might be construed to override various types of national laws for the protection of consumers.¹⁶

61. In the report, attention was directed to article 5-2 of ULIS, which specifically preserves "any mandatory provisions of national law for the protection of a party to a contract which contemplates the purchase of goods by that party by payment of the price by instalments". The question was raised as to whether this specific reference preserving one type of regulatory law implied that other types of regulatory laws would be superseded. It was suggested, however, that such laws

¹⁴ *Ibid.*, part II-D, paras. 56-72.

¹⁵ *Ibid.*, part II-I, paras. 112-117.

¹⁶ *Ibid.*, part II-J, paras. 118-124.

might be preserved by article 8 of ULIS, which provides that the uniform law shall not be concerned with "the validity of the contract"; on the other hand, it was noted that some regulatory laws might not be confined to the "validity" of the contract, and thus would not be preserved by article 8 of ULIS.

62. Various approaches to the problem were considered, including the detection of article 5-2, the broadening of its scope to preserve all mandatory rules for the protection of consumers and the exclusion from the uniform law of purchases by consumers of goods for personal use. Some representatives were of the view that the last two proposals presented problems of interpretation, since it was difficult to define the excluded category, and a seller might not know the purpose for which the buyer purchased the goods. In this connexion, one representative referred to the proposed definition of consumer sales contained in paragraph 120 of the report of the Working Group on Sales (A/CN.9/35).

63. It was also noted that a provision of the uniform law that made a general reference to mandatory rules of domestic legislation would be difficult to apply, since different legal systems follow widely varying approaches to the question of whether rules are mandatory. One representative further suggested that some provisions in ULIS might be made mandatory for the purpose of protecting the consumer buyer.

64. The Commission *decided* to refer the problem to the Working Group on Sales to consider the problem further in the light of the observations made by representatives and any studies presented by members of the Working Group giving examples of rules regarded as mandatory.

(11) *The relationship between the uniform law and national rules that contracts must be in writing (ULIS article 15)*

65. This problem was considered in the light of the suggestion in the report of the Working Group (paragraphs 123-124) that a barrier to adoption of the uniform law by some countries was presented by article 15 of ULIS which provides, in part, that the contract "need not be evidenced by writing".

66. Suggestions for solving the problem included: (a) the deletion of article 15 or the provision in article 15 that only contracts in written form are binding in cases in which the national legislation of at least one of the parties made the written form mandatory; (b) provision in the convention for adherence subject to a reservation setting forth the formalities required for entering into a contract; (c) remitting the problem to the uniform law on the formation of international sales contracts.

67. The Commission *decided* to refer the question to the Working Group on Sales for consideration in the light of the observations presented by representatives at this session.

(12) *Future work on international sales*

68. The representative of Spain offered a proposal which was designed to improve working methods with reference to a revision of the uniform law for Inter-

national Sales. In his view, the Commission itself was too large a body to undertake drafting. His delegation, therefore, proposed that drafting be entrusted to a small group representing the major legal systems of the world. Such a group would work continuously between the third and the fourth sessions. The draft text should be short, simple and less controversial.

69. All representatives who took the floor supported the idea that more effective working methods should be devised to increase the efficiency of the Commission and to accelerate its work on uniform rules of international sales. However, most representatives were of the opinion that the setting up of a standing drafting group was not feasible.

70. Various alternative suggestions were made. One representative, with whom many others agreed, suggested, that instead of focusing attention on selected items of ULIS, the Commission should proceed in a more orderly fashion and consider ULIS in successive parts, chapter by chapter. Preliminary drafts of the Working Group would then be circulated in advance and any amendments thereto should be submitted in writing. One representative suggested that the Working Group should meet for longer periods of time; one representative suggested that the Working Group should have at least two meetings between sessions. It was also suggested that the Working Group might have a special rapporteur who had the necessary time to prepare a revised text of ULIS. Another representative emphasized that members of the Commission should not seek to impose their views on matters of detail but should confine their comments to the substance of proposed texts. One representative suggested that individual members of the existing Working Group should be assigned the task of drafting specific articles. There was general agreement that the Working Group in reporting revised provisions should make explanatory comments on each article.

71. At the suggestion of the Commission, the Working Group on Sales held a meeting to consider, in connexion with its future methods of work, the suggestions made by representatives during the discussion and, in particular, the ideas mentioned in paragraph 68 above.

72. The Commission *decided*, on the recommendation of the Working Group, to adopt the following working methods with respect to uniform rules of the international sale of goods:

(a) The Working Group on the International Sale of Goods, established at the second session of the Commission, should continue its work under the terms of reference set forth in paragraph 3 (a) of the draft resolution adopted by the Commission at its second session;¹⁷ in order to accelerate its work, the Working Group should meet, for at least ten working days, before the fourth session of the Commission.

(b) Instead of considering selected items, the Working Group should consider ULIS systematically, chapter by chapter, giving priority to articles 1-17.

¹⁷ *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618), para. 38.*

(c) Members of the Working Group are requested to submit their proposals in writing and in time to allow the Secretary-General to circulate such proposals prior to the meeting.

(d) Representatives of members of the Working Group, alone or in co-operation with representatives of other members, should be entrusted, if so willing, with the examination and redrafting of the articles referred to in paragraph (b) above, and any other provisions of ULIS related to those articles. Such representatives should take into consideration the relevant suggestions of Governments, the documents mentioned in the report of the Commission on the work of its third session, and the decisions taken at that session as well as the practices of international trade.

(e) The representatives entrusted with the tasks referred to in paragraph (d) above shall submit the result of their work, including explanatory comments on each article, to the Secretary-General not later than 30 June 1970. The Secretary-General is requested to transmit these reports to other members of the Working Group on Sales for comments. The comments which reach the Secretary-General before 31 August 1970 shall be transmitted to the forthcoming session of the Working Group. The Secretary-General is also requested to submit his observations to the Working Group, whose report should contain explanatory comments on each issue or article of ULIS recommended for approval.

(f) Before the new text of a uniform law or the revised text of ULIS is completed, the Working Group should only submit questions of principle to the Commission for consideration.

(g) Members of the Commission are requested to submit their proposals relating to the report of the Working Group in writing preferably in advance of the fourth session of the Commission.

(h) The Secretary-General is requested to render assistance to the Working Group in the performance of its task, in particular, by preparing, either at the request of the Working Group or on his own motion, studies and other preparatory documents (with the assistance of experts, if necessary, within the limits permitted by the budget) and by submitting proposals for consideration.

B. *Time-limits and limitations (prescription)*

73. This subject was considered by Committee I in the course of six meetings on 16, 17 and 20 April 1970, and by the Commission at its 60th meeting, on 29 April 1970. A summary of observations made by members of the Commission and observers with respect to the actions taken by the Commission is set out in paragraphs 75 to 96 below.

74. The Commission had before it the report of the Working Group on Time-Limits and Limitations (Prescription) in the International Sale of Goods ("Working Group on Prescription") on its session held at Geneva from 18 to 22 August 1969 (A/CN.9/30), and a note by the Secretariat suggesting alternative approaches for consideration of this report. The Working Group on Prescription was established by the Commission at its second session and was requested to study the topic

with a view to the preparation of a preliminary draft of an international convention.¹⁸

(1) *Working methods and general approach*

75. The Working Group recommended in its report that the principles formulated in the convention "should be certain, objective and, as far as possible, should be independent of the rules of any individual legal system" (paragraph 5). Several representatives spoke in support of this approach as an aid to the clarity and practicality of the rules. Some representatives, however, observed that the study of the national rules of different legal systems in the various regions would be helpful in formulating uniform rules; it was suggested that an explanation of the reasons for choosing one approach and rejecting alternative approaches would be of assistance in securing acceptance of uniform rules that vary from those employed in national formulations. It was also observed that the approach to the work should be pragmatic and should concentrate on concrete results that would encourage international trade. It was agreed that more detailed attention to working methods should be given later and in the light of specific problems.

76. One representative suggested that the convention on prescription should not be confined to claims arising from the international sale of goods, but should extend to other international transactions such as licensing agreements. Another representative suggested that the uniform rules on prescription should be combined with the uniform rules on sales. Most representatives, however, were of the opinion that any advantages from broadening the scope of the work would be outweighed by added complications in drafting, and by increased difficulty in securing adoption of the uniform rules.

(2) *Scope of the convention: the definition of international sales*

77. The Working Group on Prescription recommended in its report that the convention on prescription should contain the same definition of scope as a uniform law on sales (paragraph 11).

78. The Commission approved the recommendation of the Working Group referred to in paragraph 77 above. It was noted, however, that various problems with respect to the scope of the uniform law on sales had not yet been finally decided; it was understood that the present decision contemplated incorporating into the convention on prescription the rules on scope from the uniform law on sales, such as the definition of international sale and related rules, subject to later revisions that may be made in the course of further work on the uniform law on sales. It was further understood that this decision did not reach the question of choice of law.¹⁹

(3) *Types of claims; third parties*

79. Consideration was given to the recommendation in the report of the Working Group (paragraph 13) setting forth a draft provision designed to express the central idea that the convention's rules should apply only to the rights of the seller and the buyer (their suc-

¹⁸ *Ibid.*, para. 46, sub-para. 1 and 2.

¹⁹ cf. ULIS article 2; A/CN.9/30, part VII sections B and C, paras. 108-114.

cessors and assigns, and persons who guarantee their performance) arising from a contract for the international sale of goods.

80. The Commission *approved* the above recommendation in principle. Suggestions for improvements in drafting were made. Some representatives also suggested that claims based on personal injury or physical damage, caused by the goods sold, to other property ("product liability") should be omitted from the convention. Other representatives suggested that "product liability" was given different scope and effect in different legal systems, and that an exclusion that referred to "product liability" would be difficult to construe. This problem also was referred to the Working Group.

(4) *Commencement of the period of prescription: the discovery of defects or the occurrence of damage subsequent to delivery of the goods*

81. Consideration was given to the recommendation in the report of the Working Group (paragraph 32) that where goods are delivered, the prescriptive period "for claims relying on a lack of conformity of the goods shall run from the date of delivery" even though the defect is discovered or damage ensues after that date.

82. Several representatives supported this recommendation, which, it was noted, supported the basic principles of definiteness and certainty to which the Working Group had referred in its general statement of principle (paragraph 5). Several other representatives expressed the view that this recommendation might be unfair to the buyer since the prescriptive period could start to run before the buyer had an opportunity to discover the defect or to make a claim. Various alternatives were suggested to meet this problem; these included starting the period from the time when the goods were put at the disposal of the buyer at the place of destination, the time when the buyer had first the opportunity to discover the defect, the time the cause of action arose, and the time when notice was given.²⁰

83. It was agreed that, since the danger of hardship to the buyer would be affected by the length of the prescriptive period, further attention should be given to the problem of the commencement of the period after consideration had been given to the length of the period.

84. There was general agreement that, if the recommendation of the Working Group should be accepted in principle, the period should not start from the legal concept of "delivery" (*délivrance*), but from a physical event, such as "handing over" the goods or when shipped goods have reached the buyer.²¹ One representative was of the opinion that a decision must be taken as to when the period of prescription should start in the case of a claim based not on a defect as to the quality of the goods, but on the failure of the goods to comply with the contract in respect of quantity, completeness or variety of the goods.

(5) *Length of the prescriptive period: the basic rule*

85. Consideration was given to the recommendation of the Working Group in its report that a single basic

period should govern the claims by both parties to the contract, and that the period should be within the range of three to five years (paragraphs 49-50).

86. Nearly all of the representatives favoured a period within the range of three to five years. Many representatives favoured the three-year period partly to promote the settlement of disputes promptly and before the loss of evidence, and partly to protect a seller from late claims after his right to recover from his supplier had been barred by a shorter period under domestic law. Many other representatives expressed the view that a five-year period was preferable in view of the time required for investigation, negotiation and arrangements for bringing legal action, possibly in a distant State.

87. Several of the representative indicated that their initial preference would be affected by future decisions with respect to other provisions of the convention. Such provisions included the ability of the parties to extend the period to permit further negotiation and extensions of the period while suit was impossible or was prevented by the other party.

88. In view of the varying views on the length of the period, many representatives suggested that a questionnaire be addressed to Governments and to interested international organizations, which should include a question as to whether the period of limitation could be extended or shortened; in other words, if the period of limitation is three years, whether it could be extended up to five years and, conversely, if the period of limitation is five years, whether it could be shortened to three years. Some representatives suggested that it would be appropriate to set a period that could be extended by agreement, but could not be reduced by agreement.

89. The Commission *decided* that a draft questionnaire on the length of the period and other problems should be prepared for consideration by the Working Group on Prescription at its next session, and should thereafter be addressed to Governments and interested international organizations, in order particularly to ascertain the views of those engaged in business in relation to this and any other relevant issue in accordance with the final instructions by the Working Group. The Commission consequently postponed its decision with respect to the length of the prescriptive period.

(6) *Effect of a guarantee for a specified time*

90. Consideration was given to the recommendation of the Working Group (in paragraph 37 of its report) that the convention include the following provision:

"Where the contract contains an express guarantee relating to the goods which is stated to be in force for a specified time, the period of limitation in respect of any action based on the guarantee shall expire one year after the expiration of such time or [3] [5] years after the delivery of the goods to the buyer, whichever shall be the later."

91. Members of the Working Group explained that, in view of the concluding phrase "whichever shall be the later", the intention was that this provision would never shorten the basic period (indicated alternatively

²⁰ cf. ULIS articles 38 and 39.

²¹ cf. A/CN.9/30, para. 31.

as three or five years), at least not the period running from the time of delivery. Thus, this provision would be operative only if the period of an express guarantee expired within the last year of the basic period or subsequent to the operation of the basic period; in such cases, the provision assured an added period for asserting a claim. The question was raised as to whether this intent had been clearly expressed. Attention was also called to certain drafting questions noted by the Working Group (in paragraph 38 of its report).

92. It was suggested that the added period should be two years rather than one, in view of the extensive investigation and testing that may be required in sales of industrial plants and heavy machinery, although a one-year period might be acceptable to the sale of goods like automobiles to which many representatives made reference. Another suggestion was that the added period should be the same as the basic period (three or five years).

93. The recommendation of the Working Group was accepted in substance by most representatives. It was understood that the Working Group would consider the suggestions made in the course of the discussion. One representative questioned whether, in the interest of simplicity and to avoid overly long prescription periods, the proposed provision could not be omitted altogether.

(7) *Interruption of the period by acknowledgement of the debt*

94. Consideration was given to the recommendation of the Working Group (in paragraph 74 of its report) that, if the debtor acknowledges the debt, the prescriptive period would start to run afresh from the date of acknowledgement.

The Commission accepted this recommendation in principle; attention was directed to discussion in the report of certain related questions, including whether the acknowledgement must be in writing (paragraph 77) and whether a part payment would have the same effect as an acknowledgement (paragraph 81).

(8) *General comments on the report of the Working Group*

95. Since there was insufficient time for separate debate on all of the other recommendations of the Working Group, general discussion was invited with respect to the remaining parts of the report. Representatives made comments with respect to various problems including: the effect of impossibility or *force majeure* (paragraphs 63-66); the legal action necessary to interrupt the prescriptive period (paragraphs 82-89); the applicability of the convention to actions to enforce judgements (paragraph 62); and the effect of fraud (paragraphs 67-70).

(9) *Programme for completion of the work*

96. Consideration was given to the recommendation in the report of the Working Group (paragraphs 125-126) and to the note by the Secretariat.

97. The Commission decided to request the Working Group to meet to prepare a tentative draft convention for submission to the Commission at its fourth session. It was further decided that consideration should be given

to the appropriate time and place for a meeting in the light of the convenience of the members and the availability of conference services. The Commission further decided to request the Secretary-General to prepare, in advance of the session, a draft questionnaire on the length of the prescriptive period and other related problems and a working paper analysing the problems raised by the discussion at the present session.

C. *General conditions of sale and standard contracts*

98. The subject of general conditions of sale and standard contracts was considered by Committee I in the course of its 13th meeting, held on 15 April 1970, and by the Commission in the course of its 60th meeting, on 29 April 1970.

99. The Commission had before it the report of the Secretary-General entitled "General conditions of sale and standard contracts" (A/CN.9/34) concerning the implementation of the Commission's decision at its second session.

100. It was suggested during the debate that the regional economic commissions should be encouraged to formulate new general conditions which would satisfy the needs and interests of the region.

Decision of the Commission

101. On the suggestion of the Chairman, at its 13th meeting, on 15 April 1970, the Committee approved a recommendation for submission to the Commission.

102. The Commission, at its 60th meeting, on 29 April 1970, considered the recommendation of Committee I and adopted unanimously the following decision:

"The Commission:

"Requests the Secretary-General:

"(a) To continue with the programme of implementation of the Commission's decision made at its second session,²² and to submit to the fourth session of the Commission a progress report thereon including, if possible, an analysis of the comments made by the regional economic commissions and by States on the Economic Commission for Europe General Conditions, the General Conditions of 1968 of the Council for Mutual Economic Assistance and Incoterms, 1953;

"(b) To commence a study on the feasibility of developing general conditions embracing a wider scope of commodities. The study should take into account, inter alia, the conclusions in the report, referred to in paragraph 1 above, and the analysis of the Economic Commission for Europe General Conditions to be submitted by the representative of Japan."

CHAPTER III
INTERNATIONAL PAYMENTS

A. *Negotiable instruments*

103. The subject of the harmonization and unification of the law of negotiable instruments was considered

²² *Official Records of the General Assembly Twenty-fourth Session, Supplement No. 18 (A/7618), para. 60.1.*

by Committee II in the course of four meetings, held on 14, 15 and 27 April 1970, and by the Commission in the course of its 58th meeting on 28 April 1970. A summary of the observations made by members of the Commission and by observers during those meetings is set out in paragraphs 105 to 116 below.

104. The Commission had before it a report of the Secretary-General entitled "Analysis of the replies received from Governments and banking and trade institutions to the questionnaire on negotiable instruments used for making international payments" (A/CN.9/38). That report analyses the observations of seventy-eight respondents regarding the present methods and practice for making and receiving international payments and the problems encountered in settling international transactions by means of negotiable instruments.

105. The observer of the Organization of American States (OAS) informed the Commission that the Council of OAS had requested the Inter-American Juridical Committee to make a study on negotiable instruments and to prepare a draft convention on the subject. The Juridical Committee had under consideration a draft uniform law on negotiable instruments prepared by the Institute for Latin American Integration, an agency of the Inter-American Development Bank, it had decided to concentrate its study, for the time being, on cheques and bills of exchange.

106. The Commission was of the opinion that the questionnaire and the analysis of the replies thereto, prepared by the Secretariat in consultation with interested international organizations, constituted an important contribution to the first stage of its work in respect of negotiable instruments. In this connexion, the Commission reaffirmed the opinion expressed by it at its second session that seeking the views and active support of banking and trade institutions was a prerequisite to any final decision regarding the desirability of unification and its possible scope.

107. With respect to chapter I of the report, containing information on the current practices followed in making and receiving international payments, several representatives referred to the significant changes which had taken place in banking practice in the last two decades as a result of the increased use of telegraphic and cable transfers and the development of computer techniques. These representatives qualified their statements by observing that such new practices and techniques would not replace the use of commercial paper; bills of exchange would continue to play a vital role, particularly in credit transactions; and, where the transfer method was used, there was frequently an underlying transaction involving the use of a negotiable instrument. The view was expressed, however, that the method of payment by telegraphic and cable transfers and by payment orders had, in the context of international transactions, become sufficiently important to justify a separate inquiry and study by the Secretariat. Accordingly, some representatives who commented on this aspect of international payments suggested that the Secretariat should study those new payment devices and the problems which had arisen in their use. It was observed that a study by the Secretariat of the nature and ex-

tent of international payment transfers might indicate whether there was in this respect a need for the establishment and acceptance by banks of uniform contractual arrangements or guides to practice, designed to mitigate disputes and practical problems.

108. With respect to chapter II of the report, concerning problems encountered in making and receiving international payments by means of negotiable instruments, several representatives noted that the analysis contained evidence to suggest that the task of traders and bankers would be simplified if uniformity were to be achieved in respect of the rules relating to the formal requisites of negotiable instruments, forgery, protest and notice of dishonour (including the formalities of protest and the time-limits within which protest must be made or notice be given), and the manner of proof of non-acceptance or non-payment.

109. The view was expressed that uniform contractual arrangements between banking institutions, such as the Uniform Customs and Practice for Documentary Credits and the Uniform Rules for the Collection of Commercial Paper, while useful for defining the relationships between banks and their customers, were not designed to remove difficulties arising from divergencies between national laws.

110. The view was also expressed that the Secretary-General's analysis of the replies regarding problems encountered would be of great use to those States which intended to review their legislation.

111. With respect to the alternative approaches to the harmonization and unification of the law of negotiable instruments in the context of international payments, suggested in chapter IV of the report as possible subjects for further study by the Secretariat, several representatives reiterated the opinion, already expressed at the second session of the Commission, that it would be impracticable, at the present stage, to attempt to revise the Geneva uniform laws on cheques and bills of exchange in a way that would be acceptable to both civil law and common law countries. Some representatives stressed that it was important for the Commission to establish a clear distinction between negotiable instruments law governing internal payment transactions and rules applicable to instruments used in international transactions. Therefore, the Commission's current study should relate to the possibility of establishing unified rules used for international payments only, and it should be left to States, individually or on a regional basis, to determine whether modifications were called for in their national legislation.

112. The Commission was unanimous in considering that the only viable approach at the current stage was for it to focus its work on a convention setting forth rules that would be applicable to a special negotiable instrument for use in international transactions. The uniform rules set forth in such a convention would only be applicable to an instrument bearing a heading indicating that it was subject to the rules of the convention. The use of the instrument would be optional.

113. The view was expressed that the Commission's study should in no way prejudice the ultimate form of

the instrument or the scope of the rules applicable to it. For example, it was suggested that the instrument in question, although likely to incorporate the main elements of the traditional negotiable instrument, possibly might not be a negotiable instrument in the current meaning of the term, that is, its negotiability might be restricted in one way or another.

114. In the view of several representatives, the approach advocated by the Commission would have the added advantage of enabling developing and newly independent countries that had not taken part in the shaping of negotiable instruments law to participate in the development of new rules.

115. The Commission expressed the opinion that its study on uniform rules for negotiable instruments for international transactions might make it necessary for the Secretary-General to address supplementary questions to Governments and banking and trade institutions; those questions should relate to the possible content of the rules applicable to such an instrument and, in particular, elicit comments regarding the specific rights and liabilities of the parties to an instrument.

116. The view was expressed that the co-operation with interested international organizations had proved eminently successful and that such co-operation should be intensified and, when possible, expanded.

Decision of the Commission

117. At its 15th meeting, on 27 April 1970, Committee II approved a recommendation for submission to the Commission.

118. The Commission, at its 58th meeting, on 28 April 1970, considered the recommendation of Committee II and adopted unanimously the following decision:

"The Commission:

"Requests the Secretary-General:

"(a) To complete the analysis of the comments made by Governments and banking and trade institutions regarding problems encountered in settling international transactions by means of negotiable instruments, by including the replies that were received after the report of the Secretary-General had been drawn up;

"(b) To prepare a detailed analysis of the comments made by Governments and banking and trade institutions, in response to the questions set out in the annex to the Secretary-General's questionnaire, regarding the possible content of new rules applicable to a special negotiable instrument for optional use in international transactions, and to address, if deemed necessary, supplementary questions to Governments and banking and trade institutions;

"(c) To submit these analyses to the fourth session of the Commission;

"(d) To hold further consultations with interested international organizations in carrying out the work."

B. Bankers' commercial credits

119. The subject of bankers' commercial credits was considered by Committee II in the course of five meetings,

held on 13, 15, 16, 23 and 27 April 1970, and by the Commission in the course of its 57th meeting, on 27 April 1970. A summary of the observations made by members of the Commission and by observers during those meetings is set out in paragraphs 121 to 124 below.

120. The Commission had before it a report of the Secretary-General entitled "Bankers' commercial credits" (A/CN.9/44).

121. It was stated on behalf of the International Chamber of Commerce that the ICC had appointed a working party for the revision of the 1962 version of the Uniform Customs and Practice for Documentary Credits ("Uniform Customs (1962)").

122. Several representatives, while considering that Uniform Customs (1962) was of great importance in international trade transactions, expressed the opinion that certain of the rules were subject to divergent interpretations and that the 1962 version did not adequately deal with certain aspects, such as conditional payments under the documentary credit system.

123. The Commission welcomed the work of revision of the 1962 version to be undertaken by ICC. At the same time, it felt that, in view of the widespread use of Uniform Customs (1962), a procedure should be developed that would permit interested circles in countries not represented in ICC to make observations on the operation of Uniform Customs (1962), so that these could be taken into account by ICC. The Commission was agreed that the Secretary-General should be requested to invite Governments and banking and trade institutions to submit such observations as they might wish to make on Uniform Customs (1962) for transmission to ICC. The view was also expressed that ICC should be invited to submit the revised rules to a future session of the Commission before their final adoption by ICC, since this would prepare the ground for a possible decision by the Commission to commend the use of the third revision of Uniform Customs in relation to transactions involving the establishment of a documentary credit.

124. Several representatives considered that it would be in the interest of the work of revision to be carried out by ICC and of the ultimate adoption of the third revision of the Uniform Customs by the greatest possible number of banking institutions, if ICC were to devise a procedure whereby countries not represented in ICC could participate in the work of revision. It was stated on behalf of ICC that this possibility would be given the fullest consideration.

Decision of the Commission

125. At its 14th meeting, on 23 April 1970, Committee II approved a recommendation for submission to the Commission.

126. The Commission, at its 57th meeting, on 27 April 1970, considered the recommendation of Committee II and adopted unanimously the following decision:

"The Commission:

"Requests the Secretary-General:

"(a) To inform Governments and interested bank-

ing and trade institutions that the International Chamber of Commerce intends to revise the 1962 version of the Uniform Customs and Practice for Documentary Credits (Uniform Customs (1962));

"(b) To invite these Governments and institutions to communicate to the Secretary-General for transmission to the International Chamber of Commerce their observations on the operation of Uniform Customs (1962), so that these observations may be taken into account by the International Chamber of Commerce in its work of revision;

"(c) To invite the International Chamber of Commerce to submit to a future session of the Commission, for consideration, the proposed revised text of Uniform Customs."

C. Guarantees and securities

127. The subject of guarantees and securities was considered by Committee II in the course of seven meetings, on 13, 15, 16, 20, 23 and 27 April 1970 and by the Commission in the course of its 57th and 58th meetings on 27 and 28 April 1970. A summary of the observations made by members of the Commission and by observers during those meetings is set out in paragraphs 130 to 136 below.

128. The Commission had before it the report by the Secretary-General entitled "Preliminary study of guarantees and securities as related to international payments" (A/CN.9/20 and Add.1). The Commission also had before it a proposal, submitted by Hungary to the second session of the Commission, concerning the preparation of uniform rules and practice relating to bank guarantees (A/CN.9/L.13), a note by the Secretary-General reproducing the observations received from members of the Commission on the aforementioned report of the Secretary-General (A/CN.9/45 and Add.1), and a note by the Secretary-General reproducing the report submitted by the International Chamber of Commerce on the subject of bank guarantees (A/CN.9/37).

129. The Commission decided to consider guarantees and securities separately and in turn.

(1) Guarantees

130. There was general agreement, that work on the subject of guarantees should be concentrated, for the time being, on the problems that arise in the context of guarantees where the guarantor is a bank or other financial institution. The view was expressed that the lack of standardization in respect of clauses inserted in contracts of guarantee and in respect of the designation of such guarantees often gave rise to difficulties. Thus it was not always clear what was the extent of the obligation of the guarantor, and in such cases the liability of the parties involved was difficult to determine. Other problems were said to have arisen in respect of the expiry date of a bank guarantee when no such date was included in the contract, the question of the applicable law, the influence of exchange control regulations that might result in the inability of the guarantor to transfer funds abroad in favour of the beneficiary, and the effect of *force majeure* on the obligations under

a contract of guarantee. For these reasons, the Commission advocated that a study should be undertaken of the legal nature of guarantees of payment, that unified rules for such guarantees should be drawn up, and that standard forms should be prepared of different types of bank guarantees that could be used in the context of international transactions.

131. Several representatives pointed out that the work of the International Chamber of Commerce, as evidenced by its report to the Commission, was concerned mainly with tender guarantees, performance guarantees and repayment guarantees, and suggested that the ICC's study should be expanded to include guarantees of payment which were of particular importance for exporters of goods.

132. It was pointed out on behalf of the International Chamber of Commerce that it would probably not be possible to draw up the same set of rules for the many types of guarantees in existence and that ICC had therefore concentrated its study on those types of guarantees where the need for remedial action appeared to be greatest. In this connexion, one representative expressed the opinion that there were certain basic rules common to all types of bank guarantees and that it would be advantageous to establish such rules. The suggestion was made that the Commission might at some stage wish to ascertain what types of guarantees were used in connexion with international transactions and what were the most troublesome problems in respect thereof.

133. The Commission noted that only the banking and trade institutions in countries represented in ICC had received the ICC questionnaire on performance guarantees, tender guarantees and repayment guarantees and that some of these institutions had already responded to it. In view of the widespread use of such guarantees in international transactions, the Commission was of the opinion that it was important that ICC should also take into account the observations which Governments might wish to make and the views and practices of interested banking and trade institutions not represented in ICC. For these reasons, the Commission agreed to request the Secretary-General to address the questionnaire of ICC to Governments and also to banking and trade institutions in countries not represented in ICC.

134. With respect to guarantees of payment, the Commission was of the opinion that ICC should be invited to draw up a further questionnaire relating to that type of guarantee which would be circulated by the Secretary-General to Governments and banking and trade institutions. In addition, the Secretary-General should be requested to prepare a compilation of the replies to that questionnaire and to submit it to the fourth session of the Commission.

135. The Commission was of the opinion that ICC should be invited to submit to future sessions of the Commission reports on the progress made by it in the matter of bank guarantees and that, before any final decision would be taken by ICC regarding the standardization of practice in the field, the Commission should

have the opportunity to consider the course of action which ICC will propose.

136. Several representatives considered that it would be to the benefit of the studies of ICC in respect of bank guarantees, if ICC were to devise a procedure whereby countries not represented in ICC could be associated with this work. It was stated on behalf of ICC that this possibility would be given the fullest consideration.

Decision of the Commission

137. At its 14th meeting, on 23 April 1970, Committee II approved a recommendation for submission to the Commission.

138. The Commission, at its 57th meeting, on 27 April 1970, considered the recommendation of Committee II and adopted unanimously the following decision:

"The Commission:

"Noting that the International Chamber of Commerce is likely to be ready to expand the scope of its inquiry and study on bank guarantees,

"Requests the Secretary-General:

"(a) In respect of performance guarantees, tender guarantees and repayment guarantees, to address the questionnaire of the International Chamber of Commerce to Governments, and also to banking and trade institutions in countries not represented in the International Chamber of Commerce, and to transmit it to the observations so received;

"(b) In respect of guarantees of payment,

"(i) To invite the International Chamber of Commerce to prepare a questionnaire on the subject;

"(ii) To address such a questionnaire to Governments and to banking and trade institutions, and to transmit the observations so received to the International Chamber of Commerce;

"(iii) To prepare a compilation of the observations received in response to the questionnaire and to submit it to the fourth session of the Commission;

"(c) In future, to invite the International Chamber of Commerce to submit to the Commission, for consideration, reports on the progress made by it and on its proposed action in the matter of bank guarantees."

(2) Securities

139. It was generally agreed that the great diversity of the laws relating to security interests in goods was one of the main reasons why the use of security interests in international transactions appeared to be limited. The representatives who spoke on the subject noted that security interests were usually governed by the *lex situs*, and that property encumbered by such interests would not normally be moved from one jurisdiction to another. Therefore, conflict of law problems were not likely to occur with great frequency. These representa-

tives noted, however, that exporters, wishing to secure the unpaid purchase price for goods sold by them to a foreign buyer, had a clear interest in being informed about their rights under the foreign law vis-à-vis the foreign buyer and third parties. Similarly, lending institutions would wish to know what devices to secure the loan were available in the country of the borrower.

140. The Commission was of the opinion that it should exclude from its consideration security interests in ambulatory chattels, such as ships and aircraft, that had already been the subject of international agreements.

141. The Commission agreed that, at the present time, its work should be concentrated on obtaining information about the national legal rules on security devices relevant to international transactions, and on the dissemination of such information.

142. Several representatives referred to the use of trust receipts in respect of transactions under which a lender who has no prior title in goods obtains a lien on those goods for the purpose of securing a loan. It was stated that, in the use of this trust receipt the possession of the goods remained with the borrower, and that the borrower was empowered to sell the goods clear of the lien, but was required to turn over all or a part of the proceeds of the sale to the lender. Some representatives advocated that the Secretariat should make a study of the subject of trust receipts. Other representatives were of the opinion that this device, accepted in certain common law jurisdiction, could not easily be received into civil law systems. Still other representatives pointed out that trust receipts were usually held by a lending bank in the country of the debtor and therefore seldom gave rise to problems internationally.

143. Reference was made during the discussions to conditional sale contracts by virtue of which the seller secures payment of the purchase price by retaining title to the goods sold until the full purchase price is paid. It was observed that an advantage of a credit granted directly by the seller to the buyer would be that the cost of the credit might be considerably lowered. The suggestion was made that the Secretariat should make a study of the rules of the principal legal systems with respect to this type of sale contract, having regard to existing studies on the subject.

Decision of the Commission

144. At its 15th meeting, on 27 April 1970, Committee II approved a recommendation for submission to the Commission.

145. The Commission, at its 58th meeting, on 28 April 1970, considered the recommendation of Committee II and adopted unanimously the following decision:

"The Commission:

"Requests the Secretary-General:

"(a) To invite Governments to submit information on security interests in goods, under their national laws and practice, that are relevant to international transactions — such information to relate to the main characteristics of each security device and the legal effects it entails;

"(b) To make the information so received available to the Commission at its fourth session;

"(c) To make a study of the rules of the principal legal systems concerning the conditional sale contract and the trust receipt, having regard to existing studies on the subjects."

CHAPTER IV

INTERNATIONAL COMMERCIAL ARBITRATION

146. The subject of international commercial arbitration was considered by the Commission at its 52nd, 53rd and 60th meetings, on 21 and 29 April 1970.

147. The Commission had before it a preliminary report on international commercial arbitration (A/CN.9/42) by Mr. Ion Nestor (Romania), the Special Rapporteur appointed by the Commission at its second session, and a note by the Secretary-General concerning the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (A/CN.9/49 and Add.1).

148. The Special Rapporteur explained the manner in which he intended to pursue his study of international commercial arbitration, and referred to the problems, set out in paragraph 74 of his preliminary report, which he intended to study in his final report with a view to ascertaining whether they were appropriate for further attention and action by the Commission. The Special Rapporteur further stated that he expected to be able to submit his final report to the fifth session of the Commission.

149. The representatives who spoke on the subject commended the Special Rapporteur's preliminary report, and expressed their appreciation for his efforts. There was general agreement that the Special Rapporteur's mandate should be extended to the fifth session, at which he would present his final report, and that every assistance in gathering materials should be given him by the members of the Commission and the Secretariat.

150. The view was generally held that the Special Rapporteur, in completing his study, should consider which of the problems set out in paragraph 74 of his preliminary report offered sufficient indication that they could be successfully resolved within the near future to justify undertaking work at the present time. A number of representatives offered suggestions in this regard for consideration by the Special Rapporteur. The view was expressed that it was desirable that the final report should also deal with the problem of the uniform application of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. It was further stated that the report should analyse the causes of the absence of uniformity and what measures could be taken to ensure uniform application of the Convention. Some representatives stated that the problems should be ranked in terms of the possibility of reaching a solution to them rather than in terms of importance. One representative suggested that the Special Rapporteur take into consideration for his further work the rules of the Inter-American Commercial Arbitration Commission.

151. Several representatives expressed the opinion that uniform rules on international commercial arbitration should be prepared, which would become the subject of an international convention. The organization of a world-wide system of international commercial arbitration was also suggested. Other representatives were of the view that, instead of drafting a new convention, the Commission should concentrate on making the existing formulation more acceptable and should seek to ascertain why certain conventions, such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 and the European Convention on International Commercial Arbitration of 21 April 1961 have not been adopted by a greater number of countries.

152. It was suggested that consideration should be given to the unification and simplification of national rules concerning the enforcement of arbitral awards and the limitation of judicial control over arbitral awards, including the reduction of means of recourse against enforcement.

153. Some representatives expressed the view that the Commission should promote the organization of new arbitration centres in developing countries and the rendering of technical assistance in this field. It was suggested that encouragement be given by the Commission to the Economic Commission for Africa and the Organization of African Unity for the creation of an African Arbitration Association, which would have panels of African arbitrators. The widespread inclusion of Africans as arbitrators in arbitral tribunals involving trade with African countries was also mentioned as means for promoting international commercial arbitration in Africa.

154. Some representatives stated that the use of arbitration was impeded by its high cost, and suggested that work be done towards stabilizing such expense.

155. A number of representatives indicated the progress made in their respective countries toward adherence to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. These statements were made in connexion with the decision of the Commission at its second session that the 1958 Convention should be adhered to by the largest possible number of States.²³

Decision of the Commission

156. The Commission, at its 60th meeting, on 29 April 1970, unanimously adopted the following decision:

"The Commission:

"Unanimously expressing its appreciation to the Special Rapporteur, Mr. Ion Nestor (Romania), for his preliminary report,

"1. Decides:

"(a) To extend the mandate of the Special Rapporteur to the fifth session of the Commission;

"(b) To request the Special Rapporteur to take into consideration the suggestions made by members of the Commission and to submit his final report to the fifth session of the Commission;

²³ Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618), para. 112.

"(c) To request the members of the Commission and interested intergovernmental and international non-governmental organizations to assist the Special Rapporteur in his task by giving him information on existing laws and practices in the field of international commercial arbitration;

"(d) To request the Secretary-General to arrange, if possible, for the reimbursement of the Special Rapporteur for his expenses in gathering, translating and reproducing materials for his report;

"2. *Reaffirms* the opinion expressed at its second session that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 should be adhered to by the largest possible number of States."

CHAPTER V

INTERNATIONAL LEGISLATION ON SHIPPING

157. The subject of international shipping legislation was considered by Committee II in the course of two meetings, on 10 April 1970, and by the Commission in the course of its 59th meeting, on 29 April 1970. A summary of the observations made by members of the Commission and by observers during those meetings is set out in paragraphs 158 to 165 below.

158. Some representatives stated that it would have been preferable if the UNCITRAL Working Group on International Shipping Legislation, set up by the Commission at its second session, had been convened before the Commission's third session. In their opinion, it would have been consistent with the decision taken by the Commission at its second session for the Secretary-General to have convened the Working Group on his own initiative, without prior consultation with its members. It was also observed by other representatives, however, that under the circumstances a meeting of the Working Group prior to the third session would not have furthered the Commission's work in the field.

159. In the view of the representatives who spoke on the subject, a rational approach to the working relationship between UNCITRAL and UNCTAD was essential. These representatives were of the opinion that the primary task of UNCTAD was to deal with the economic and financial aspects of shipping legislation, providing the Commission with information which would enable it, where appropriate, to prepare uniform rules in the field. In this connexion, one representative expressed the view that the Commission should suggest to UNCTAD the general nature of the information it needed, and request the Conference to provide information on the financial and economic consequences of changes in existing international legislation. Another view was that UNCTAD should be invited to exclude all legal matters from its programme of work. If this were not done, endless conflicts would ensue and, in that event, it would be preferable if the Conference were to deal with both the legal and economic aspects of international shipping legislation.

160. The view was generally held that UNCITRAL had a significant role to play in the field of international shipping legislation. It was stated, on behalf of the

African, Asian and Latin American members of the Commission, that the Commission should reaffirm that international shipping legislation was a priority topic in its work programme. It was the view of these members that the UNCITRAL Working Group should be convened at least prior to the fourth session of the Commission.

161. Several representatives urged the Commission to bear in mind that certain organizations, in addition to UNCTAD, were active in the field and that co-operation with them should be maintained.

162. Other representatives were of the opinion that, in view of the fact that UNCTAD is already working on the topic of bills of lading and that progress is expected to be slow in this complex field, UNCITRAL could examine closely related topics in the field, such as charter parties, the obligations and duties of the shipper before and after the cargo has been unloaded, container shipping and the powers of shipping agents. The Commission would thus avoid duplication of effort and, on the other hand, it would not be virtually abandoning a priority field by waiting until the UNCTAD Working Group had completed its study.

163. It was stated on behalf of UNCTAD that it had prepared a questionnaire on bills of lading to be addressed to Governments, insurance associations, carriers and shippers, in order to obtain information regarding the existing problems in the area. A number of experts and consultants had been engaged by UNCTAD to assist it in this work.

164. A meeting of the Working Group on International Shipping Legislation was convened during the third session. The Chairman of the Working Group, Mr. E. Cornejo Fuller (Chile), reported to the Commission that the Group had agreed to the following arrangements: (a) the Chairman of the Working Group would represent UNCITRAL at the UNCTAD Working Group meeting even if Chile were not re-elected to the Commission; and (b) the election of an alternate to the Chairman would be postponed in view of the Chairman's firm intention to attend the UNCTAD Working Group meeting; and (c) should it become necessary to elect an alternate to the Chairman, the Working Group would be convened in New York from among the permanent missions of the members of the Group.

165. The Commission was of the opinion that alternates to those members of the Working Group on Shipping whose membership in the Commission is due to expire in 1970 should be appointed for reasons of continuity of work. The Commission appointed Kenya as the alternate for the United Arab Republic; the Democratic Republic of the Congo as the alternate for Ghana; Australia as the alternate for the United Kingdom of Great Britain and Northern Ireland; the United States of America as the alternate for Italy; Hungary as the alternate for the Union of Soviet Socialist Republics; and Mexico as the alternate for Chile.

Decision of the Commission

166. The Commission, at its 59th meeting, on 29 April 1970, adopted unanimously the following decision:

"The Commission:

"Decides:

"1. To request the Chairman of the Working Group on International Shipping Legislation to attend, as the Special Representative of the Commission, the session of the United Nations Conference on Trade and Development Working Group on Shipping Legislation to be held at Geneva in December 1970 or February 1971;

"2. To request the Special Representative:

"(a) To observe the session of the Working Group on Shipping Legislation of the United Nations Conference on Trade and Development;

"(b) To inform that Working Group of the course of the discussion in the Commission at the present session;

"(c) To express the Commission's desire to avoid duplication of work and to strengthen the close co-operation and effective co-ordination between the Commission and the United Nations Conference on Trade and Development in making progress in the study of shipping legislation, and invite their views on how this objective might best be achieved;

"(d) To submit a report on the session of the Working Group of the United Nations Conference on Trade and Development to the Commission's Working Group;

"3. That, at the request of the Special Representative, the Chairman of the third session of the Commission shall request the Secretary-General to convene a meeting of the Working Group on Shipping, it being understood that duplication between the Working Groups of the Commission and of the United Nations Conference on Trade and Development should be avoided;

"4. That, the meeting of the Working Group shall be held in Geneva, for a period not longer than a week, after the session of the Working Group of the United Nations Conference on Trade and Development and before the opening of the fourth session of the Commission;

"5. That, if the Commission's Working Group meets after 1 January 1971, its composition shall be the following:

"(a) Members of the present Working Group whose membership continues, and those re-elected to the Commission;

"(b) For the remaining membership of the Working Group, the alternates as elected by the Commission at its present session, who shall become full members of the Working Group and will be designated as members;

"6. To request the Secretary-General to invite other members of the Commission, and intergovernmental and non-governmental organizations active in the field to be present as observers at the meeting of the Working Group;

"7. That the terms of reference of the Working Group at its meeting shall be the same as were

assigned to the Working Group under paragraph 3 of the resolution adopted at the second session, namely 'to indicate the topics and method of work on the subject, . . . giving full regard to the recommendations of the United Nations Conference on Trade and Development and any of its organs';

"8. That the Working Group will submit its report to the fourth session of the Commission;

"9. That the term of the Working Group on International Shipping Legislation will expire after it has submitted its report to the fourth session of the Commission, in view of the fact that it is anticipated that a new and larger Working Group will be set up at the fourth session of the Commission."

CHAPTER VI

REGISTERS AND BIBLIOGRAPHY

A. Register of organizations

167. The question of the establishment of a register of organizations was considered by Committee II in the course of two meetings, on 8 and 14 April 1970, and by the Commission in the course of its 56th meeting, on 23 April 1970. A summary of the observations made by members of the Commission and observers during those meetings is set out in paragraphs 169 and 170 below.

168. The Commission had before it the report of the Secretary-General entitled "Register of organizations and register of texts" (A/CN.9/40), and a note by the Secretariat setting out the questionnaire addressed to international organizations interested in international trade law, together with the replies of nine organizations that are currently working on one or more projects relating to topics included in the programme of work of the Commission.

169. The Commission recognized the usefulness of up-to-date information on the activities of other organizations in matters dealt with by the Commission. It considered alternative methods by which such information could be presented: (1) a permanent publication comparable to the register of texts, and (2) annual reports by the Secretary-General for the use of members of the Commission only. The view was generally held that the second alternative would be an adequate means of providing the Commission with the necessary information. It was suggested that the list of organizations that had been invited to submit information on their activities should be reviewed so as to include all international organizations that are active in the field of international trade law.

170. The Commission took note of the publication, by the International Institute for the Unification of Private Law (UNIDROIT), entitled *Digest of Legal Activities of International Organizations and Other Institutions*, published for the first time in 1969, which provides succinct information on the work of a number of organizations and institutions in both the private and public law sectors. The view was expressed that co-operation between the two organizations with respect to the compilation and dissemination of information on legal activities in matters included in the Commission's work

programme would make the "Digest" a more useful reference document for members of the Commission and interested trade circles. The Commission was therefore of the opinion that the Secretary-General should be requested to examine with UNIDROIT the possibility of a more detailed record in the "Digest" of the activities of organizations where these activities are of special interest to the Commission.

Decision of the Commission

171. At its 7th meeting, on 14 April 1970, Committee II approved a recommendation for submission to the Commission.

172. The Commission, at its 56th meeting on 23 April 1970, considered the recommendation of Committee II and adopted unanimously the following decision:

"The Commission:

"Requests the Secretary-General:

"(a) To submit reports to the annual sessions of the Commission on the current work of international organizations in matters included in the programme of work of the Commission;

"(b) To consult with the International Institute for the Unification of Private Law on the feasibility of giving a more detailed record of activities of organizations concerning matters included in the programme of work of the Commission in the *Digest of Legal Activities of International Organizations and Other Institutions* published by the International Institute for the Unification of Private Law."

B. Register of texts

173. The question of the establishment of a register of texts was considered by Committee II in the course of two meetings, on 8 and 14 April 1970, and by the Commission in the course of its 57th meeting, on 27 April 1970. A summary of the observations made by the members of the Commission during those meetings is set out in paragraphs 175 and 176 below.

174. The Commission had before it the report of the Secretary-General entitled "Register of organizations and register of texts" (A/CN.9/40).

175. The Commission noted with satisfaction that the first volume of the *Register of Texts* would be published in the course of 1970 and that, in accordance with the request formulated by the Commission at its second session, the volume would set out the texts of conventions and other relevant instruments, and summaries of draft conventions, in the fields of the international sale of goods and international payments, and would list the titles and sources of instruments in the fields of international commercial arbitration and international shipping legislation.

176. Several representatives were of the opinion that work should be started on a second volume of the *Register of Texts*, containing the texts of conventions and other relevant instruments relating to priority topics not included in the first volume, and that, accordingly, the Secretary-General should be requested to report to

the Commission at its fourth session on the contents of a second volume, and the financial implications thereof.

Decision of the Commission

177. At its 7th meeting, on 14 April 1970, Committee II approved a recommendation for submission to the Commission.

178. The Commission, at its 57th meeting, on 27 April 1970, considered the recommendation of the Committee II and adopted unanimously the following decision:

"The Commission:

"Requests the Secretary-General to submit to the Commission at its fourth session a report on the proposed contents of a second volume of the register of texts, and the financial implications thereof, for the Commission's consideration in reaching a decision concerning the publication of a second volume of the register of texts."

C. Bibliography on international trade law

179. The question of bibliographies on international trade law was considered by Committee II in the course of three meetings, on 8 and 20 April 1970, and by the Commission in the course of its 57th meeting, on 27 April 1970. A summary of the observations made by members of the Commission during those meetings is set out in paragraphs 180 to 184 below.

180. The Commission had before it a report of the Secretary-General entitled "Bibliography on international trade law" (A/CN.9/43), and samples of bibliographies on arbitration law (A/CN.9/24/Add.1) and on the international sale of goods, standard trade terms, negotiable instruments, and documentary credits and the collection of commercial paper.

181. The Commission expressed its appreciation for the assistance rendered by the Parker School of Foreign and Comparative Law of Columbia University and the work accomplished by Professor P. Herzog, of Syracuse University (New York) in the preparation of the bibliographies.

182. In considering what further work should be undertaken, the Commission was aware of certain practical and financial limitations which explained why references to publications in certain languages were not included in the bibliographies. At the same time, the Commission was of the opinion that, in order to achieve optimum usefulness, the bibliographies should include references to such publications. The Commission was also informed that it could not be assumed that further bibliographic work could be carried out without involving expenditure on the part of the United Nations.

183. The Commission therefore considered ways and means by which the bibliographies could be expanded without involving such expenditure. It was noted that extensive bibliographic materials on specific subjects were regularly being published in a number of countries, and that some universities and other institutions issued bibliographies of publications that appeared in certain languages or were related to a particular legal system. The Commission was of the opinion that the

Secretary-General should investigate whether the work already done elsewhere could be utilized in the preparation of more complete UNCITRAL bibliographies. In addition, members of the Commission should be invited to explore whether research institutions in their country or region could provide references to materials appearing in their country or region. Finally, the Secretary-General should approach research institutions with a view to entrusting them with the preparation, on a voluntary basis, of bibliographies relating to subjects included in the programme of work of the Commission.

184. The Commission was of the opinion that such possibilities should be explored before requesting the General Assembly to make funds available to support further work on bibliographies.

Decision of the Commission

185. At its 13th meeting, on 20 April 1970, Committee II approved a recommendation for submission to the Commission.

186. The Commission, at its 57th meeting, on 27 April 1970, considered the recommendation of Committee II and adopted unanimously the following decision:

"The Commission:

"1. Requests the Secretary-General:

"(a) To ascertain the extent to which current publications give bibliographical information relating to subject matters included in the programme of work of the Commission;

"(b) To ascertain whether such publications could be utilized in the preparation of further bibliographies;

"(c) To invite the members of the Commission to inform the Secretary-General whether they, or research institutions in their country or region, could provide bibliographies of materials relating to subject matters included in the programme of work of the Commission;

"(d) To examine the possibility of entrusting to a research institution the preparation, on a voluntary basis, of bibliographies on subjects within the programme of work of the Commission; all materials received under sub-paragraph (iii) above would be transmitted to that institution;

"(e) To inform the Commission of the financial implications that would be involved in the preparation of further bibliographies by the Secretariat or by the Secretariat in co-operation with a research institution.

"2. Decides to consider, at its fourth session, what action it should take regarding the continuation of work on the bibliographies in the light of further information to be obtained by the Secretary-General."

CHAPTER VII

CO-ORDINATION OF THE WORK OF ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW AND COLLABORATION WITH THOSE ORGANIZATIONS

187. The Commission noted that the General Assembly, in its resolution 2502 (XXIV), of 12 November

1969, on the report of the United Nations Commission on International Trade Law, on the work of its second session, recommended that the Commission should continue to collaborate fully with international organizations active in the field of international trade law".

188. The Commission had before it a note by the Secretariat setting out the replies by international organizations to a questionnaire concerning their current activities in the field of international trade law. In this connexion, the Commission referred to its decision set out in paragraph 172 above, whereby the Secretary-General was requested to submit reports to the Commission at its annual session on the current work of international organizations in matters included in the programme of work of the Commission.

189. In the view of the Commission, its working methods were sufficiently flexible to ensure meaningful collaboration with international organizations in respect of the subjects included in its programme of work and to achieve any necessary co-ordination of work. In this connexion, reference was made to the arrangements whereby observers of international organizations may attend sessions of the Commission and of intersessional working groups, to the consultations that have taken place on specific subjects with interested organizations, and to the opportunity for organizations to submit suggestions to the Commission.

190. The Commission was therefore of the opinion that this pragmatic approach had produced satisfactory results and should be continued.

CHAPTER VIII

TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW

191. The Commission considered the question of training and assistance in international trade law at its 53rd meeting, on 21 April 1970.

192. The Commission had before it the report by the Secretary-General (A/CN.9/39), in which the Commission's decision on this subject at its second session was recalled and the steps taken to implement that decision were described.

193. The view was generally expressed that training and assistance in international trade law is of high importance and that every effort should be made to encourage activities within this area.

194. Several representatives stressed the importance of affording persons from developing countries the opportunity to benefit from fellowships granted by Governments or through the United Nations Programme of Assistance on the Teaching, Study, Dissemination and Wider Appreciation of International Law.

195. Other representatives stressed the importance of continuing the consultations regarding the establishment, in developing countries, of chairs in universities and regional institutes relating to international trade law. Similar views were expressed with regard to the organization of seminars especially devoted to the subject of international trade law. One representative proposed that the sessions of the Commission, or at least

Working Group meetings, could be held in places other than New York or Geneva, thus exposing interested persons in the particular countries and regions to a more intense awareness of the work of the Commission.

196. The suggestions advanced in the report of the Secretary-General concerning the development of appropriate teaching materials in the field was supported by several representatives who considered it desirable that the Secretary-General pursue his consultations in this matter with public and private institutions working in the field of legal development and assistance.

197. Satisfaction was expressed that the "Supplement on international trade law" to the "Register of experts and scholars in international law" is being compiled.

198. The view was expressed by some representatives that the Commission should aim at the establishment of an independent programme of training and assistance rather than, as is presently the case, encouraging the inclusion of such a programme within those in existence, particularly the United Nations Programme of Assistance on the Teaching, Study, Dissemination and Wider Appreciation of International Law.

199. It was noted, however, that suggestions calling for substantial financial outlays must take into account the fact that appropriations made available for these activities were limited, and that activities could only be undertaken within the limits of available resources.

Decision of the Commission

200. The Commission, at its 58th meeting, on 28 April 1970, adopted unanimously the following decision:

"The Commission:

"Requests the Secretary-General to continue and intensify the activities on training and assistance in the field of international trade law undertaken pursuant to the Commission's decision at its second session, and to consult with appropriate institutions on the feasibility of developing teaching materials in the subject-matter of this field and of giving a larger share to the teaching of the law of international trade in the programme of those institutions."

CHAPTER IX

YEARBOOK OF THE COMMISSION

201. The question of the establishment of a yearbook of the Commission was considered by Committee II in the course of two meetings, on 8 and 14 April 1970, and by the Commission in the course of its 57th meeting, on 27 April 1970. A summary of the observations made by members of the Commission during those meetings is set out in paragraphs 203 to 207 below.

202. The Commission had before it the report of the Secretary-General entitled "The establishment of an UNCITRAL yearbook" (A/CN.9/32), submitted at the request of the Commission to the General Assembly at its twenty-fourth session, and an addendum to that report, which set forth the action taken by the General Assembly. A revised outline of contents for the yearbook was attached as annex I. It reflects the dis-

cussions and decisions of the Assembly at its twenty-fourth session (A/CN.9/32/Add.1).

203. The Commission noted with satisfaction that the General Assembly, by its resolution 2502 (XXIV), approved in principle the establishment of a Yearbook of the Commission and authorized the Secretary-General to establish such a Yearbook in accordance with the decisions and recommendations to be adopted by the Commission at its third session. The Commission also noted that the General Assembly requested it to consider, at the present session, the timing and content of the Yearbook in the light of the report of the Secretary-General and the discussions in the General Assembly. The Commission further noted that the General Assembly, on the recommendation of its Advisory Committee on Administrative and Budgetary Questions, had approved the appropriation of \$25,000 for the publication of the Yearbook on the assumption that the Yearbook would be published in 1970 and that the Commission would decide to include in the first volume of the Yearbook materials relating to its first three sessions. Accordingly, the Commission considered the timing and the contents of the first volume of the Yearbook.

204. The Commission was unanimous in considering that the first volume of the Yearbook should be published in 1970 and should contain the materials relating to the first three sessions of the Commission as outlined in annex I to the report of the Secretary-General on the establishment of an UNCITRAL yearbook.

205. The Commission considered the proposal of one representative for the rearrangement of part III of the outline referred to above. The Commission agreed that part III should be rearranged as follows:

- A. International sale of goods:
 1. Unification of substantive and choice of law rules;
 2. General conditions of sale and standard contracts, incoterms and other trade terms;
 3. Time-limits and limitations (prescription) in the field of the international sale of goods.
- B. International shipping legislation.
- C. International payments.
- D. International commercial arbitration.
- E. Training and assistance in the field of international trade law.

206. With regard to "Training and assistance in the field of international trade law", one representative noted that any programme to be developed under this item would be part of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, and expressed the view that it would be preferable not to include documentation on this subject in the Yearbook, since such inclusion would give the reader of the Yearbook an incomplete view of the United Nations Programme. In this connexion, it was pointed out by the representative of the Secretary-General that the Yearbook could refer to other publications and documents of the United Nations containing particulars regarding the Programme.

207. The view was expressed that the Secretary-General should have a measure of discretion in editing the Yearbook so as to keep the volume of materials

within the limits imposed by the financial allocation authorized by the General Assembly.

Decision of the Commission

208. At its 7th meeting, on 14 April 1970, Committee II approved a recommendation for submission to the Commission.

209. The Commission, at its 57th meeting, on 27 April 1970, considered the recommendation of Committee II and adopted unanimously the following decision:

"The Commission:

"1. Requests the Secretary-General:

"(a) To publish in 1970 the first volume of the Yearbook of the United Nations Commission on International Trade Law; the Yearbook should contain the materials relating to the first three sessions of the Commission, and in general follow the arrangement set out in annex I of the report of the Secretary-General on the establishment of a Yearbook, with due regard to the views expressed in the Commission during its discussion of the item;

"(b) To submit to the Commission at its fourth session a report on the publication of a second volume of the Yearbook, and the financial implications thereof;

"2. Decides to take its final decision concerning the contents of a second volume of the Yearbook at its fourth session."

CHAPTER X

QUESTIONS RELATING TO FUTURE WORK

210. Questions relating to future work of the Commission, including the programme of work through 1973 and certain organizational questions, were considered by the Commission at its 55th, 56th, 61st and 62nd meetings, on 22, 23 and 30 April 1970.

211. The Commission had before it a note by the Secretary-General on the programme of work (A/CN.9/46), a proposal submitted by the French delegation concerning a basic convention establishing a common body of international trade law and a note by the secretariat of UNIDROIT on the progressive codification of the law of international trade (A/CN.9/L.19).

A. Basic convention establishing a common body of international trade law

212. The representative of France introduced the proposal of his delegation and stated that it was now being submitted in detail as requested by several representatives at the second session of the Commission.

213. The representative of France explained that the basic idea of his proposal was to find a way by which unified rules for international trade would be more rapidly accepted than by the existing system of ratification of separate conventions. His proposal therefore called for the conclusion of a basic convention under which: (a) UNCITRAL would be made responsible for establishing appropriate regulations within the various branches of law concerned with international trade;

(b) those regulations would constitute the common body of international trade law and, under certain conditions, would automatically enter into force in those countries adhering to the basic convention; (c) in those States, they would henceforth constitute the law applicable to international legal relations, except in so far as a State had informed the international organization that it did not accept certain provisions proposed by UNCITRAL; (d) a country which rejected or modified a provision of the convention would have to stipulate which rule of its municipal law would replace that provision.

214. Many representatives commended the French proposal. Several representatives, however, expressed doubt as to its feasibility because of its far-reaching implications. These implications, which involve, among other things, radical change in the constitutional theory and practice of many States, might discourage these States from ratifying the basic convention. These representatives, therefore, suggested that more time would be needed for a closer examination of the proposal.

215. Some representatives suggested that, at least for the present, it would be wiser to seek separate approval of unification projects after they have been completed. It was also noted that experience had shown that international conventions concluded under the auspices of the United Nations stood a better chance of acceptance and ratification by individual States than did other conventions that lacked United Nations sponsorship.

216. Several representatives, while supporting the idea of deferring consideration of the French proposal until the fourth session, expressed the hope that the representative of France would prepare a draft text of the basic convention so that their Governments might be able to assess better the practicability of the proposal.

Decision of the Commission

217. At its 61st meeting, on 30 April 1970, the Commission unanimously adopted the following decision:

"The Commission:

"Decides:

"(a) To defer its decision on the French proposal until its fourth session;

"(b) To include in the agenda of its fourth session an item concerning possible measures which may ensure that conventions drawn up by the Commission will enter into force without delay in the largest possible number of countries."

B. Progressive codification of the law of international trade

218. The Commission noted with appreciation the contents of the document submitted by the secretariat of UNIDROIT on the progressive codification of the law of international trade.

C. Planning for future work

219. The Commission reaffirmed the opinion expressed at its second session that the preparatory work, to be done by intersessional working groups, special rap-

porteurs and the Secretariat, should be aided by the active contribution of Governments through the submission, at the request of the Commission, of detailed information on subject matters included in the Commission's programme of work. The Commission also considered it desirable that provision should be made, where necessary, to obtain the services of consultants or organizations with special expertise in matters dealt with by the Commission.

220. The Commission also agreed that it was necessary that the Secretariat should be adequately staffed to cope with the increased work-load involved in servicing the Commission.

221. The Commission further considered that it could establish a detailed programme of work for the coming year only, and agreed that the Secretariat should prepare the necessary budget and planning estimates for subsequent years in order to enable the Commission to carry out its work in the light of the considerations set forth in paragraphs 219 and 220 above.

D. Date of the fourth session

222. The Commission decided, at its 61st plenary meeting, on 30 April 1970, that its fourth session, to be held at the United Nations Office at Geneva, should meet from 29 March to 23 April 1971.

ANNEX I

Representatives of members of the Commission

ARGENTINA

Representative

Mr. Gervasio Ramón Carlos COLOMBRES, Profesor de Derecho Comercial en la Facultad de Derecho de Buenos Aires, Asesor del Ministro de Justicia.

AUSTRALIA

Representative

Mr. R. J. ELLICOTT, Solicitor-General for the Commonwealth of Australia.

Alternates

Mr. S. F. PARSONS, Senior Assistant Secretary, Attorney General's Department;
Mr. M. C. B. COULTAS, Australian Trade Commissioner;
Mr. R. S. MERRILLEES, Second Secretary, Australian Mission to the United Nations.

BELGIUM

Representative

Mr. Albert LILAR, Professeur à la Faculté de droit et à la Faculté des sciences sociales, politiques et économiques de l'Université libre de Bruxelles, Ancien Ministre, Sénateur.

Alternates

Mr. Paul JENARD, Directeur d'administration au Ministère des affaires étrangères et du commerce extérieur;
Mr. Jean DEBERGH, Conseiller d'Ambassade, Mission permanente auprès de l'Organisation des Nations Unies.

BRAZIL

Representative

Mr. Nhemias GUEIROS, Professor of Civil Law, Recife Law School, Honorary President of the Interamerican Bar Association.

Alternates

Mr. Evaldo CABRAL DE MELLO, Second Secretary of Embassy, Brazilian Mission to the United Nations;
Mr. Claudio Cesar DE AVELLAR, Second Secretary of Embassy, Brazilian Mission to the United Nations.

CHILE

Representative

Mr. Eugenio CORNEJO FULLER, Professor of Commercial Law.

Alternate

Mr. Carlos DUCCI, Second Secretary, Permanent Mission of Chile to the United Nations.

COLOMBIA

Representative

Mr. Manuel ARBELÁEZ PAVA, Asesor Jurídico del Ministerio de Relaciones Exteriores.

CONGO (DEMOCRATIC REPUBLIC OF)

Representative

Mr. Vincent MUTUALE, First Secretary, Permanent Mission of the Democratic Republic of the Congo to the United Nations.

CZECHOSLOVAKIA

Representative

Mr. Ludvík KOPAC, Legal Counsel, Ministry of Foreign Trade, Prague.

Alternates

Mr. Rastislav LACKO, Envoy, Deputy Permanent Representative to the United Nations;
Mr. Jan PECHACEK, Second Secretary, Permanent Mission of the Czechoslovak Socialist Republic to the United Nations.

FRANCE

Representative

Mr. René DAVID, Professeur à la Faculté de droit et des sciences économiques de Paris.

Alternates

Mr. LEMONTEY, Magistrat au Ministère de la justice, Paris, Chef du Bureau de droit européen et international;
Mlle Sylvie ALVAREZ, Secrétaire d'Ambassade, Mission permanente de la France auprès de l'Organisation des Nations Unies;
Mr. François LESTERLIN, Secrétaire des Affaires étrangères, Direction des Affaires juridiques au Ministère des Affaires étrangères, Paris.

GHANA

Representative

Mr. Emmanuel SAM, Legal Counsellor, Permanent Mission of Ghana to the United Nations.

Alternates

Mr. Samuel K. DATE-BAH, Lecturer in Law, University of Ghana;
Mr. Michael K. NAMON, Second Secretary, Permanent Mission of Ghana to the United Nations.

HUNGARY

Representative

Mr. László RECZEI, Ambassador, Professor of Law, University of Budapest.

Alternates

Mr. Iván MEZNERICS, Director-General of Hungarian National Bank, Professor of Law;

Mr. Ferenc KRESKAY, Dean of the University of Economics, Budapest;
Mr. Ivan SZASZ, Head of the Legal Department, Ministry of Foreign Trade.

INDIA

Representative

Mr. S. P. JAGOTA, Director, Legal and Treaties Division, Ministry of External Affairs, New Delhi.

Alternate

Mr. C. V. RANGANATHAN, First Secretary, Permanent Mission of India to the United Nations.

Adviser

Mr. B. SWARAJ, Attaché, Permanent Mission of India to the United Nations.

IRAN

Representative

Mr. Mansour SAGHRI, Professeur de droit commercial, Faculté de droit de l'Université de Téhéran.

ITALY

Representative

Mr. Giorgio BERNINI, Professor of Law, University of Padua.

Alternate

Mr. Joseph NITTI, First Secretary, Permanent Mission of Italy to the United Nations.

Adviser

Mr. Guido RUTA, Bank of Italy, Rome.

JAPAN

Representative

Mr. Shinichiro MICHIDA, Professor of Law, University of Kyoto.

Alternate

Mr. Yuko URANO, Attorney, Civil Affairs Bureau, Ministry of Justice, Tokyo.

Adviser

Mr. Hiromu NITTA, Third Secretary, Permanent Mission of Japan to the United Nations.

KENYA

Representative

Mr. Raphael Joseph OMBERE, Second Secretary, Permanent Mission of the Republic of Kenya to the United Nations.

MEXICO

Representative

Mr. Jorge BARRERA GRAF, Professor of Law, University of Mexico.

Alternate

Mr. Carlos MINIVIELLE MARABOTO, Attorney-at-law.

NIGERIA

Representative

Mr. A. A. ADEDIRAN, Solicitor-General of the Federation of Nigeria.

Alternates

Mr. O. A. O. OSHODI, First Secretary, Permanent Mission of Nigeria to the United Nations;

Mr. K. AHMED, Second Secretary, Permanent Mission of Nigeria to the United Nations.

NORWAY

Representative

Mr. Stein ROGNLIEN, Director-General, Ministry of Justice, Oslo.

Alternate

Mr. Per TRESSELT, First Secretary, Permanent Mission of Norway to the United Nations.

Adviser

Mr. Heikki Juhani IMMONEN, Counsellor of Legislation, Ministry of Justice, Helsinki.

ROMANIA

Representative

Mr. Ion NESTOR, Directeur-Adjoint Scientifique, Institut de Recherches juridiques, Académie de la République socialiste de Roumanie.

Alternate

Mr. Gheorghe BACIU, Chef de l'Office juridique de la Banque roumanie pour le commerce extérieur.

SPAIN

Representative

Mr. Joaquín GARRIGUES DIAZ-CANABATE, Catedrático de la Facultad de Derecho de la Universidad de Madrid.

Alternate

Mr. D. Amador MARTINEZ-MORCILLO, Secretario de Embajada en la Misión Permanente de España en las Naciones Unidas.

SYRIA

Representative

Mr. Rafic JOUEJATI, Counsellor, Permanent Mission of the Syrian Arab Republic to the United Nations.

Alternate

Mr. Issa AWAD, First Secretary, Permanent Mission of the Syrian Arab Republic to the United Nations.

THAILAND

Representative

Mr. Klos VISESSURAKARN, First Secretary, Permanent Mission of Thailand to the United Nations.

TUNISIA

Representative

Mr. Abdelmajid BEN MESSAOUDA, Chef du Service juridique au Ministère des Affaires étrangères.

Alternate

Mr. Larbi FAYACHE, Premier Secrétaire, Mission Permanente de la Tunisie auprès de l'Organisation des Nations Unies.

UNION OF SOVIET SOCIALIST REPUBLICS

Representative

Mr. G. S. BURGUCHEV, Chief of the Treaty and Law Administration of the USSR, Ministry of Foreign Trade, Moscow.

Alternates

Mr. V. S. POZDNIakov, Associate Professor, Head of the Law Chair of the All-Union Academy of Foreign Trade;

Mrs. A. P. STRELIANOVA, Expert on Juridical Matters, Ministry of Foreign Trade, Moscow;

Mrs. N. A. KAZAKOVA, Senior Consultant, Bank of Foreign Trade.

UNITED ARAB REPUBLIC

Representative

Mr. Mohsen CHAFIK, Professor of Trade Law, Cairo University.

Alternate

Mr. Esmat HAMMAN, Counsellor, Ministry of Foreign Affairs, Cairo.

Advisers

Mr. Nabil ELARABY, First Secretary, Permanent Mission of the United Arab Republic to the United Nations;

Mr. Mohamed EL-BARADEI, Third Secretary, Permanent Mission.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Representative

Mr. Anthony Gordon GUEST, Professor of English Law, University of London.

Alternates

Mr. Michael John WARE, Senior Legal Assistant, Board of Trade;

Mr. Bernard S. WHEBLE, Brown, Shipley Co., Ltd., London;

Mr. Henry G. DARWIN, Counsellor and Legal Adviser, Permanent Mission of the United Kingdom to the United Nations.

UNITED REPUBLIC OF TANZANIA

Representative

Mr. M. N. BATTANSEY, Counsellor, Permanent Mission of the United Republic of Tanzania to the United Nations.

Alternate

Mr. Ismat STEINER, Second Secretary, Permanent Mission of the United Republic of Tanzania to the United Nations.

UNITED STATES OF AMERICA

Representative

Mr. E. Allen FARNSWORTH, Professor of Law, Columbia Law School, New York.

Alternate

Mr. James F. SAMS, Attorney, Washington, D.C.

Advisers

Mr. John Lawrence HARGROVE, Senior Adviser, International Law, Permanent Mission of the United States of America to the United Nations;

Mr. Richard D. KEARNEY, Ambassador, Office of the Legal Adviser, Department of State;

Mr. Norman PENNEY, Professor of Law, Cornell Law School, Ithaca, New York;

Mr. Hans SMIT, Professor of Law, Columbia Law School, New York.

ANNEX II

Secretariat of the Commission

Mr. Constantin A. STAVROPOULOS, Representative of the Secretary-General, The Legal Counsel;

Mr. Blaine SLOAN, Director of the General Legal Division, Office of Legal Affairs;

Mr. John HONNOLD, Secretary of the Commission, Chief of the International Trade Law Branch;

Mr. Peter KATONA, Assistant Secretary of the Commission, Senior Legal Officer, International Trade Law Branch;

Mr. Willem Vis, Assistant Secretary of the Commission, Senior Legal Officer, International Trade Law Branch;

Mr. Hassan Omer AHMED, Legal Officer, International Trade Law Branch;

Mr. Kazuaki SONO, Legal Officer, International Trade Law Branch;

Mr. Gabriel WILNER, Legal Officer, International Trade Law Branch.

ANNEX III

Observers

A. UNITED NATIONS ORGANS

United Nations Conference on Trade and Development

Mr. M. SHAH, Chief, Joint UNCTAD/UN Office of Legal Affairs, Shipping Legislation Unit.

B. SPECIALIZED AGENCIES

International Bank for Reconstruction and Development

Mr. Aron BROCHES, General Counsel;

Mr. David SURATGAR, Member of the Legal Department;

Mr. David SASSOON, Member of the Legal Department.

Inter-Governmental Maritime Consultative Organization

Mr. Thomas A. MENSAH, Head of the Legal Division.

International Monetary Fund

Mr. Robert EFFROS, Counsellor for Legislation in the Legal Department;

Mr. Roland TENCONI.

C. INTERGOVERNMENTAL ORGANIZATIONS

Commission of the European Communities

Mr. Winfried M. HAUSCHILD, Chef de Division, Direction générale du Marché intérieur et du Rapprochement des Législations;

Mr. Thierry CATHALA, Administrateur principal à la Commission des Communautés Européennes.

Council of European Communities

Mr. Bernhard SCHLOH, Conseiller juridique adjoint.

Council for Mutual Economic Assistance

Mr. Michael K. KOUDRIASHEV, Chief of the Legal Office;

Mr. Gerhard VISHKA, Counsellor.

Hague Conference on Private International Law

Mr. M. H. VAN HOOGBRATEN, Secretary-General.

Inter-American Juridical Committee

Mr. William S. BARNES.

International Institute for the Unification of Private Law

Mr. Jean-Pierre PLANTARD, Deputy Secretary-General.

Organization of African Unity

Mr. Mamadou Mactar THIAM.

Organization of American States

Mr. Isidoro ZANOTTI, Acting Chief of the Division of Codification, General Secretariat of OAS.

United International Bureaux for the Protection of Intellectual Property

Mr. Roger HARBEN, External Relations Officer.

D. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS

International Chamber of Commerce

Mr. G. W. HAIGHT, Attorney-at-Law, Vice-Chairman of ICC Commission on Laws and Practices relating to Competition;

Mr. Frederic EISEMANN, Secretary-General, ICC Court of Arbitration, Director of ICC Law and Commercial Practice Service;

Mrs. Roberta M. LUSARDI, ICC Permanent Representative to
United Nations Headquarters.

World Peace through Law Center

Mr. Leo NEVAS, Representative to the United Nations;

Miss Miriam ROONEY, Representative to the United Nations.

International Chamber of Shipping

Mr. Robert P. NASH.

International Law Association

Mr. Martin DOMKE, Professor of Law.

ANNEX IV

List of documents considered by the Commission

[Annex not reproduced; see check list of UNCITRAL documents at the end of this volume.]

B. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
The establishment of an UNCITRAL yearbook: report of the Secretary-General	A/CN.9/32, Add.1
Training and assistance in the field of international trade law: report of the Secretary-General	A/CN.9/39
Register of organizations and register of texts: report of the Secretary-General	A/CN.9/40
Bibliography on international trade law: report of the Secretary-General	A/CN.9/43
Programme of work through 1973: note by the Secretary-General	A/CN.9/46
Progressive codification of the law of international trade: note by the secretariat of UNIDROIT	A/CN.9/L.19
Summary records of the third session of the Commission (1970)	A/CN.9/SR. 50-52
Bibliography	A/CN.9/R.3
Draft report of the Commission	UNCITRAL/III/ CRP/16 and Add.1-15

I. INTERNATIONAL SALE OF GOODS*

A. Uniform rules on substantive law .

1. *Analysis of replies and comments by governments on the Hague Conventions of 1964:** report of the Secretary-General****

CONTENS

	<i>Paragraphs</i>
I. INTRODUCTION	1-5
II. ANALYSIS OF THE REPLIES, STUDIES AND COMMENTS.....	6-156
A. Ratification of, or accession to, the Hague Conventions of 1964.....	6-7
B. The 1964 Hague Conventions	8-156
(a) Observations of a general nature	8-19
(b) Observations on the Convention on Sales and the Convention on Formation	20-57
1. Article I, paragraphs 1 and 2 of the Convention: incorporation of the Uniform Laws into national legislation.....	20-23
2. Article II: opportunity to exclude applicability as to regions: States deemed not different for the purpose of the requirements of the Uniform Law	24
3. Article III: declaration to the effect that the Uniform Law shall be applicable only if each of the parties has his place of business (habitual residence) in the territory of a different Contracting State	25-27
4. Article IV of the Conventions, article 2 of the Uniform Law on Sales and article 1, paragraph 9, of the Uniform Law on Formation, the Uniform Laws and rules of private international law.....	28-40
(a) A uniform substantive sales law obviates the necessity of rules of private international law.....	29-30
(b) Coexistence of uniform substantive rules and rules of private international law	31-40
5. Article V of the Convention and article 3 of the Uniform Law: freedom of contract	41-54
6. Articles IX and XIII: accession to the Convention: applicability of Convention to territories for whose international relations a Contracting State is responsible	55-57
(c) Observations on the Uniform Law on Sales	58-143
7. Article 1: definition of international sale	58-66
8. Article 3: autonomy of the will of the parties: exclusion of the Uniform Laws by contract	67-70
9. Article 5, paragraph 2: mandatory provisions of national law designed to protect a party to an instalment sales contract are not affected	71-75
10. Article 6: contracts for the supply of goods to be manufactured or produced	76
11. Article 7: commercial and civil character of the parties or of the contracts	77
12. Article 8: matters governed by the Uniform Law.....	78
13. Article 9: commercial usages and practices	79-84
14. Article 10: fundamental breach of contract	85-87
15. Articles 11, 12 and 13: the expressions "promptly", "short period", "current price", "according to the usage of the market", "reasonable person"	88-89
16. Article 15: form of a contract of sale	90-92
17. Article 16: specific performance.....	93-94
18. Article 17: interpretation in conformity with Law's general principles.....	95-97

* For action by the Commission with respect to this subject, see part two, section II, A, Report of the Commission on the work of its second session, 1969, paragraphs 16-39. See also part two, section III, A, Report of the Commission on the work of its third session, 1970, paragraphs 17-102.

** The Convention relating to a Uniform Law on the International Sale of Goods will hereinafter be referred to as "Convention on Sales" and the annexed Uniform Law on the International Sale of Goods as "Uniform Law on Sales"; the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods will be hereinafter referred to as the "Convention on Formation", and the annexed Uniform Law on the Formation of Contracts for the International Sale of Goods as "Uniform Law on Formation".

*** A/CN.9/31.

CONTENTS (continued)

	<i>Paragraphs</i>
19. Articles 18 and 19: obligation of the seller to deliver the goods	98-107
20. Article 25: remedies for the seller's failure to perform his obligations	108
21. Article 26: remedies as regards delay of delivery	109
22. Articles 27 and 30: the terms "time of reasonable length", within a reasonable time", and promptly	110-111
23. Article 33, paragraph 2: the expression "not material"	112
24. Article 35: lack of conformity and passing of risk	113
25. Article 38: duty of the buyer to examine the goods	114-115
26. Article 42, paragraph 1: requiring seller to remedy defects in the goods ..	116-117
27. Article 44, paragraph 2: rights of the buyer after expiration of period within the seller should have remedied the defects in the goods	118
28. Article 49: time-limit for exercise of right to rely on lack of conformity ...	119
29. Articles 50 and 51: handing over of documents	120
30. Articles 52 and 53: rights or claims of third persons over the goods sold ..	121-122
31. Articles 54, 55 and 56: other obligations of the seller and the buyer	123-124
32. Article 57: fixing the price	125-126
33. Article 62: remedies of the seller for non-payment	127-129
34. Article 69: other obligations of the buyer	130
35. Article 70, paragraph 1 (a): other obligations of the seller	131
36. Article 73, paragraph 2: prevention by the seller of the handing over of the goods	132-133
37. Article 74: liability for non-performance of an obligation	134-137
38. Article 84: damages in cases of avoidance	138-139
39. Articles 97 and 98: passing of the risk	140-143
(d) Observations on the Uniform Law on Formation	144-156
40. General comments on the Uniform Law on Formation	144-146
41. Article 2: application of the provisions of the Uniform Law	147
42. Article 4: communication constituting an offer	148-149
43. Article 5: when the offer is binding	150-154
44. Article 10: revocation of an acceptance	155
45. Article 13: definition of usage	156

I. Introduction

1. The United Nations Commission on International Trade Law (UNCITRAL), at its first session, decided to include in its work programme, as a priority topic, the harmonization and unification of the law of the international sale of goods. The Commission selected, as one of the items falling within the scope of the international sale of goods, the Hague Conventions of 1 July 1964 on the International Sale of Goods and on the Formation of Contracts of Sale.¹ Considering it desirable to ascertain the attitude of States in respect of those Conventions, the Commission requested the Secretary-General (a) to invite States Members of the United Nations and States members of any of its specialized agencies to indicate whether or not they intended to accede to the 1964 Conventions and the reasons for their position, and (b) to invite States members of the Commission to make, if possible, a study in depth of the subject taking into account the aim of the Commission in the promotion

of the harmonization and unification of the law of the international sale of goods.²

2. The substantive portions of the replies and studies received by the Secretary-General have been reproduced in document A/CN.9/11 and Addenda 1, 2, 3 and 4. In accordance with the Commission's request,³ an analysis of the replies and studies was prepared by the Secretary-General for the second session of the Commission.⁴

3. The Commission considered the Hague Conventions of 1964 at its second session. A summary of the Commission's discussions on general aspects of the Conventions is set out in its Report on the work of its second session;⁵ a summary of the comments made by members of the Commission on specified articles of the Conventions and annexed Uniform Laws is set out in annex I to that Report.

² *Ibid.*, p. 19, para. 14, A and B.

³ *Ibid.*, para. 14 E.

⁴ A/CN.9/17.

⁵ *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)*, paras. 21-30.

¹ *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216)*, p. 17, para. 7.

4. In a resolution concerning uniform rules governing the international sale of goods adopted at its second session, the Commission decided, *inter alia*, to request the Secretary-General "to complete the analysis of the replies received from States regarding the Hague Conventions of 1964 (A/CN.9/17) in the light of the replies and studies received since its preparation and of the written and oral comments by members of the Commission during its second session" and to submit the analysis to a Working Group which the Commission established under paragraph 3 of the resolution.

5. The analysis requested by the Commission is set out in chapter II hereinafter and replaces the earlier analysis set out in document A/CN.9/17. It is divided into two parts. Part A summarizes the information submitted by Governments as to ratification of, or accession to, the Hague Conventions. Part B summarizes the opinions on the Conventions and annexed Uniform Laws expressed by Governments and by representatives of members of the Commission at its second session. For the sake of completeness, part B summarizes also the comments made by observers from international organizations at the second session of the Commission.

II. Analysis of the replies, studies and comments

A. RATIFICATION OF, OR ACCESSION TO, THE HAGUE CONVENTIONS OF 1964

6. As of the date of this report, the Convention on Sales has been ratified by Belgium,⁶ the United Kingdom,⁷ and San Marino.⁸ The Convention on Formation

⁶ In depositing, on 12 December 1968, its instrument of ratification, Belgium made the following declaration: in accordance with the provisions of article V of the Convention, the Kingdom of Belgium will apply the Uniform Law only to contracts in which the parties thereto have, by virtue of article 4 of the Uniform Law, chosen that Law as the law of the contract. In accordance with article IV of the Convention, the Kingdom of Belgium will apply the Uniform Law only if the Hague Convention of 15 June 1955 on the Law Applicable to the International Sale of Goods leads to the application of the Uniform Law. The latter notification shall become operative when the Kingdom of Belgium withdraws the declaration made in accordance with article V of the Convention.

⁷ In depositing, on 31 August 1967, its instrument of ratification, the United Kingdom made the following declaration:

(a) In accordance with the provisions of article III of the Convention, the United Kingdom will apply the Uniform Law only if each of the parties to the contract of sale has his place of business, or, if he has no place of business, his habitual residence in the territory of a different contracting State. The United Kingdom will in consequence insert the word "contracting" before the word "States" where the latter word first occurs in paragraph 1 of article 1 of the Uniform Law.

(b) In accordance with the provisions of article V of the Convention, the United Kingdom will apply the Uniform Law only to contracts in which the parties thereto have, by virtue of article IV of the Uniform Law, chosen that Law as the law of the contract.

⁸ In depositing, on 24 May 1968, its instrument of ratification, San Marino made the following declaration: in accordance with the provisions of article III of the Convention relating to a Uniform Law on the International Sale of Goods, the Republic of San Marino will apply the Uniform Law only if the parties to the contract of sale have their place of business

had been ratified by the United Kingdom and San Marino.⁹

7. The position of the other States that have submitted replies and studies may be summarized as follows:

(a) *States which have expressed the intention to ratify, or to accede to, the Convention on Sales and or the Convention on Formation:* Australia,¹⁰ Colombia,¹¹ Federal Republic of Germany,¹² France,¹³ Gambia,^{13a} Greece,¹⁴ Israel,¹⁵ Luxembourg,¹⁶ Mexico,¹⁷ and Netherlands.¹⁸

(b) *States in which the question of whether to ratify or accede is under consideration:* Denmark,¹⁹ Finland,²⁰ Hungary,²¹ Ireland,²² Japan,²³ Korea,²⁴ Norway,²⁵ Pak-

or, if they have no place of business, their habitual residence, in the territory of different contracting States. The Republic of San Marino will in consequence insert the word "contracting" before the word "States" where the latter word first occurs in paragraph 1 of article 1 of the Uniform Law.

⁹ In depositing, on 24 May 1968, its instrument of ratification, San Marino made the following declaration: in accordance with the provisions of article III of the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, the Republic of San Marino will apply the Uniform Law only if the parties to the contract of sale have their place of business or, if they have no place of business, their habitual residence, in the territory of different contracting States. The Republic of San Marino will in consequence insert the word "contracting" before the word "States" where the latter word first occurs in paragraph 1 of article 1 of the Uniform Law.

¹⁰ "...the present intention is to accede to the Conventions with similar reservations to those made by the United Kingdom" (A/CN.9/11, p. 4).

¹¹ "...intends to adhere..." (*ibid.*, p. 13).

¹² "...intends to propose to the German parliamentary bodies that the (1964 Conventions) ...be ratified, if feasible, during the present legislative term of the German Bundestag which ends in the autumn of 1969" (*ibid.*, p. 14).

¹³ "...has decided to ratify... (and) initiated the procedure for the parliamentary authorization required by the Constitution" (*ibid.*, p. 15).

^{13a} "...has the honour to convey its decision to accede..." (Note by the Ministry of External Affairs of Gambia to the Secretary-General of 30 July 1969).

¹⁴ "...proposes to ratify the Convention relating to a Uniform Law on the International Sale of Goods..." (A/CN.9/11/Add.3, p. 3).

¹⁵ "The Israeli Ministry of Justice is... preparing a memorandum to be submitted to the government recommending that it ratify without reservation" (A/CN.9/11, p. 16).

¹⁶ "...has initiated the procedure for the parliamentary approval" of the Conventions of 1964 (*ibid.*, p. 17).

¹⁷ "...considers it fitting to ratify" (the 1964 Conventions) (*ibid.*, p. 18).

¹⁸ "By Royal Message of 23 September 1968, draft Bills pertaining to the approval and execution of both Conventions... have been submitted to Parliament" (*ibid.*, p. 18).

¹⁹ A/CN.9/11, p. 13 and A/CN.9/11/Add.6, p. 2.

²⁰ A/CN.9/11/Add.6, p. 2.

²¹ A/CN.9/11/Add.2, p. 3.

²² A/CN.9/11, p. 15.

²³ A/CN.9/11/Add.3, p. 22.

²⁴ A/CN.9/11, p. 17.

²⁵ *Ibid.*, p. 19.

istan,²⁶ Romania,²⁷ Sweden,²⁸ Switzerland,²⁹ and Togo.³⁰

(c) *States which do not intend to ratify or accede:* Austria,³¹ China,³² Jordan,³³ Laos,³⁴ Maldives Islands,³⁵ South Africa,³⁶ United Arab Republic,³⁷ Union of Soviet Socialist Republics,³⁸ United States of America,³⁹ and Upper Volta.⁴⁰

B. THE 1964 HAGUE CONVENTIONS

(a) *Observations of the general nature*

8. Some of the replies and studies received from States refer to what are, in their view, the merits and weaknesses of the 1964 Conventions in general.

9. Belgium stressed the importance of the 1964 Conventions in view of the inadequacy of national legislation on the sale of goods which was generally designed to regulate the domestic sale of goods only.⁴¹ The Federal Republic of Germany considered that the Conventions were an excellent means of ensuring a uniform solution to the most important legal problems involved in the international sale of goods, while Norway, though noting that several provisions of the Uniform Law on Sales have been met with considerable criticism in the Nordic States, expressed the view that the Uniform Law

provided a coherent system of rules on the most important subjects of the law on international sales.⁴²

10. A similar view was expressed by the United Kingdom which saw the Uniform Laws as providing a valuable bridge between divergent legal systems which would enable parties to international contracts of sale, who carried on business in countries where different legal systems applied, to conduct their business by reference to a common code of law with which each was, or might readily become, equally familiar.⁴³

11. In the opinion of Hungary, the Uniform Laws could be considered as high standard, novel pieces of legislation which had taken into account the solutions provided by different legal systems,⁴⁴ while the United Arab Republic considered the Conventions to constitute an important contribution to the unification of private law in a sphere which is essential to the development of international trade relations.⁴⁵

12. The need for a uniform law on international sales was, however, denied by South Africa which held the view that the field covered by the Conventions is regulated reasonably satisfactorily by either existing legislation or commercial practice.⁴⁶

13. The Conventions in their present form were criticized by the Union of Soviet Socialist Republics which noted that only twenty-eight States, of which only three are socialist and two developing States, participated in the 1964 Hague Conference and expressed the opinion that the Conventions do not meet the requirements which the majority of States demand from international instruments of this kind.⁴⁷

14. Austria expressed the opinion that the Uniform Law on Sales is too voluminous, too detailed and not always well arranged and feared that its complexity would have an adverse effect on its application.⁴⁸ Sweden considered that many of the provisions of the Uniform Laws were vague and gave rise to considerable doubt in the context of practical issues that might arise.⁴⁹ The United States doubted whether the Uniform Law on Sales would be understood by individuals in the commercial field,⁵⁰ regretted the use of abstract, artificial and complex concepts which could result in ambiguity and error⁵¹ and were likely to be construed differently in different parts of the world; it further stated that this result ill-served the basic objective to lead to effective unification.⁵² Other weaknesses of the Uniform Law on Sales were, in the view of the United States, that it pointed more to external trade between common boundary nations geographically near to each other and that

²⁶ A/CN.9/11/Add.2, p. 3.

²⁷ A/CN.9/11/Add.1, p. 24.

²⁸ A/CN.9/11, p. 28 and A/CN.9/11/Add.5, pp. 6-7. Should they decide to ratify the Conventions, "The Nordic countries, having unified their laws on sales, will probably make a declaration in accordance with article II, paragraph 1 of the Conventions. Furthermore, since Sweden has ratified the 1955 Hague Convention on the applicable law, Sweden may make use of the reservation in article IV. It may also be deemed appropriate to make a reservation in accordance with article III; the position taken by other Contracting Parties on this issue will be of importance for the Swedish decision. As regards article V, Sweden is not at present contemplating to make use of the reservation provided for therein." In their replies of 29 July 1969, Denmark and Finland stated that they concurred in the views expressed in the reply of the Government of Sweden (A/CN.9/11/Add.5), "including those relating to the use of the right to make reservations ensured in the Conventions" (A/CN.9/11/Add.6, p. 2). The views attributed in this document to Sweden represent therefore also the views of Denmark and Finland.

²⁹ A/CN.9/11, p. 28.

³⁰ A/CN.9/11/Add.3, p. 22.

³¹ A/CN.9/11, p. 4. In its additional comments (A/CN.9/11/Add.3, pp. 2-3), Austria stated that it was "not in a position to accede to the Conventions unless a number of States with which Austria is maintaining close and friendly relations become parties to the Conventions without reservations (including reservations in respect of the field of application). It is, therefore, by no means excluded that Austria may sign and ratify the Conventions at a later stage."

³² A/CN.9/11/Add.2, p. 2.

³³ A/CN.9/11, p. 17.

³⁴ *Ibid.*, p. 17.

³⁵ A/CN.9/11/Add.1, p. 9.

³⁶ A/CN.9/11, p. 28.

³⁷ A/CN.9/11/Add.3, p. 27.

³⁸ A/CN.9/L.9, para. 13.

³⁹ A/CN.9/11, p. 36.

⁴⁰ A/CN.9/11/Add.2, p. 4.

⁴¹ A/CN.9/11, p. 12.

⁴² *Ibid.*, pp. 14, 20-21.

⁴³ A/CN.9/11/Add.2, p. 4.

⁴⁴ A/CN.9/11/Add.3, p. 21.

⁴⁵ *Ibid.*, p. 23.

⁴⁶ A/CN.9/11, p. 28.

⁴⁷ A/CN.9/11, Add.1, p. 32.

⁴⁸ A/CN.9/11, p. 6.

⁴⁹ A/CN.9/11/Add.5, p. 5.

⁵⁰ A/CN.9/11/Add.1, p. 35.

⁵¹ A/CN.9/11/Add.4, p. 8.

⁵² A/CN.9/11/Add.1, pp. 34 and 36.

insufficient attention had been given to international trade problems involving overseas shipments.⁵³

15. In the opinion of Belgium, the Federal Republic of Germany and Norway the Uniform Law on Sales strikes a fair and proper balance between the rights and obligations of the seller and of the buyer.⁵⁴

16. This view was, however, not shared by the United States according to which these rights and obligations, viewed in the light of the practical realities of trade practices, were not well balanced;⁵⁵ Spain noted that the Law's obligations were not clearly defined and would therefore benefit the stronger party.⁵⁶ Along the same lines, Hungary submitted that some of the solutions adopted by the Uniform Laws were objectionable because they helped a better situated and economically stronger party to occupy a more favourable position vis-à-vis a less developed party.⁵⁷ The United Arab Republic stated that certain principles embodied in the Uniform Law on Sales caused developing countries some apprehension.⁵⁸

17. In the opinion of the United States the Uniform Laws were as yet not ready for adoption. Improvements subsequent to adoption could not deal with problems that lay at the heart of the law's structure and approach. Therefore, further work on the Uniform Laws was needed at the present stage before they come into force.⁵⁹

18. Sweden, drawing attention to the relation between the Uniform Laws and standard contracts, expressed the view that it would be expected that the main legal issues of the greater part of international contracts of sale would be governed by standard contracts and that it would be the role of the Uniform Laws to supplement these contracts on points on which they did not contain provisions. Specific examples of possible difficulties were mentioned; the interrelation between the Uniform Laws and such contracts should be studied in greater depth.⁶⁰

19. In the view of Sweden, a similar issue was raised by the connexion between the provisions of the Uniform Laws and the trade terms that were in common use. It was standard procedure to include such terms in the contract of sale in order to regulate questions of transport and payment. It was a matter of regret that the Uniform Laws gave so little guidance regarding the way in which they were supposed to relate to these terms.⁶¹ There was also a measure of uncertainty as to whether or not the Uniform Laws were intended to apply to various types of contract such as contracts involving the supply and erection of plants and machinery. The position of these laws with regard to the consequences of export

and import restrictions, currency regulations, etc., could not be ascertained, and their relationship to tort liability and to general principles of contract law was subject to considerable doubt.⁶²

(b) *Observations on the Convention on Sales and the Convention on Formation*

1. *Article I, paragraphs 1 and 2 of the Convention: incorporation of the Uniform Laws into national legislation*

20. Norway expressed the view that a contracting State should be at liberty to incorporate the provisions of the Uniform Law into its own legislation as would best suit the State concerned in view of its own legal system and traditions of drafting legal texts, without being bound by the special, and partly unfamiliar, structure of the Uniform Law and the wording of its different articles.⁶³ China expressed a similar view.⁶⁴

21. At the second session of the Commission, the representative of Norway further observed that a contracting State should not be prevented, for example, from adding to its domestic law matters which might go beyond the scope of the Uniform Law, without being inconsistent with it; accordingly, he suggested that paragraph 2 of article I should be deleted.⁶⁵ This, in his view, would in no way endanger uniformity as to substance. The representatives of the USSR, Tunisia, Romania and Czechoslovakia, and the observer from the Hague Conference on Private International Law, expressed agreement with the Norwegian suggestion.⁶⁶

22. The representative of the United Kingdom opposed the Norwegian suggestion on the ground that the ensuing flexibility would, in effect, transform the Uniform Laws into model laws and that this would, in turn, increase disparities between the laws of different countries governing the international sale of goods.⁶⁷ The representatives of Australia and Mexico concurred with this view.⁶⁸

23. The representative of the Union of Soviet Socialist Republics expressed the opinion that the system of an international convention was preferable to the technique of incorporating the text of a uniform law into national legislation. Such a convention should only establish broad principles. Moreover, States should be at liberty to apply other international instruments relating to international sale which were in force at the present time or might be concluded in the future.⁶⁹

2. *Article II: opportunity to exclude applicability as to regions: States deemed not different for the purpose of the requirements of the Uniform Law*

24. The representative of the United Arab Republic suggested at the second session of the Commission that

⁵³ *Ibid.*, p. 35.

⁵⁴ Belgium, A/CN.9/11, p. 12; Federal Republic of Germany, *ibid.*, p. 14.

⁵⁵ A/CN.9/11/Add.1, p. 35.

⁵⁶ *Ibid.*, p. 28.

⁵⁷ A/CN.9/11/Add.3, p. 21.

⁵⁸ *Ibid.*, p. 23.

⁵⁹ A/CN.9/11/Add.1, p. 36.

⁶⁰ A/CN.9/11/Add.5, p. 5.

⁶¹ *Ibid.*

⁶² *Ibid.*, p. 6.

⁶³ A/CN.9/11, p. 21.

⁶⁴ A/CN.9/11/Add.2, p. 2.

⁶⁵ A/7618, annex I, para. 1.

⁶⁶ *Ibid.*, para. 2.

⁶⁷ *Ibid.*, para. 5.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, para. 4.

the principle embodied in article II, permitting the unification and harmonization of international sales law on regional level within the framework of a world-wide unification, should be incorporated in article 1 of the Uniform Law.⁷⁰

3. *Article III: declaration to the effect that the Uniform Law shall be applicable only if each of the parties has his place of business (habitual residence) in the territory of a different contracting State.*

25. The United Arab Republic submitted that the exception permitted by this article should be the rule. Indeed, without the reservation provided for in article III, the Uniform Law could, in certain circumstances, apply to a contract between parties whose places of business were in the territories of non-contracting States.⁷¹ The representative of Tunisia, at the second session of the Commission, expressed the same view.⁷²

26. In connexion with his observations on articles 1 and 2 of the Uniform Law on Sales, the representative of the United States expressed the view that the "coercive effect" of those articles would only be relieved by the reservation made under article III if that reservation had been made by the forum State.⁷³

27. The same view was held by Hungary, which pointed out that the reservation would effectively restrict the application of the Uniform Laws to cases where the countries of both parties are contracting States only when the reservation had been made by the State of the forum. Hungary noted in addition that it was hardly worth while to make the reservation under article III since it tended to limit the unification of laws and would thus reduce the resulting advantages.⁷⁴

4. *Article IV of the Conventions, article 2 of the Uniform Law on Sales and article 1, paragraph 9, of the Uniform Law on Formation: the Uniform Laws and rules of private international law*⁷⁵

28. The observations made in connexion with the above articles centre on the following questions:

- (a) *A uniform substantive sales law obviates the necessity of rules of private international law*

29. Luxembourg stated that the six member States of the European Economic Community (Belgium, Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands) had decided that those member States which had not yet ratified the 1955 Hague Convention on the Law Applicable to the International Sale of Goods would not continue the procedure for obtaining parliamentary approval, while those which had already ratified that Convention would denounce it as soon as they had the option of doing so.⁷⁶ In this connexion,

Belgium submitted that the 1964 Conventions would put an end to the uncertainties involved in the application of the rules of private international law.⁷⁷ The Federal Republic of Germany expressed the opinion that the essential aim of the standardization of substantive sales law was to do away with any stipulation as to which national law should be applicable, and that article 2 of the Uniform Law on Sales achieved that aim.⁷⁸ The Federal Republic added that, in its view, the declaration under article IV of the Convention on Sales would result in largely eliminating the benefits afforded by the Uniform Law through the standardization of substantive law.⁷⁹ A similar view was expressed by the Netherlands which stated that the removal of differences in various legal systems could be more fully realized by application of a uniform sales law than by application of rules governing conflicts of law.⁸⁰

30. On its part, Israel observed that ratification of the Convention on Sales would obviate the necessity to accede to the 1955 Convention in view of the mandatory provision of article 2 of the Uniform Law on Sales.⁸¹

- (b) *Coexistence of uniform substantive rules and rules of private international law*

31. Several States hold the view, expressly or impliedly, that ratification of the 1964 Conventions would still leave room for rules of private international law. Thus, Colombia and Mexico stated that they intended to ratify, or accede to, both the 1964 Conventions and the 1955 Convention.⁸² Spain suggested that the 1955 Convention should be brought into line with the Convention on International Sale⁸³ which it complements.⁸⁴

32. Other States opposed the exclusion of rules of private international law on the ground that this might lead to undesirable consequences in so far as the application of the Uniform Laws was concerned. The United States noted that provisions such as article 2 of the Uniform Law on Sales had been the subject of considerable controversy and might be deterring States from becoming parties to the Convention on Sales.⁸⁵ At the second session of the Commission, the representative of the United States further amplified that view by stating that the "coercive effect" of article 2, as well as of article 1, of the Uniform Law on Sales was unfortunate in that the Uniform Law might be forced on the parties to a sales contract even though their Governments had not accepted the Uniform Law and the contract was executed and performed outside the forum State.⁸⁶

33. Similar views were advanced by Czechoslovakia which observed that the principle embodied in article 2

⁷⁰ A/7618, annex I, para. 8.

⁷¹ A/CN.9/11/Add.3, p. 26.

⁷² A/7618, annex I, para. 10.

⁷³ A/7618, annex I, para. 40.

⁷⁴ A/CN.9/11/Add.3, p. 5.

⁷⁵ On this question, see also A/CN.9/12, and the comments submitted by the Secretary-General of the Hague Conference on Private International Law (A/CN.9/12/Add.2).

⁷⁶ A/CN.9/12, p. 9.

⁷⁷ A/CN.9/11, p. 12.

⁷⁸ A/CN.9/12, p. 7.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ A/CN.9/12, p. 8.

⁸² Colombia, A/CN.9/11, p. 13; Mexico, *ibid.*, p. 18.

⁸³ A/CN.9/12/Add.1, p. 12.

⁸⁴ A/CN.9/11/Add.1, p. 28.

⁸⁵ *Ibid.*, p. 35.

⁸⁶ A/7618, annex I, para. 40.

entailed for a contracting State the application of the *lex fori* (i.e. the Uniform Law), regardless of the fact whether that law was, in a given case, to be applied at all according to rules of private international law; the Uniform Law would thus be applicable to transactions between persons having their seat of business or residence in non-contracting States by the mere fact of a court of a Contracting State having jurisdiction.⁸⁷ Also Norway considered that it was unfortunate that the Uniform Law sought to extend its field of application by covering cases which had little or no connexion with the State of the forum.⁸⁸

34. Other objections against the provision of article 2 of the Uniform Law on Sales were put forward by the Union of Soviet Socialist Republics and Hungary.

The representative of the Union of Soviet Socialist Republics, at the second session of the Commission, observed that article 2 seemed to be based on the premise that the Uniform Law dealt with all matters relating to the international sale of goods. While it was true that article 17 of the Uniform Law on Sales provided that questions concerning matters governed by the Uniform Law which were not expressly settled therein should be settled in conformity with general principles, it could not be doubted that the expression "general principles" was very vague and that there remained matters which would still fall outside the scope of the Uniform Law. Those matters should be governed by the rules of private international law.⁸⁹

35. In this connexion, the observer of UNIDROIT specified that the purpose of article 2 was to give the Uniform Law an autonomous character, and to make it unnecessary for courts to determine the applicable law in each case. However, it would not be possible to exclude totally the application of conflict rules since these were matters (e.g. prescription) that were not dealt with in the Uniform Law and which could not be settled by reference to the general principles on which Uniform Law was based. Hence, in some cases recourse should be had to rules of private international law.⁹⁰

36. Sweden stated that the exclusion of rules of private international law was undesirable in that the Uniform Laws could be applied by a court for the sole reason that one of the parties to a contract was subject to suit in a country which had adopted those laws and the other party deemed it advantageous to institute a law suit there. Moreover, the reservations which contracting States were allowed to make under the Conventions more or less represented exceptions from the main principle that the Uniform Laws were to be applied whenever they formed part of the *lex fori*. The result was to jeopardize the main objective of excluding the rules of private international law, namely to diminish the uncertainty and complications supposed to ensue from the application of these rules.⁹¹

37. Hungary recognized that the exclusion of private international law had the advantage that the forum would never apply foreign substantive law. On the other hand, it was observed that the parties would not know in advance which law applied to their contract, since there was no way of knowing beforehand which party would bring an action, nor whether he would do so in a third country.⁹²

38. Both Czechoslovakia and Hungary suggested that a solution would seem to lie in the unification of rules of private international law and to decide in accordance with these rules which law would be applicable. In the view of Czechoslovakia, the Uniform Law would thus be applicable only if the conflict rules refer to the substantive law of a State which is a party to the Convention on Sales.⁹³ In the view of Hungary, such a solution would offer a greater degree of security than the solution adopted in the Uniform Laws.⁹⁴

39. Along the same lines, Norway suggested that article 2 be deleted, or be amended in order to make the application of the Uniform Law dependent on the rules of private international law of the State of the forum. Attention was also directed to article IV of the Convention on Sales, which laid down the requirements of previous ratification or accession of a conflict of laws convention; this article should be amended to make it permissible for a Contracting State also to accede to conventions on conflict of laws after having ratified, or acceded to, the Convention on International Sales.⁹⁵ The deletion of article 2 was also suggested by the representative of the Union of Soviet Socialist Republics.⁹⁶

40. It was also pointed out by Czechoslovakia that article 3 of the Uniform Law on Sales, which allowed the parties to a contract of sale to exclude the application of the Uniform Law either entirely or partially was in contradiction with article 2 of the Uniform Law which started from the opposite premise.⁹⁷ A similar objection was made by Mexico which considered that it followed from the consequences inherent in permitting the parties to a contract of sale to exclude the Uniform Law under article 3, that the rules of the 1955 Convention on the Applicable Law which refer to domestic law, would apply.⁹⁸

5. *Article V of the Convention and article 3 of the Uniform Law: freedom of contract*

41. The United Kingdom, which ratified the Convention on Sales subject to a declaration under article V of that Convention, stated that such ratification had the advantage of providing a flexible system under which the Uniform Law would affect the relations of parties to contracts only to the extent that they had expressly agreed that their relations should be governed by that law. Parties to contracts would thus be free to adopt

⁸⁷ A/CN.9/11/Add.1, p. 5.

⁸⁸ A/CN.9/11, p. 22.

⁸⁹ A/7618, annex I, para. 38.

⁹⁰ *Ibid.*, para. 39.

⁹¹ A/CN.9/11/Add.5, pp. 2-3.

⁹² A/CN.9/11/Add.3, p. 5.

⁹³ A/CN.9/11/Add.1, p. 5.

⁹⁴ A/CN.9/11/Add.3, p. 6.

⁹⁵ A/CN.9/11, p. 22.

⁹⁶ A/7618, annex I, para. 38.

⁹⁷ A/CN.9/11/Add.1, p. 6.

⁹⁸ A/CN.9/12/Add.1, p. 7.

some provisions and to exclude others or to apply some other law if they preferred to do so.⁹⁸

42. At the second session of the Commission, the representative of the United Kingdom further observed that in view of the fact that the Uniform Law incorporated certain civil law concepts with which common law countries were not familiar, a transitional period was necessary and this was made possible by article V.⁹⁹

43. The representatives of Australia and Japan expressed similar views. Retention of article V might mean the difference between ratification and non-ratification by a number of countries, especially those belonging to the common law system.¹⁰⁰ Business circles had expressed themselves in favour of the reservation which made it possible to test the effectiveness of the Uniform Law over a period of time.¹⁰¹

44. Objections to the reservation permitted by article V of the Convention (either on its own merits or in conjunction with article 3 of the Uniform Law) were raised by the United Arab Republic, Austria, Spain and Hungary, and, at the second session of the Commission, by the representatives of Iran, Mexico, Argentina, Ghana, Romania and Tunisia.

45. The United Arab Republic considered the reservation allowed by article V superfluous, since under article 3 of the Uniform Law on Sales the parties were at liberty to exclude the application of the Uniform Law either entirely or partially. In addition, the United Arab Republic considered it inadmissible that the application or effectiveness of a law should depend exclusively on the will of those governed by it.¹⁰²

46. In the view of Austria, article V reduced considerably the value of the Uniform Law since the reservation made it possible for any State to become a party to the Convention without having to make even the slightest change in its own law, as required by article I of the Convention on Sales. It was also suggested that, in view of article 4 of the Uniform Law on Sales, agreements choosing the Uniform Law presented difficult problems with respect to mandatory rules of national law.¹⁰³

47. The reservation permitted under article V was also opposed by Spain in that it unduly complicated the application of the Convention, extended even further the principle of freedom of contract recognized in article 3 of the Uniform Law on Sales.¹⁰⁴

48. Similar objections were raised by the representatives of Iran and the United Arab Republic: the combined effect of article V of the Convention and article 3 of the Uniform Law was to give the parties to a sales contract complete freedom to exclude the application of the Uniform Law even where both parties were nationals of, or had their places of business in, contrac-

ting States. This was held inconsistent with the very purpose of the Convention which sought to ensure uniformity.¹⁰⁵

49. It was further observed by Spain that application of the reservation could be detrimental to nationals of other countries who entered into a contract without knowing of the existence of such a reservation extending to nationals of the country which had made it. Furthermore, the reservation might entail divergencies in the settlement of disputes related to the application of the Convention and involving nationals of countries which had not made the reservation, depending on which country the court considering the case was situated in.¹⁰⁶ Spain therefore suggested that article V of the Convention on International Sales should be deleted.

50. With particular regard to article 3 of the Uniform Law on Sales, Spain, although not objecting to the general principle of the freedom of contract which that article recognizes, expressed the view that article 3, in its present wording, made it possible for the parties to exclude, entirely or partially, the application of the Uniform Law on Sales without indicating what provisions were to govern the contractual relationship in lieu of the Uniform Law; the principle of freedom of contract could thus be used in such a way that the parties would not know what their position was under the contract.¹⁰⁷ For that reason, Spain expressed preference for article 6 of the 1963 draft¹⁰⁸ which accords freedom of contract only when the parties make it sufficiently clear what provisions are applicable to the contract.¹⁰⁹ A similar view was expressed by the representatives of Mexico,¹¹⁰ Argentina and the United Arab Republic.¹¹¹

51. A similar view was expressed by Hungary. Article 3 supported the autonomy of the will of the parties, but was at variance with the 1955 Hague Convention on the Applicable Law and the 1963 draft, in that it allowed the implied exclusion, in part or in whole, of the Uniform Law. This would give rise to uncertainties and legal disputes and widely extended the possibility for the forum to base interpretations on implications to the detriment of uniformity.¹¹²

⁹⁸ A/7618, annex I, para. 12.

⁹⁹ *Ibid.*, p. 27.

¹⁰⁰ *Ibid.*

¹⁰¹ Draft of a Uniform Law on the International Sale of Goods, text of the articles modified in accordance with the propositions of the Special Commission in 1963 (Doc. V/Prep.4 of the Hague Conference). The text of article 6 is as follows:

"The parties may entirely exclude the application of the present law provided that they indicate the municipal law to be applied to their contract.

"The parties may derogate in part from the provisions of the present law provided that they agree on alternative provisions, either by setting them out or by stating to what specific rules other than those of the present law they intend to refer.

"The reference, declarations or indications provided in the preceding paragraphs are to be subject of an express term or to clearly follow from the provisions of the contract."

¹⁰² A/CN.9/11/Add.1, pp. 27-28; and A/7618, annex I, para. 15.

¹⁰³ A/7618, annex I, para. 19.

¹⁰⁴ *Ibid.*, para. 18.

¹⁰⁵ A/CN.9/11/Add.3, pp. 12-13.

⁹⁸ A/CN.9/11/Add.2, p. 4.

⁹⁹ A/7618, annex I, para. 20.

¹⁰⁰ Australia, *ibid.*, para. 21.

¹⁰¹ Japan, *ibid.*, para. 22.

¹⁰² A/CN.9/11/Add.3, p. 26.

¹⁰³ A/CN.9/11, p. 5.

¹⁰⁴ A/CN.9/11/Add.1, p. 26.

52. The representative of Ghana submitted that article V of the Convention conflicted with articles 1, 3 and 4 of the Uniform Law, in that articles 1 and 4 enumerated the cases where the Uniform Law "shall" apply, whereas article 3 permitted the exclusion of its application by the parties. It followed that the Uniform Law was applicable as between the parties, unless they availed themselves of the right to exclude its application under article 3. Nevertheless, under article V of the Convention, the Uniform Law would only apply where the parties had chosen the Uniform Law as the law of the contract.¹¹³

53. In the view of Hungary, the declaration under article V of the Convention would transform the Uniform Law into a set of general conditions of sale, whereas a law was needed in this area.¹¹⁴

54. An intermediate position was taken by the representative of Belgium and the observer of UNIDROIT at the second session of the Commission. They observed that most of the objections against article 5 were legally unassailable;¹¹⁵ however, practical considerations militated in favour of its retention¹¹⁶ and the consequences might not be very serious in practice.¹¹⁷

6. *Articles IX and XIII: accession to the Convention; applicability of Convention to territories for whose international relations a contracting State is responsible*

55. At the second session of the Commission, the representatives of Kenya, Tanzania and the Union of Soviet Socialist Republics objected to the provisions of these two articles.

56. The representative of the Union of Soviet Socialist Republics, supported by the representative of Kenya, submitted that article IX would deprive a number of States of the opportunity to accede to the Convention, while article XIII was a reflection of the past and had no place in a modern international instrument.¹¹⁸

57. The representative of Tanzania suggested that the wording of article IX should be amended to follow that of the corresponding article of the Hague Convention on the Applicable Law of 1955.¹¹⁹

(c) *Observations on the Uniform Law on Sales*

7. *Article 1: definition of international sale*

58. It was suggested by Norway that contracting States should be given the opportunity of applying a less restrictive and complicated definition in their municipal law, and that the scope of the Uniform Law should therefore be extended.¹²⁰

59. Czechoslovakia considered that the provisions of article 1 were too complicated and that the definition of international sale ought to be re-examined on the ground that it might well be desirable to bring within the purview of the Uniform Laws certain contracts of sale of goods which did not satisfy the conditions laid down in the present text.¹²¹ In defining the international character of goods, the point of departure should be, according to Czechoslovakia, the subjective criterion of the domicile of the parties to the contract of sale, while the commercial character of the sale (of which there was no definition in the Uniform Law) should be determined according to the purpose of the sale. It would thus be possible, for instance, to define international sale as a contract of sale concluded between parties not having their domicile or place of business in the territory of the same country if at the time of conclusion of the contract they knew, or ought to have known, that the goods were destined for resale or other commercial activities of the buyer. In the view of Czechoslovakia, it would also be desirable to exclude from the definition of a contract of sale contracts for the supply of goods to be manufactured when the party who ordered the goods undertakes to supply components or items to be used in the manufacturing process. It was stated by Czechoslovakia that difficulties would probably arise in connexion with the interpretation of the words "an essential and substantial part of the materials", found in article 6 of the Uniform Law on Sales.¹²²

60. Czechoslovakia, Japan, Norway and the Union of Soviet Socialist Republics expressed the opinion that the present text gave rise to certain difficulties of interpretation.

61. Czechoslovakia stated that in connexion with one of the requirements, namely that goods will be carried from one territory to another, doubts might exist at the time of conclusion of the contract (when it ought to be clear which law was applicable), whether the carriage would actually take place. Doubts might further arise in respect of the applicable law if the place of delivery was not indicated in the contract.¹²³

62. According to Norway, it was not clear from paragraph 1 (a) whether the contract of sale, in order to fall within the sphere of application of the Uniform Law on Sales, must contain a provision or information to the effect that the goods are to be sent to another country, or whether it was sufficient that the seller understood that the goods were to be sent out of the country; clarity in this respect was particularly important in connexion with the question whether an f.o.b. sale or a sale "ex works" fell within the scope of the Uniform Law on Sales.¹²⁴

63. A similar view was expressed, at the second session of the Commission, by the representatives of Japan and of the Union of Soviet Socialist Republics.

64. The representative of Japan stated that several trading companies which bought goods on an f.o.b. basis

¹¹³ A/7618, annex 1, para. 13.

¹¹⁴ *Ibid.*, para. 16.

¹¹⁵ *Ibid.*, paras. 23 and 24.

¹¹⁶ Belgium, *ibid.*, para. 24.

¹¹⁷ UNIDROIT, *ibid.*, para. 23.

¹¹⁸ A/7618, annex I, para. 27.

¹¹⁹ *Ibid.*, para. 28.

Note: Under the terms of article 11 of the 1955 Hague Convention, "any State not represented at the Seventh Session of the Hague Conference on Private International Law may accede to the present Convention..."

¹²⁰ A/CN.9/11, p. 19.

¹²¹ A/CN.9/11/Add.1, pp. 6 and 7.

¹²² *Ibid.*, p. 8.

¹²³ *Ibid.*, p. 7 and A/7618, annex I, para. 33.

¹²⁴ A/CN.9/11, p. 23.

and sold them at the same time c.i.f. to their buyers abroad agreed with the comments made by Norway.¹²⁵ In this connexion, the representative of Japan questioned the necessity, for the purpose of the application of the Uniform Law, for both parties to a contract to know that the goods were to be carried from the territory of one State to the territory of another.¹²⁶

65. The representative of the Union of Soviet Socialist Republics suggested that the provisions of article 1 (a) should be extended to cover also goods already carried from the territory of one State to the territory of another, but which had not yet been sold (e.g. articles of exhibition).¹²⁷

66. The representative of Japan suggested that it would be useful to define the expression "place of business", which had different connotations in different countries.¹²⁸ The representative of Iran, expressing the view that the Uniform Law should make no distinction between commercial and non-commercial sales, suggested that it would be appropriate to replace the words "places of business" by the term "domiciles".¹²⁹ The distinction between commercial and non-commercial sales was, however, advocated by Czechoslovakia; the Uniform Law should be made applicable to commercial sales only, excluding e.g. purchases made by tourists abroad.¹³⁰

8. *Article 3: autonomy of the will of the parties: exclusion of the Uniform Law by contract*¹³¹

67. Mexico observed that the principle of the autonomy of the will of the parties had rightly been criticized; obvious reasons of justice and equity required that mandatory provisions of the law of obligation be upheld.¹³² The General Conditions of the Delivery of Goods of the Council for Mutual Economic Assistance did not permit derogation from the General Conditions unless this was rendered necessary by the specific nature of the goods or the characteristics of their delivery; the non-mandatory nature of the Uniform Law on Sales might possibly produce the result that the will of the stronger party to the contract prevailed.¹³³

68. At the second session of the Commission, the representative of Norway suggested that the freedom of contract, recognized in article 3, should apply only when the parties made clear which law applied to their contract.¹³⁴

69. The representative of Hungary supported the approach of article 3, but took the view that in excluding

the application of the Uniform Law the parties should be required to decide which would be the governing law.

70. The representative of Japan and the observer of the Hague Conference on Private International Law submitted that to allow the parties to exclude the application of the Uniform Law impliedly would give rise to uncertainties and might lead to litigation.¹³⁵

9. *Article 5, paragraph 2: mandatory provisions of national law designed to protect a party to an instalment sales contract are not affected*

71. It was pointed out by Norway that this article seemed to invite an interpretation *a contrario*, namely that only the mandatory provisions relating to the protection of a party to an instalment sales contract would not be affected by the Uniform Law.¹³⁶ Furthermore, in the view of Norway, this paragraph seemed superfluous since the Uniform Law, according to article 8 of the Uniform Law, was not concerned with the validity of the contract or any of its provisions.¹³⁷

72. In the view of Norway, paragraph 2 should be deleted or amended for the purpose of extending it to all mandatory rules amounting to international *ordre public*, and the question as to whether a national mandatory rule should be regarded as an imperative rule for purposes of international transactions should in general be governed by national law.¹³⁸ The representative of Romania expressed a similar view.

73. The representative of the United Arab Republic expressed himself in favour of excluding, in respect of both buyers and sellers, the application of mandatory rules in respect of instalment payments, in view of the growing importance of that type of sale.¹³⁹

74. The representative of Hungary considered that it was correct to exclude from the application of the law mandatory rules in respect of instalment payments; it was, however, evident that the imperative rules (rules of *ordre public*) superseded the provisions of the Uniform Law.¹⁴⁰

75. The observer of the Hague Conference on Private International Law submitted that under the present wording of paragraph 2 of article 5 difficulties might arise in ascertaining which national law would apply as to the mandatory character of the rules concerned, and suggested that the paragraph should be interpreted in the same way as the provision of article 4 relating to the application of mandatory rules.¹⁴¹

¹²⁵ A/7618, annex I, para. 31.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, para. 32.

¹²⁸ *Ibid.*, para. 31.

¹²⁹ *Ibid.*, para. 35.

¹³⁰ *Ibid.*, para. 33, and A/CN.9/11/Add.1, p. 8.

¹³¹ Certain comments on this article were made with reference to the relevance of rules of private international law and may be found in paras. 47, 48, 50 and 52 above.

¹³² A/CN.9/11/Add.1, pp. 17-18.

¹³³ *Ibid.*, p. 18.

¹³⁴ A/7618, annex I, para. 42.

¹³⁵ *Ibid.*, para. 44.

¹³⁶ A/CN.9/11, p. 23.

¹³⁷ *Ibid.* Reference is made by Norway to the comments of the Special Commission on the 1956 Draft Uniform Law on Sales, vol. II, page 30 of the Records and Documents of the 1964 Hague Conference, where it is stated that the Uniform Law "does not in any way affect the imperative rules of municipal law".

¹³⁸ A/7618, annex I, para. 48.

¹³⁹ *Ibid.*, para. 50.

¹⁴⁰ *Ibid.*, para. 51.

¹⁴¹ *Ibid.*, para. 52.

10. *Article 6: contracts for the supply of goods to be manufactured or produced*

76. At the second session of the Commission, the representative of Czechoslovakia expressed the view that difficulties were likely to arise in interpreting the meaning of the expression "an essential and substantial part of the materials". In addition to the difficulty of determining what were essential and non-essential materials, it should be borne in mind that violation by the purchaser of his obligation with regard to handling the materials would affect the position of the parties concerning deficiencies in the goods produced. It would therefore be desirable to subject such cases to the same legal provisions as those applicable to cases where production of the goods concerned only the seller.¹⁴²

11. *Article 7: commercial and civil character of the parties or of the contracts*

77. At the second session of the Commission, the representative of Hungary expressed the opinion that the application of the Uniform Law should be confined to commercial matters only.¹⁴³

12. *Article 8: matters governed by the Uniform Law*

78. At the second of the Commission, the representative of the Union of Soviet Socialist Republics suggested that rules regarding the sale of goods and rules regarding the formation of contracts of sale should be incorporated in a single instrument.¹⁴⁴

13. *Article 9: commercial usages and practices*

79. In the view of Mexico, the subordination of the Uniform Laws to normative and interpretative usages and practices could result in the imposition of unfair usages or inequitable practices, for example, those based on limited responsibility clauses, or those existing in the waiver by the buyer of certain warranties or in the establishment of very short time-limits for the submission of claims, which in standard contracts were usually laid down by the economically stronger party to the detriment of the weaker party.¹⁴⁵ This danger was deemed to be aggravated by the fact that, according to article 8 of the Uniform Law on Sales, the Uniform Law was not concerned with the validity of any usage.¹⁴⁶

80. At the second session of the Commission, the representative of the Union of Soviet Socialist Republics expressed a similar view and objected to the principle laid down by article 9. Usages were often devices established by monopolies and it would hence be wrong to recognize their priority over the law.¹⁴⁷

81. The representative of Czechoslovakia, while recognizing the importance of usages in the international commodity trade, observed that they were less precise than legal rules and could thus lead to uncertainties.

Reference was made in this connexion to the Czechoslovak International Trade Code where the following sequence obtained: mandatory rules, direct contract stipulations, indirect contract stipulations (e.g. reference in the contract to certain usages), and general usages used in international trade for particular commodities.¹⁴⁸

82. The representative of Hungary observed that different usages might obtain in the same country for the same commodities. Moreover, the usage to be applied might be that of the place of the conclusion of the contract or of the place of its execution. Finally, under article 9 even usages unknown to the parties would prevail over the law, which was a clearly unacceptable principle.¹⁴⁹

83. The representative of Norway expressed the view that under article 8 of the Uniform Law the validity of usages was left to national law.¹⁵⁰

84. The representative of Japan submitted that the term "usage", which was found in articles 8, 9, 25, 42 and 61 of the Uniform Law, might give rise to considerable difficulties. The definition of "usage" was too abstract and also ambiguous, and it was not clear whether "usage" meant usage in the world at large or in a particular region or country.¹⁵¹

14. *Article 10: fundamental breach of contract*

85. It was pointed out by Austria that the wording in the French text of this article "*personne raisonnable de même qualité placée dans la situation de l'autre partie*" differed from the wording in the English text: "reasonable person in the same situation as the other party".¹⁵² Moreover, the requirement that a person should be of the same character as the other party (*de même qualité*) could not, in the view of Austria, be seriously imposed.¹⁵³

86. At the second session of the Commission, the representative of the United Arab Republic submitted that article 10 was defective in that it was left to the subjective judgement of the parties to determine whether a fundamental breach had occurred. That question could better be determined by a judge or arbitrator.¹⁵⁴

87. The representative of the United Kingdom observed that article 10 attempted to define in broad terms what constituted a fundamental breach of contract. Another approach might have been to enumerate specifically the cases amounting to a fundamental breach, but this might give rise to injustice because of the possibility of automatic avoidance of the contract. A broad and flexible definition of fundamental breach had therefore certain advantages, but it would seem desirable to improve the present text.¹⁵⁵

¹⁴² A/7618, annex I, para. 53.

¹⁴³ *Ibid.*, para. 54.

¹⁴⁴ *Ibid.*, para. 55.

¹⁴⁵ A/CN.9/11/Add.1, p. 19.

¹⁴⁶ *Ibid.*

¹⁴⁷ A/7618, annex I, para. 57.

¹⁴⁸ *Ibid.*, para. 58.

¹⁴⁹ *Ibid.*, para. 59.

¹⁵⁰ *Ibid.*, para. 60.

¹⁵¹ *Ibid.*, para. 61.

¹⁵² A/CN.9/11, p. 6.

¹⁵³ *Ibid.*

¹⁵⁴ A/7618, annex I, para. 68, and A/CN.9/11/Add.3, p. 26.

¹⁵⁵ *Ibid.*, para. 66.

15. *Articles 11, 12 and 13: the expressions "promptly", "short period", "current price", "according to the usage of the market", "reasonable person"*

88. Austria observed that the term "promptly", is defined in article 11, but that this term is used less frequently in the following articles of the Uniform Law on Sales than the words "within a reasonable time", for which no definition is given.¹⁵⁶

89. At the second session of the Commission, the representative of the Union of Soviet Socialist Republics observed that articles 11 to 13 contained a number of vague expressions which were ambiguous and would give rise to difficulties and uncertainties. The following examples were given: "short period" (article 11), "current price" and "usage of the market" (article 12), and "reasonable person" (article 13).¹⁵⁷

16. *Article 15: form of a contract of sale*

90. Austria submitted that this article was out of place in the Uniform Law on Sales and further observed that many countries prescribed in their legislation special forms for legal transactions by persons suffering from physical or mental infirmity, or standing in certain close relationship to each other. In the view of Austria, article 15 of the Uniform Law on Sales, and also article 3 of the Uniform Law on Formation, make it appear that, in so far as the application of the Uniform Law was concerned, it would no longer be permissible to prescribe such forms.¹⁵⁸

91. At the second session of the Commission, the representative of the Union of Soviet Socialist Republics observed that, in the Soviet Union, all contracts should be in written form; he suggested that article 15 should be modified so as to provide that if, under the law of one State whose enterprises were concluding a contract, an international sales contract should be made in a written form, the contract would be valid if the offer and acceptance were made in writing.¹⁵⁹

92. The representative of the United Kingdom observed that many international contracts were made by telephone and that it was therefore reasonable to provide that evidence in writing was not required. It was open to the parties to exclude the application of article 15 by availing themselves of article 3 of the Uniform Law.¹⁶⁰

17. *Article 16: specific performance*

93. At the second session of the Commission, the representative of the United Arab Republic observed that the concept of specific performance was unknown in certain countries and any reference to it should, therefore, be deleted.¹⁶¹

94. The representative of Japan suggested that the concept should be defined for the benefit of countries not familiar with it.¹⁶²

18. *Article 17: interpretation in conformity with Law's general principles*

95. Austria submitted that the requirement laid down by article 17 was of questionable practicability. Some questions of very great importance to transactions arising from contracts of sale, such as prescription, were not dealt with at all in the Uniform Law on Sales and it would be impossible to settle such questions in conformity with the spirit of the Uniform Law. Furthermore, the Uniform Law on Sales contained many terms which also occurred in national laws but it did not define these specifically, and it did not seem possible to separate their interpretation from the interpretation of the same terms as they were used in national laws.¹⁶³

96. Norway considered the article to be unfortunate; under this provision it might not be permissible to rely on other principles even when the "general principles" of the Uniform Law on Sales provided inadequate guidance. This question was made the more acute in view of the obligation under article I of the Convention on Sales to incorporate the article literally into national legislation without any complementing provision. Norway would therefore like to see the article deleted.¹⁶⁴

97. Similar views were put forward at the second session of the Commission by the representative of the Union of Soviet Socialist Republics, according to whom the expression "general principles on which the present law is based" was too vague and would give rise to difficulties of interpretation.¹⁶⁵ Similar views were expressed by the representative of Japan.¹⁶⁶

19. *Articles 18 and 19: obligation of the seller to deliver the goods*

98. The United States cited the concept of *délivrance*, which in English had been translated erroneously, but unavoidably, by "delivery", as an example of an artificial concept giving rise to unintended consequences, in particular when considered in connexion with the passing of risk which passed on "delivery".¹⁶⁷

99. Spain expressed the opinion that the inclusion of delivery among the obligations of the seller was unacceptable on the following grounds: delivery in its true sense meant the transfer of possession of the goods but such transfer was not dependent solely upon the will of the seller since it required co-operation of the buyer; it was thus a bilateral act, which consisted of the seller's applying the goods and the buyer's accepting them. In no circumstances, therefore, could delivery be regarded as an exclusive obligation of the seller.¹⁶⁸ Accordingly, Spain suggested: (i) to replace, in article 18, the word "*entrega*" (delivery) by the words "*puesta a disposición de una cosa conforme con el contrato*" (placing the goods which conform with the contract at the disposal of); (ii) to delete as being unnecessary, paragraph 1 of article 19 and, throughout the Uniform Law, replace the word

¹⁵⁶ A/CN.9/11, p. 6.

¹⁵⁷ A/7618, annex I, para. 69.

¹⁵⁸ A/CN.9/11, pp. 6-7.

¹⁵⁹ A/7618, annex I, para. 70.

¹⁶⁰ *Ibid.*, para. 71.

¹⁶¹ *Ibid.*, para. 72.

¹⁶² *Ibid.*

¹⁶³ A/CN.9/11, p. 5.

¹⁶⁴ *Ibid.*, p. 24, and A/7618, annex I, para. 74.

¹⁶⁵ A/7618, annex I, para. 73.

¹⁶⁶ *Ibid.*, para. 75.

¹⁶⁷ A/CN.9/11/Add.4, parts D (1) and (2), pp. 8-12.

¹⁶⁸ A/CN.9/11/Add.1, p. 29.

"entrega" (delivery) by the words "*puesta a disposición*" (placing at the disposal).¹⁶⁹ In the view of Spain, these amendments would bring the substance of articles 18 and 19 more into line with the rest of the Uniform Law. Reference was made in this respect to article 56 of the Uniform Law on Sales which places upon the buyer the obligations "to take delivery" of the goods and to article 65 which defines taking delivery as consisting in "the buyer's doing all such acts as are necessary in order to enable the seller to hand over the goods and actually taking them over", the passing of risk thus being effected by placing the goods at the disposal of the buyer.¹⁷⁰

100. At the second session of the Commission, the representative of Spain supplemented his Government's comments by submitting that the definition of "delivery" found in earlier drafts¹⁷¹ was more satisfactory and

¹⁶⁹ *Ibid.*, p. 30.

¹⁷⁰ *Ibid.*

¹⁷¹ *Note by the Secretariat:*

(a) *Draft Uniform Law on International Sales of Goods (Corporeal Movables) (1939)*

Article 18. The seller undertakes to deliver the goods to the buyer. The seller is bound to consign to the buyer simultaneously with the goods, their accessories.

Article 19. Delivery is accomplished when the seller has done all the acts which he is bound to do in order that the goods be consigned to the buyer or a person authorized to receive them on his behalf. What acts are necessary for this purpose, depends on the nature of the contract.

In the case of a sale of unascertained goods delivery is not accomplished until the goods, manifestly appropriated to the contract, are set aside on behalf of the buyer, and the seller notifies the buyer of such specification. Where unascertained goods are part of an indivisible whole and are of such a nature that the seller cannot set them aside until the buyer takes delivery of them, it shall be sufficient for the seller to do all the acts necessary to enable the buyer to take delivery of them.

Where the seller is bound to dispatch the goods to a place other than that of delivery, delivery shall be effected by consigning the goods to the first carrier or forwarding agent, or, if the first part of the journey is by sea, by placing them on board ship. Where, under the contract or by usage of the trade, the seller is entitled to present a received for shipment bill of lading to the buyer it shall be sufficient to deliver the goods to the shipowner.

(b) *Draft Uniform Law on the International Sale of Goods, text prepared by the Special Commission (1956)*

Article 20. Delivery consists in the handing over of goods which conform with the contract and their accessories; the seller undertakes to effect delivery according to the terms of the contract and of the present law.

Article 21. Where the contract of sale implies the carriage of the goods, unless it is provided that delivery is to be effected at the place of destination, delivery shall be deemed to take place when the goods are handed over to the carrier. When some part of the carriage has to be effected by the seller in his own transport or in transport hired by him on his own account, delivery shall take place when the goods are handed over to the carrier with whom a contract of carriage has been made on the buyer's account. Should the carriage of the goods have to be effected by several carriers acting successively, and the contract of sale thereby required the seller to make one or more contracts to cover the whole of the carriage, delivery shall be accomplished by handing over the goods to the first carrier.

Where the goods handed over to the carrier are not clearly appropriated to performance of the contract by being marked with an address or by some other means, the seller shall be deemed to have effected delivery of the goods only if, in addition to handing over the goods, he sends to the buyer

that paragraph 1 of article 19 should be replaced by the provisions of the 1939 Rome draft.¹⁷²

101. Mexico also criticized the definition of delivery given in article 19 as an over-simplification and the term "handing over" as being vague, and stated its preference for the terminology of the 1939 draft.¹⁷³

102. The representative of the United Arab Republic was of the opinion that the term "*remise*" ("handing over") in paragraph 1 of article 19 was correct, but agreed that it should be made clear that the seller was required to take whatever action was necessary to ensure that the goods were placed at the disposal of the buyer.¹⁷⁴

103. The representative of Tunisia expressed the view that the definition of "*délivrance*" in paragraph 1 of article 19 was clear in French and could only mean the placing of the goods at the disposal of the buyer. The form of delivery would have to be in accordance with the terms of the contract.¹⁷⁵

104. The representative of the United Kingdom recalled that the concept of "delivery" in the Uniform Law had been formulated in accordance with the Anglo-Saxon concept which recognized the duties of the seller to deliver the goods, but submitted that it might be desirable to define the concept of delivery more precisely.¹⁷⁶

105. Concerning paragraph 2 of article 19, the representative of Spain expressed the view that its provisions were inconsistent with those of paragraph 2 of article 73: if the seller had already dispatched the goods before the difficult economic situation of the buyer envisaged in paragraph 2 of article 73 had become apparent, how could he suspend the performance of his obligations if, according to the terms of paragraph 2 of article 19, he had already effected delivery by handing over the goods to the carrier?¹⁷⁷ The representative

notice of the consignment, and, if necessary, some document specifying the goods.

Where the carrier to whom, in accordance with the provisions of the first paragraph, the goods have to be handed over is a carrier by water, delivery shall be effected either by placing the goods on board ship or by placing them alongside, whichever the terms of the contract provide, unless the seller shall be entitled, according to the terms of the contract or usage, to present to the buyer a received for shipment bill of lading or other similar document.

(c) *Draft of a Uniform Law on the International Sale of Goods, text of the articles modified in accordance with the propositions of the Special Commission in 1963*

Article 20 is identical with article 20 of the 1956 draft. Article 21 is identical with article 21 of the 1956 draft, except that the last paragraph (where the carrier to whom, etc.) was not retained.

(d) *Text for a Uniform Law on the International Sale of Goods, elaborated by the Drafting Committee and submitted to the Conference in plenary session*

Article 20 is identical with the present article 18. Article 21 is identical with the present article 19.

¹⁷² A/7618, annex I, para. 76.

¹⁷³ A/CN.9/11/Add.1, p. 30, and A/7618, annex I, para. 80.

¹⁷⁴ A/7618, annex I, para. 78.

¹⁷⁵ *Ibid.*, para. 79.

¹⁷⁶ *Ibid.*, para. 81.

¹⁷⁷ *Ibid.*, para. 77.

of Italy expressed the view that there was no such inconsistency.¹⁷⁸

106. The observer of the International Chamber of Commerce submitted that the wording of paragraph 2 of article 19 could give rise to difficulties as it was not clear whether the expression "handing over the goods to the carrier" applied to the first carrier or to the sea carrier.¹⁷⁹

107. Austria observed that article 19, paragraph 2, of the Uniform Law on Sales conflicted with the provisions of the Geneva Convention of 1956 on the Contract for the International Carriage of Goods by Road (CMR) and the International Convention concerning the Carriage of Goods by Rail (CIM) in so far as the sender's right of disposal during transit were concerned, and that this contradiction could in practice only produce adverse consequences.¹⁸⁰ A similar observation was made by the representative of Tunisia at the second session of the Commission.¹⁸¹

20. *Article 25: remedies for the seller's failure to perform his obligations*

108. At the second session of the Commission, the representative of Japan observed that the provisions of article 25, and also article 26, would seem fair in the case of commodities of which the price fluctuated rapidly, but not in the case of industrial products where the price tended to be more stable. While it seemed reasonable to prevent speculation, there seemed to be less justification for depriving the buyer of the right to require performance of the contract in cases where, owing to rapid means of communication, the risk of speculation was minimal.¹⁸²

21. *Article 26: remedies as regards delay of delivery*

109. Norway observed that, whereas article 39 of the Uniform Law on Sales laid down strict rules for the making of notifications applicable to all remedies as regards lack of conformity, article 26 provided only for notification concerning claims for performance or avoidance of the contract, and not concerning claims for damages. This was regarded as a lacuna in the Uniform Law on Sales. In the opinion of Norway, the buyer should be under an obligation to notify also if he intended to claim damages on account of delay or when the goods had been delivered at a wrong place, though only after delivery had taken place.¹⁸³

22. *Articles 27 and 30: the terms "time of reasonable length", "within a reasonable time", and "promptly"*

110. At the second session, the representative of Romania criticized the expressions "reasonable" and "promptly" used in these articles as imprecise and vague concepts.¹⁸⁴

¹⁷⁸ *Ibid.*, para. 82.

¹⁷⁹ *Ibid.*, para. 83.

¹⁸⁰ A/CN.9/11, p. 7.

¹⁸¹ A/7618, annex I, para. 79.

¹⁸² *Ibid.*, para. 85.

¹⁸³ A/CN.9/11, p. 24.

¹⁸⁴ A/7618, annex I, para. 86.

111. The representative of the United Arab Republic suggested that it should be left to the courts or arbitral tribunals to interpret these terms in the light of the circumstances of each case.¹⁸⁵

23. *Article 33, paragraph 2: the expression "not material"*

112. At the second session of the Commission, the representative of Japan expressed the view that under the wording of paragraph 2 of article 33 doubts could arise as to what should be regarded as "not material". This expression might be given an unreasonably broad interpretation to the detriment of the buyer's rights.¹⁸⁶

24. *Article 35: lack of conformity and passing of risk*

113. At the second session of the Commission, the representative of the Union of Soviet Socialist Republics expressed the opinion that article 35, in addition to linking the responsibility of the seller to the passing of risk, should deal with the question of the seller's responsibility with regard to goods covered by a guarantee under the contract (e.g., in the case of purchase of plant, machinery, etc.).¹⁸⁷

25. *Article 38: duty of the buyer to examine the goods*

114. The representative of Japan, at the second session of the Commission, expressed the opinion that the term "promptly", in paragraph 1 of article 38, could give rise to difficulties especially when read in conjunction with the provision of paragraph 2 of the same article, according to which the goods should be examined by the buyer "at the place of destination". The latter requirement could possibly give rise to uncertainties, e.g. in the case of the buyer who was a trading company, and thus a middleman between the manufacturer and the user or consumer, or one of the middlemen in a chain of contracts. The same might be true with such buyers in connexion with the requirement of "without trans-shipment" in paragraph 3 of article 38, if the goods were to be put on rail or automobile from ship.¹⁸⁸

115. Norway submitted that a difficulty might arise in connexion with paragraph 3 of article 38, when goods were shipped in containers, and suggested that the deferment of the buyer's duty to examine the goods might be made subject to the condition that examination before redispach would put an unreasonable burden on the buyer, even when there is trans-shipment.¹⁸⁹

26. *Article 42, paragraph 1: requiring seller to remedy defects in the goods*

116. Sweden expressed the view that the rules on "remedies for lack of conformity" (articles 42-49), which related to a matter of great practical importance for the law on sales, were extremely complex. By way of example, it could be asked what the relation was supposed to be between the right to require perform-

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*, para. 87.

¹⁸⁷ *Ibid.*, para. 88.

¹⁸⁸ *Ibid.*, para. 87.

¹⁸⁹ A/CN.9/11, pp. 24-25.

ance of the contract by the seller (article 42) and the right to fix an additional period of time for further delivery or for remedying a defect (article 44, para. 2). These two remedies of the buyer would for practical purposes often coincide, but they were subject to different conditions under the Uniform Law.¹⁹⁰

117. Norway submitted that the right of the buyer under paragraph 1 (a) should be made subject to the condition that the seller's remedying defects in the goods would not cause the seller unreasonable inconvenience or expense. It was further suggested that the buyer's right under paragraph 1 (c) should be exercised only when the lack of conformity was of an essential nature, i.e. amounted to a fundamental breach of contract. In the opinion of Norway, the exercise of both these rights should further be made subject to the condition that the buyer presented his claims within a reasonable time after giving notice in accordance with the provisions of article 39 of the Uniform Law on Sales.¹⁹¹

27. *Article 44, paragraph 2: rights of the buyer after expiration of period within which the seller should have remedied the defects in the goods*

118. Norway expressed the opinion that the provision of article 44, paragraph 2, seemed to go too far in enabling the buyer to declare the contract avoided even if the defect was unimportant. It was proposed, therefore, to restrict the exercise of this remedy by the buyer to cases meeting the requirements laid down by article 42,¹⁹² with the amendments suggested in respect of that article.¹⁹³

28. *Article 49: time-limit for exercise of right to rely on lack of conformity*

119. Norway observed that it was probably correct to interpret paragraph 1 of article 49 in the sense that the one year's time-limit could only be interrupted by legal action, but submitted that this did not clearly ensue from the wording of the paragraph. In the opinion of Norway, the period of limitation of one year was too short and should be prolonged to two or three years.¹⁹⁴

29. *Articles 50 and 51: handing over of documents*

120. The United Arab Republic noted that the conditions of commercial sale (e.g. sale of f.o.b., c.i.f.) have not been included in the Uniform Law and suggested that it would be preferable to delete articles 50 and 51. These articles dealt only partially with a practice which should be regulated as a whole, independently of the Uniform Law.¹⁹⁵

30. *Articles 52 and 53: rights or claims of third persons over the goods sold*

121. Austria submitted that the provision of article 52 did not distinguish between cases where a right of a

third person existed and those where a third person merely claimed a right; this led to the conclusion that the buyer could avail himself of the guarantees set out in the article even in cases where a third person claimed a non-existent right over the goods. This provision was too wide, since the seller could not be held responsible for unwarranted claims. Moreover, article 52 did not set any time-limit for claims to the goods by a third person.¹⁹⁶

122. At the second session of the Commission, the representative of Tunisia, in the context of a general reference to section III of the Uniform Law, expressed the opinion that articles 52 and 53 dealt only with the transfer of property in case of litigation, and that it might be desirable to include in the Uniform Law also provisions for the transfer of property in general.¹⁹⁷

31. *Articles 54, 55 and 56: other obligations of the seller and the buyer*

123. Austria pointed out that whereas article 55 attached penalties to non-performance by the seller of any obligations not mentioned in articles 20 to 53, article 54 arbitrarily singled out two of those obligations which were not otherwise dealt with.¹⁹⁸

124. The representative of Czechoslovakia, at the second session of the Commission, submitted that the provisions in articles 55 and 56 concerning the obligations of the seller and the buyer were not complete and suggested that the obligation of the creditor to co-operate in the fulfilment of the transaction should be more fully regulated. In this connexion, he referred to the Czechoslovak International Trade Code which contained provisions concerning all contractual obligations in the context of a sale of goods.¹⁹⁹

32. *Article 57: fixing the price*

125. Austria expressed the opinion that the wording of article 57 would oblige the buyer to pay the price generally charged by the seller at the time of the conclusion of the contract even if that price was much higher than the usual price for such goods. The provision left also unsolved the case where the purchase price had not been agreed upon either expressly or, by reference to the seller's general price lists, tacitly. According to Austria, in that case the normal commercial practice was that the purchase price meant the usual price generally agreed on for similar goods at the same place. It was submitted by Austria that, according to the rule laid down in the Uniform Law, no effective contract of sale would have come into being in such cases a consequence which was intolerable in the light of prevailing commercial practice.²⁰⁰

126. The representatives of the Union of Soviet Socialist Republics and Hungary, at the second session of the Commission, criticized that article on the ground that a law should not permit the conclusion of a contract

¹⁹⁰ A/CN.9/11/Add.5, p. 4.

¹⁹¹ A/CN.9/11, p. 25.

¹⁹² *Ibid.*

¹⁹³ See under sub-section 26, para. 117.

¹⁹⁴ A/CN.9/11, p. 25.

¹⁹⁵ A/CN.9/11/Add.3, p. 27.

¹⁹⁶ A/CN.9/11, pp. 7-8.

¹⁹⁷ A/7618, annex I, para. 90.

¹⁹⁸ A/CN.9/11, p. 8.

¹⁹⁹ A/7618, annex I, para. 91.

²⁰⁰ A/CN.9/11, pp. 8-9.

without a price or at least a clear indication as to the means for determining the price.²⁰¹ In the view of the representative of the Union of Soviet Socialist Republics, article 57 in its present wording would lead to arbitrariness.²⁰² The representative of Hungary stated that an exception to the rule that the price is an essential element of the contract should only be made where the price could be inferred from a previous contract between the same parties for the same goods.²⁰³

33. *Article 62: remedies of the seller for non-payment*

127. Norway suggested that there should be included in this article a provision regarding the right of interpellation in favour of the buyer, corresponding to what had been provided in favour of the seller in article 26, paragraph 2, of the Uniform Law on Sales, and that the seller should be obliged to inform the buyer of his decision if payment was made later than on the date fixed and he nevertheless wished to declare the contract avoided. It was noted by Norway that, under paragraph 1, the contract would be *ipso facto* avoided if the seller did not inform the buyer within a reasonable time whether he required payment or declared the contract avoided. Norway suggested that this rule should be confined to cases where the goods had not been delivered. In cases where delivery had taken place, it should be sufficient that the seller had the right to declare the contract avoided.²⁰⁴

128. As to paragraph 2 of the article, Norway did not regard the requirement that the seller should make his declaration of avoidance promptly as a well-founded general rule for all cases. The suggestion was made that in cases where the price has not been paid and where delivery had not taken place, the right of the seller to declare the contract avoided should be maintained as long as the delay continued.²⁰⁵

129. Sweden noted that under the wording of article 62, a delay in notification by the seller may deprive the seller of his right to payment for the goods, although the goods have been delivered to the buyer. As a practical matter, it seemed entirely unsuitable that a seller who had delivered the goods would after a certain time only have the right to retake the goods from the buyer. The present rule — which had no counterpart in the text of the 1963 draft — seemed, according to Sweden, to be based on an unjustified analogy of the corresponding rule for the case that the buyer omitted to inform the seller of his decision when goods were not delivered in time (cf. article 26, para. 1 of the Uniform Law on Sales).²⁰⁶

34. *Article 69: other obligations of the buyer*

130. At the second session of the Commission, the representative of Japan submitted that the provisions of article 69 made no provision for the many disputes that could arise between buyers and sellers regarding docu-

mentary credits, e.g. disputes over contracts providing for a letter of credit without specifying its precise contents, the time of opening the credit or the amount involved.²⁰⁷

35. *Article 70, paragraph 1 (a): other obligations of the seller*

131. Austria expressed the view that it was difficult to understand why the seller could only declare the contract avoided if he did so promptly; an additional period of time for the buyer to perform would be in the latter's interest.²⁰⁸

36. *Article 73, paragraph 2: prevention by the seller of the handing over of the goods*

132. In the opinion of Austria, paragraph 2 of article 73, in imposing obligations upon the carrier, was in conflict with provisions of municipal and international law concerning the carriage of goods, and also placed an unreasonable burden on the carrier.²⁰⁹

133. The United Arab Republic criticized this provision on the ground that it would enable a seller to prevent the delivery of goods already dispatched if he considered that the economic situation of the buyer justified such stoppage *in transitu*. Such a unilateral decision would open the door to arbitrary action and might have serious consequences for the buyer, in particular where the buyer was of a developing country having a vital need for certain goods.²¹⁰

37. *Article 74: liability for non-performance of an obligation*

134. Norway suggested that the party who wished to be relieved of his liability for non-performance should have a duty to notify the other party of the impediment, so that failure to notify would entail liability to pay damages for the loss sustained by the other party through lack of proper notification.²¹¹

135. According to Austria, the party who was the beneficiary of the obligation which was not performed and was liable for reciprocal performance, retained the possibility of declaring the contract void. In many cases he could only do so if he acted "promptly"; if for any reason he failed to act promptly he was obliged to perform without being entitled to reciprocal performance. In the view of Austria, this would constitute a hardship for that party.²¹²

136. At the second session of the Commission, the representative of Czechoslovakia expressed the view that article 74 did not deal with sufficient precision with the consequences of governmental interference in private contractual relations, for example where a government prevented goods sold to a foreign buyer from being shipped to that buyer. The problems which arose then was whether the seller could disclaim liability. Ar-

²⁰¹ A/7618, annex I, paras. 92-93.

²⁰² *Ibid.*, para. 92.

²⁰³ *Ibid.*, para. 93.

²⁰⁴ A/CN.9/11, p. 26.

²⁰⁵ *Ibid.*

²⁰⁶ A/CN.9/11/Add.5, p. 4.

²⁰⁷ A/7618, annex I, para. 94.

²⁰⁸ A/CN.9/11, p. 9.

²⁰⁹ *Ibid.*

²¹⁰ A/CN.9/11/Add.3, p. 24, and A/7618, annex I, para. 95.

²¹¹ A/CN.9/11, p. 26.

²¹² *Ibid.*, p. 9.

article 74 did not, in the view of the representative of Czechoslovakia, provide a clear-cut solution. He added that the Czechoslovak International Trade Code sought to solve problems of this nature by providing that the seller was responsible for obtaining export and related permits and the buyer for obtaining import and related permits.²¹³

137. The representative of Argentina criticized article 74 for being insufficiently clear and for having an excessively subjective character.²¹⁴

38. *Article 84: damages in cases of avoidance*

138. Austria submitted that the provision of paragraph 1 of article 84 would make it possible for the party avoiding the contract by declaration to engage in speculation and suggested that the applicable date should be the date on which the goods were delivered or should have been delivered.²¹⁵

139. The United Arab Republic called attention to the following language of article 84: "prevailing in the market in which the transaction took place". It was not clear what the term "transaction" signified. This term might be construed as the place where preliminary negotiations took place, the place where the contract was concluded or the place where the contract was to be executed.²¹⁶

39. *Articles 97 and 98: passing of the risk*

140. Mexico considered that the provisions in the Uniform Law concerning the passing of the risk were adequate. These provisions indicated clearly the effects which they produced and provided for different possibilities, such as goods in transit, sales of unascertained goods and cases of non-performance or lack of conformity of the goods and made the passing of the risk a consequence not of passing of property, but of delivery of the goods. Mexico further pointed out that these provisions allowed the parties to arrange for the risk to be assumed in a manner other than that provided for in the Uniform Law on Sales.²¹⁷

141. The United States objected to the way the problem of passing of the risk had been approached in the Uniform Law which obliged one to refer to the definition given to "délivrance" in article 19 of the Uniform Law. The difficulties arising in respect of that definition were in turn a source of difficulties in important specific transactions such as contracts in which the seller retained control of the goods by a bill of lading.²¹⁸

142. Similarly, the observer of the International Chamber of Commerce, at the second session of the Commission, noted that under that article the risk would pass to the buyer when delivery of the goods was effected. No problem would arise where the parties had agreed to accept well-known delivery clauses, such as INCOTERMS. Where this was not the case, the Uni-

form Law failed to provide a clear solution, e.g. where the goods were delivered to a carrier or in the case of subsequent trans-shipment.²¹⁹

143. In the opinion of Austria, paragraph 1 of article 98, could possibly produce unfair consequences: if the handing over of the goods was delayed owing to non-performance of accessory obligations of the buyer, but through no fault of his, then the buyer had not committed a breach of those accessory obligations because he is relieved of them under article 74 of the Uniform Law on Sales. It is pointed out by Austria that in that event the risk will continue to be borne by the seller, although the non-performance was solely for reasons pertaining to the buyer.²²⁰

(d) *Observations on the Uniform Law on Formation*

40. *General comments on the Uniform Law on Formation*

144. The United States submitted that it seemed necessary to give principal attention to the problems presented by the Uniform Law on Sales, since it would be impractical to give approval to the Uniform Law on Formation independently of the closely related Uniform Law on Sales.²²¹

145. Mexico, referring to the various theories on the question at which moment contracts were concluded, stated that it would have been preferable for one or another theory to have been stated openly and clearly in the Uniform Law, so as to avoid conflicts and doubts regarding its interpretation.²²²

146. Austria expressed the view that the Uniform Law on Formation did not regulate the most important questions in connexion with the formation of contracts, namely, the time and place at which the contract came into being.²²³ This absence was also noted by Mexico.²²⁴ Austria further observed that the Uniform Law on Formation applied to transactions up to the coming into being of the contract, while the Uniform Law on Sales applied to the consequences of the formation of the contract. Between the two instruments there remains therefore a gap which would have to be filled by municipal law and this constituted, according to Austria, another reason for the necessity of rules of private international law.²²⁵

41. *Article 2: application of the provisions of the Uniform Law*

147. Austria noted that the purpose of the Uniform Law was to establish the validity, not only of the expressly agreed terms of the contract, but also of what might be deemed to be the legal intention of the parties. However, only intentions shared by both parties had any effect and the fixing of the terms of the contract by one party was excluded. The fact that article 2 of

²¹³ A/7618, annex I, para. 97.

²¹⁴ *Ibid.*, para. 98.

²¹⁵ A/CN.9/11, pp. 9-10.

²¹⁶ A/CN.9/11/Add.3.

²¹⁷ A/CN.9/11/Add.1, p. 22.

²¹⁸ A/CN.9/11/Add.4, pp. 11-12.

²¹⁹ A/7618, annex I, para. 100.

²²⁰ A/CN.9/11, p. 10.

²²¹ A/CN.9/11/Add.1, p. 34.

²²² *Ibid.*, pp. 22-23.

²²³ A/CN.9/11, p. 11.

²²⁴ A/CN.9/11/Add.1, p. 22.

²²⁵ A/CN.9/11, p. 11.

the Uniform Law on Formation singled out a specific case of unilateral fixing of the terms of the contract and declared it without effect, might, in the opinion of Austria, lead to the conclusion *a contrario* that the provisions contained in the offer and reply could have effect unilaterally.²²⁶

42. *Article 4: communication constituting an offer*

148. Austria suggested that it should be made clear what essentials of a contract must be included in a communication so that it could be regarded as an offer.²²⁷

149. Hungary stated that, in accordance with paragraph 1 of article 4, the offer had to be sufficiently definite and had to express the offeror's intention to be bound by the contract. It appeared from the preparatory work that the Uniform Law on Formation did not in any way provide for "public offers". In such cases it remained doubtful whether there was an offer or only an invitation for an offer. This inevitably resulted in uncertainty.²²⁸

43. *Article 5: when the offer is binding*

150. According to Hungary, the binding character of the offer resulted from the offeror's declaration to that effect, but such an indication might also be inferred from the circumstances, from primary negotiations, from any practices which the parties had established between themselves, or from usages. The offer could be revoked only in good faith or in conformity with fair dealing. The exceptions were therefore unlimited in principle, and discrepancies of application are likely to result as courts apply their own conceptions about which offers are revocable.²²⁹

151. At the second session of the Commission, the representative of the Union of Soviet Socialist Republics submitted that it was inappropriate to provide in a law that an indication to the extent that the offer

was firm or irrevocable might be "implied from the circumstances, the preliminary negotiations, in practices which the parties have established between themselves, or usage". It was for the offer itself to indicate clearly that it was firm or irrevocable.²³⁰

152. In the opinion of Austria the rule in this article would be a source of disputes and difficulties.²³¹

153. In the view of Hungary it would be difficult to decide whether the discrepancies contained in the acceptance were essential or not.²³²

154. At the second session of the Commission, the representative of the Union of Soviet Socialist Republics suggested deletion of the provision of article 7 under which a contract might be concluded even when the acceptance contained additions to or limitations or modifications of the offer.²³³

44. *Article 10: Revocation of an acceptance*

155. At the second session of the Commission, the representative of Norway criticized the wording of this article on the ground that it would not permit national legislation to grant a buyer a period of reflection during which he could revoke the acceptance. This was particularly important in instances where the sales resistance of a buyer was too weak as compared to modern methods of salesmanship, as, for example, in the case of unsolicited offers.²³⁴

45. *Article 13: Definition of usage*

156. At the second session of the Commission, the representative of the Union of Soviet Socialist Republics expressed his disagreement with the definition of usage given in this article. In his view, the priority of law over the applicability of usage in commercial transactions should be established.²³⁵

²³⁰ A/7618, annex I, para. 106.

²³¹ A/CN.9/11, p. 11.

²³² *Ibid.*, p. 20.

²³³ A/7618, annex I, para. 106.

²³⁴ *Ibid.*, para. 113.

²³⁵ *Ibid.*, para. 106.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ A/CN.9/11/Add.3, pp. 19-20.

²²⁹ *Ibid.*

2. *Report of the Working Group on the international sale of goods, first session, 5-16 January 1970**

CONTENTS

	Paragraphs
I. INTRODUCTION: MANDATE; ORGANIZATION OF WORK PROGRAMME	1-9
II. CONSIDERATION OF SUBSTANTIVE ISSUES	10-124
A. Principles on choice of law in uniform legislation on sales; the relationship between the 1955 Hague Convention and the Hague Conventions of 1964	10-29
B. The character of the international sale that will invoke a uniform law	30-44
C. Relationships among Unification Projects-Reconciliation or Consolidation	45-55
1. The Uniform Law on Sales and the Uniform Law on Formation	45-47
2. The Uniform Law on Sales and the proposed convention on time-limits and limitations (prescription)	48-53
3. Possible consolidation with other projects for unification with respect to international sale of goods	54-55

* A/CN.9/35.

CONTENTS (continued)

	Paragraphs
D. Recourse to General Principles: article 17 of the ULIS	56-72
E. The Binding Effect of General Usages	73-90
F. Continuing need for uniform rules on choice of law: the 1955 Hague Convention	91
G. Use of abstract or complex legal terms in drafting: <i>ipso facto</i> avoidance and notice to the other party to a sales transaction	92-104
H. Time and place for inspection notification of defects in delivered goods	105-111
I. The concept of "delivery" (<i>délivrance</i>) and the definition of the seller's obligations	112-117
J. Consumer protection and mandatory or regulatory rules of national law	118-124
III. RECOMMENDATIONS AS TO FURTHER WORK	125

Annexes

	Page
I. List of Participants	187
II. Working Paper prepared by the Secretariat	188
III. Report by Working Party I to the Working Group on the International Sale of Goods	198
IV. Proposal of the Norwegian Delegation	200
V. Report by Working Party II to the Working Group on the International Sale of Goods	200
VI. Report of Working Party V: Article 49 of ULIS	202

I. INTRODUCTION: MANDATE; ORGANIZATION OF WORK PROGRAMME

1. The Working Group on the International Sale of Goods was established by the United Nations Commission on International Trade Law at its second session in March 1969. The Working Group consists of the following fourteen members of the Commission: Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Under the Commission's decision,¹ the Working Group shall:

"(a) Consider the comments and suggestions by States as analysed in the documents to be prepared by the Secretary-General² ... in order to ascertain which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose, or what other steps might be taken to further the harmonization or unification of the law of the international sale of goods;

"(b) Consider ways and means by which a more widely acceptable text might best be prepared and promoted, taking also into consideration the possibility of ascertaining whether States would be prepared to participate in a Conference;

"(c) Submit a progress report to the third session of the Commission;"

2. The Working Group met at the United Nations Headquarters in New York from 5 January to 16 January 1970. All the members of the Working Group were represented except Tunisia. The list of representatives is contained in annex I to this report.

3. The meeting was also attended by observers from the Democratic Republic of the Congo, Czechoslovakia, Italy, Romania and Spain and the following intergovernmental and international non-governmental organizations who were invited pursuant to the Commission's decision: the Council of the European Economic Community, the Hague Conference on Private International Law (hereinafter referred to as Hague Conference), the International Institute for the Unification of Private Law (UNIDROIT) and the International Chamber of Commerce (ICC).

4. At its first meeting on 5 January 1970, the Working Group elected the following officers by acclamation:

Chairman: Mr. Jorge Barrera Graf (Mexico);

Rapporteur: Mr. Emmanuel Sam (Ghana).

5. The documents placed before the Working Group were in part concerned with the two Hague Conventions of 1964: the Convention relating to a Uniform Law on the International Sale of Goods (hereinafter referred to as the 1964 Hague Convention) to which the Uniform Law on the International Sale of Goods (hereinafter referred to as ULIS or Uniform Law) is annexed and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods to which the Uniform Law on the Formation of Contracts for the International Sale of Goods (here-

¹ Report of the Commission on the work of its second session (1969) (A/7618), para. 38.

² The documents to be prepared by the Secretary-General were described in paragraphs 1 and 2 of the Commission's decision. These documents are described more fully in this report at paragraph 5, *infra*.

inafter referred to as ULF) is annexed. The documentation with respect to these Conventions and Uniform Laws included the replies and studies by States concerning the Hague Conventions of 1964 (A/CN.9/11 and Add.1-6), annex I to the report on the second session of UNCITRAL (A/7618), and an analysis by the Secretary-General of the studies and comments by Governments on the Hague Conventions of 1964 (A/CN.9/31). Documents concerned with the 1955 Hague Convention on the Law Applicable to the International Sale of Goods (hereinafter referred to as the 1955 Hague Convention) included replies by States concerning this Convention (A/CN.9/12 and Add.1-4), annex II to the report on the second session of UNCITRAL (A/7618 and an analysis by the Secretary-General of the replies and comments by Governments on the 1955 Hague Convention (A/CN.9/33). The Working Group also had before it the report of the Working Group on Time-Limits and Limitations (Prescription) in the International Sale of Goods (A/CN.9/30). An analysis of the issues raised by these various documents and suggestions with respect to the order for their consideration was presented in the Working Paper prepared by the Secretariat (A/CN.9/WG.2/WP.1) (hereinafter referred to as the Working Paper). A note by UNIDROIT with respect to the Hague Conventions of 1964 (A/CN.9/WG.2/WP.3) was also placed before the Working Group.

6. The Working Group adopted the following agenda (A/CN.9/WG.2/WP.3):

1. Election of officers.
2. Adoption of the agenda.
3. Working methods.
4. Consideration of substantive issues under the Commission's mandate.
5. Adoption of the report.

7. With respect to item 3 of this agenda, it was noted that problems of working methods would arise in connexion with the consideration of substantive issues under item 4. It was therefore agreed by the Working Group that problems of working methods could be considered under item 4.

8. The Working Group decided to consider the substantive issues in the order in which they were presented in part III of the Working Paper which appears as annex II to the report and to consider later which of these issues might call for a sub-group or rapporteur. It was suggested that proposals to the Working Group be submitted in writing.

9. In connexion with the discussion of specific provisions of the uniform laws annexed to the Hague Conventions of 1964, one representative expressed the view that the Working Group should first consider whether the unification and harmonization of the law of the international sale of goods could not better be promoted by the preparation of a new text. Other representatives were of the view that this question could best be considered after the discussion of the existing provisions, since this would indicate the number and nature of any modifications required for the production of a more widely acceptable text. It was agreed that the discus-

sion of provisions of the existing texts did not foreclose the basic question of approach.

II. CONSIDERATION OF SUBSTANTIVE ISSUES

A. *Principles on choice of law in uniform legislation on sales; the relationship between the 1955 Hague Convention and the Hague Conventions of 1964*

10. The Working Group considered first the issue analysed in part III chapter A of the Working Paper: What (if any) rules should a uniform law for international sales contain with respect to the law's application to transactions involving one or more States that had not adopted the uniform law?

11. The discussion at the outset considered the relative merits of the four following alternative approaches (Working Paper, para. 17):

Alternative I. Application of the uniform law by courts of contracting States without regard to the relationship between the transaction and a contracting State (cf. arts. 1 and 2 of ULIS).

Alternative II. Inclusion in the uniform law of choice of law rules, possibly comparable to those of the 1955 Hague Convention prescribing the relationship between the international sale transaction and a contracting State under which a contracting State would apply the uniform law.

Alternative III. Restriction of the field of application of the uniform law to cases where parties to the transaction are located in different contracting States (cf. art. III of the 1964 Hague Convention).

Alternative IV. Omission of any rule on choice of law from the uniform law thereby remitting the question to the rules on choice of law of the *forum*.

12. In discussing alternative I, above, several representatives pointed out that article 2 of ULIS calls for the *fora* of contracting States to apply ULIS even in cases where the transaction involved in the litigation has no connexion whatsoever with a State that has adopted the uniform law. The opinion was voiced that the Uniform Law should be applied only if its application is warranted by sufficient connexion between the sale and at least one contracting State.

13. Other representatives referred to the reservations permitted by the 1964 Hague Convention and expressed the view that this possibility provided in articles III, IV and V, and especially in article III of the Convention, greatly mitigated the "coercive effect" of the Uniform Law. On the other hand it was noted that the possibility of numerous reservations derogating from the basic rules of the Convention was a serious departure from the principle of uniformity and could lead to uncertainties and complexities.

14. Some representatives who disapproved of the current approach of the Uniform Law (alternative I, above), suggested the deletion of article 2 of that law, or the inclusion in the Uniform Law of the principle now optional under article III of the 1964 Hague Convention that the Uniform Law would only apply to transactions between parties in different "contracting States".

One representative suggested that the same result could be achieved without modifying the existing text: under this suggestion UNCITRAL might recommend that contracting States make the reservation under article III of the 1964 Hague Convention when ratifying or acceding to it.

15. Some representatives considered that the deletion of article 2 of the Uniform Law and the reintroduction of rules of private international law (alternative IV) would cause uncertainty as to the law applicable to the contract. It was also pointed out that the unification of substantive rules obviates the need for conflict rules. Other representatives, however, were of the opinion that rules of conflict of laws continue to be needed after ratification of the 1964 Hague Convention; in support of this view it was noted that the Uniform Law (article 8) excludes many questions from its field of application such as the rights of third persons and the validity of the contract.

16. Several representatives noted that, apart from the merits of article 2 of ULIS, this provision was impeding the ratification of both the 1955 and 1964 Hague Conventions. In this connexion it was also observed that the reservation under article IV of the 1964 Hague Convention can only be made by those States which have "previously" adopted the 1955 Hague Convention; ratification of that Convention is not possible after the States has adopted the 1964 Hague Convention. One representative considered that this difficulty might impede the ratification of the 1964 Hague Convention.

17. To permit more detailed work towards solving this problem, on 6 January 1970, at the third meeting of the Working Group, the Chairman established a Working Party consisting of the representatives of Ghana, Hungary, Norway and the United Kingdom. Other representatives and observers, including the representatives of the international organizations concerned, were invited to participate in the work of the Working Party. (This group was designated as Working Party I.)

18. Working Party I presented to the Working Group its written report, which appears as annex III to this report.

19. The Working Party reported to the Working Group that it recommended the revision of article 2 of ULIS. After minor stylistic changes suggested in the course of discussion, the proposed substitute for article 2 reads:

In the English text:

"1. The Law shall apply where the places of business of the contracting parties are in the territory of States that are parties to the Convention and the law of both these States makes the Uniform Law applicable to the contract;

"2. The Law shall also apply where the rules of private international law indicate that the applicable law is the law of a contracting State and the Uniform Law is applicable to the contract according to this law."

In the French text:

"1. La présente loi est applicable lorsque les par-

ties contractantes ont leur établissement sur le territoire d'Etats parties à la Convention et qu'au regard de la loi de chacun de ces deux Etats, le contrat est régi par la loi uniforme;

"2. La présente loi est également applicable lorsque les règles du droit international privé désignent la loi d'un Etat contractant comme étant la loi applicable et qu'au regard de cette loi, le contrat est régi par la loi uniforme."

20. It was pointed out that the proposed text should be supplemented by a provision to cover the event of one or both parties having no place of business; in such cases reference should be made to the place of residence of the party or parties.

21. To illustrate the application of the language in paragraph 19 above, the report of Working Party I (paras. 7-8) set forth a number of examples.

22. One member of the Working Party proposed retention of the present language of the Uniform Law; he stated that the existing text of the 1964 Hague Convention would be more widely acceptable if States proposing to ratify the Convention took advantage of the reservation permitted by article III.

23. A majority of the representatives approved the above-quoted revision of article 2. Certain of the reasons for revision, stated above, were developed further. In addition, it was noted that although the language of the proposal might seem more complex than the present language of article 2, this was true only because the present language concealed the complications resulting from numerous and conflicting reservations. In addition, the present provision was an impediment to widespread adoption of the 1964 Hague Convention.

24. Three representatives supported the proposal to retain article 2 of ULIS and to recommend reservations under article III of the 1964 Hague Convention. In their view the reintroduction of rules of conflict of laws into the Uniform Law would detract from unification, and would introduce into ULIS such uncertainty that businessmen for whom ULIS was intended would often not know whether their contracts were covered by it. The opportunity to make the article III reservation should overcome objections to article 2 of ULIS.

25. One representative was of the view that article 2 should be deleted so that the rules of conflict of laws would govern the applicability of the Uniform Law. Other representatives stated that they would be inclined to support this view if the proposed revision of article 2 of ULIS were not to be adopted. Another representative, however, was of the opinion that ULIS should apply only to contracts concluded between traders of contracting States.

26. It was then proposed that consideration be given to article IV of the 1964 Hague Convention permitting a reservation by a State "which has previously ratified or acceded to one or more Conventions on conflict of laws in respect of the international sale of goods...". It was suggested that the word "previously" made the article too restrictive; ratification of such a convention subsequent to ratifying the 1964 Hague Convention should be possible.

27. One representative submitted a proposal for revision of article IV of the 1964 Hague Convention. The proposal appears as annex IV to this report.

28. The sponsor of the proposed revision noted that his proposal was presented in two alternatives. Alternative A made a slight change in article IV to remove the restriction that only States that had "previously" adopted a convention on conflict of laws could make the reservation in favour of a convention on conflict of laws. Alternative B was offered to deal with the possibility that article 2 of the Uniform Law might not be so amended as to give adequate recognition to the principles of private international law.

29. After preliminary discussion, at the suggestion of the sponsor, it was decided not to take action on these proposals, and to refer the matter to the Commission for consideration at its third session.

B. The character of the international sale that will invoke a uniform law

30. The Working Group considered the issue presented in part III, chapter B of the Working Paper: the definition of the international sale of goods for the purpose of defining the scope of a uniform law. Early attention to this problem responded to the request by the Working Group on Time-Limits that the Working Group on Sale and the Commission give priority attention to the definition of international sale so that a convention on prescription could "contain the same definition of scope as a convention on the substantive law governing the international sale of goods" (A/CN.9/30, para. 11).

Expression of parties' expectation concerning international carriage

31. The Working Group considered these questions: Where carriage of goods from one State to another State is made a necessary element for the applicability of a uniform law, must such carriage be expected by the parties at the time of the making of the contract? If such carriage must be expected by the parties, must this expectation be expressed in the contract?

32. The Working Group considered a question of interpretation on this point presented by the French and English versions of article 1, paragraph (a) of the Uniform Law. Under the provision, one test for applicability is fulfilled.

In the English version:

"(a) Where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;"

In the French version:

"(a) Lorsque le contrat implique que la chose fait, lors de la conclusion du contrat, ou fera l'objet d'un transport du territoire d'un Etat dans le territoire d'un autre Etat;"

33. The view was expressed that, under the French version, this test is satisfied if at the time of contracting it may be objectively believed that the parties expect

that the goods are then in the course of international carriage or that such carriage will occur in response to the contract. It was further observed, however, that this expectation need not be expressed in the contract.

34. A broader reading was given to the English version. Under this language ("involves... goods which... will be carried..."), it was suggested that the Uniform Law may be applicable if there is no understanding (or expectation) that the goods will be the subject of international carriage if such carriage in fact occurs. Some representatives did not accept this interpretation and considered that the English version bore the same meaning as that set out in paragraph 33.

35. In discussing the above question it was observed that events occurring after the making of the contract would not affect the applicability of the Uniform Law; thus, unanticipated shipment of the goods from one State to another should not bring the contract within the law's coverage.

36. It was suggested that if the buyer takes personal delivery in the seller's State, the transaction seemed not necessarily to have an international character sufficient to justify coverage even though the seller expects the buyer to remove the goods to another State. It would be necessary that such expectation be reflected in the contract.

37. It was also noted that clarity was of greater importance than whether the law, should be slightly broader or slightly narrower in scope. However, the view was expressed that adoption might be more difficult if the law's scope were substantially broadened.

38. Other observations were made with respect to definition of scope set forth in article 1 of the Uniform Law. One was that simplification might be gained by having fewer criteria than those specified in paragraphs 1 (a), 1 (b) and 1 (c). On the other hand, it was suggested that the Uniform Law should include the sales of stocks of goods brought by the seller to the buyer's country before the sale. Two representatives submitted written proposals for the revision of article 1.

39. After preliminary discussion of these proposals, the Working Group decided to refer the question to a Working Party (Working Party II) consisting of the representatives of France, India, Norway, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The observers from UNIDROIT, the Hague Conference and the ICC were also invited to participate.

40. Working Party II submitted a written report which appears as annex V. This report, in paragraph 4, noted that the English text of article 1, paragraph 1 (a) of ULIS did not correspond with the French text, and suggested the following as a more accurate translation:

"(a) Where the contract contemplates that the goods are, at the time of the conclusion of the contract, or will be the subject of transport from the territory of one State to the territory of another."

41. The Working Group considered that, in general, the definition set forth in article 1 of ULIS was satisfactory.

42. However, certain representatives noted the reservations expressed in paragraphs 7, 8, 9 and 10 of Working Party II's report. An amendment proposed by the USSR appears in annex C to the report. In addition, the representative of Norway offered proposals to revise article 1 in the interest of simplicity and clarity. These proposals and accompanying explanations appear as annex B to the attached report of the Working Party. In addition, one observer expressed doubt about the clarity of the definition as applied to sales "ex works" and the like.

43. A majority of the Working Group approved the recommendation of Working Party II.

44. One representative noted his reservation to the effect that the rewording of article 1 (a) of ULIS should be considered to enable the inclusion of commodities (such as fish) sold on the high seas and carried by the buyer to his territory; under the present text such commodities might not be deemed "carried from the territory of one State to the territory of another".

C. *Relationships among Unification Projects Reconciliation or Consolidation*

1. *The Uniform Law on Sales and the Uniform Law on Formation*

45. The question of the relationship among various unification projects was analysed in part III, chapter C 1, of the Working Paper.

46. One specific issue examined by the Working Group was whether ULIS and ULF should be consolidated. (Working Paper, paras. 24-33.)

47. In the initial discussion of this question attention was called to certain duplications and discrepancies between these two laws; it was suggested that brevity and clarity could be gained by consolidation. On the other hand it was noted that States willing to adopt one of these laws might have objections to the other; consolidation therefore might impede ratification and accession. The Working Group was of the view that the discussion of specific provisions of the uniform laws might shed light on these questions, and decided not to take action on this question at the present session.

2. *The Uniform Law on Sales and the proposed convention on time-limits and limitations (prescription)*

48. The issues under this heading were discussed in part III, chapter C 2, of the Working Paper (paras. 34-49). A problem concerning the relationship between the Uniform Law and the proposed convention on prescription arose from these facts: (a) The Working Group on Prescription proposed, in response to the Commission's mandate, to prepare unified rules on prescription applicable to claims of both the buyer and seller; (b) The Uniform Law in article 49 sets a limit (one year) for one type of claim by buyers against sellers; it was suggested that this was a prescriptive limit governing actions in court.

49. The Working Paper suggested the following three alternative approaches to the relationship between ULIS and the proposed convention on prescription:

Alternative I. The convention on prescription should be conformed to the rules of article 49 of ULIS;

Alternative II. Omission of rules on prescription from the uniform rules on sales so that all problems of prescription could be dealt with in a single convention;

Alternative III. Merger of a uniform law on sales and general rules on prescription in international sales.

50. After preliminary examination of this problem it was decided to defer further discussion until later in the session. When the issue was taken up again it was suggested that the one-year period prescribed in article 49 of ULIS was not a prescriptive limit in the sense that action before a court was necessary to interrupt it. Thus, it was thought that the requirement of this article could be satisfied by action other than instituting a claim before a tribunal as by other energetic or unequivocal action showing that the buyer proposed to press a claim.

51. There was general agreement that under this interpretation of article 49 there might be no acute conflict with the project to prepare a convention on prescription in the field of international sale of goods. It was suggested, however, that, under this reading of article 49, there were problems of reconciliation between article 49 and article 39 of ULIS on notice of non-conformity. In addition, it might be necessary to revise the language of article 49 to make clear that it was not a prescriptive limit governing actions in court. A Working Party consisting of France, Ghana, Hungary, Japan and Norway (Working Party V) was established to deal with this problem.

52. Working Party V presented a written report that appears as annex VI. For reasons explained in the report, it was recommended that article 49 of the Uniform Law should be deleted; certain subsidiary recommendations are also set forth in the report.

53. The Working Group approved the recommendation set forth in the report.

3. *Possible consolidation with other projects for unification with respect to international sale of goods*

54. In response to a suggestion that other pending unification projects might be consolidated, the Working Paper in part III, chapter C 3 (paras. 50-54) discussed the status of other pending unification projects and analysed the problems that might be encountered in attempts at consolidation.

55. There was general agreement that the Working Group would not consider the consolidation of these pending projects. The observer from UNIDROIT stated that his organization would shortly present a draft to the Commission on the consolidation of various pending projects. The observer of the Hague Conference thought that it would be useful to harmonize the 1964 Hague Convention with that of 1955. This, however, would depend on the outcome of the discussion of the problem dealt with in part III, chapter A of the Working Paper.

D. *Recourse to General Principles: article 17 of the ULIS*

56. The Working Group considered the issues, introduced in part III, chapter D of the Working Paper, concerning article 17 of ULIS. Article 17 provides as follows:

"Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

57. A number of representatives pointed to difficulties that, in their view, were presented by article 17. It was stated that matters not expressly settled by ULIS although governed by it cannot be settled "in conformity with the general principles on which the present Law is based" because it is difficult or impossible to identify such general principles particularly due to the fact that ULIS has no domestic legal background. There might also be a danger that lacking such a legal background the courts might in fact fall back on the *lex fori*. This reference to unidentified general principles therefore gives rise to ambiguity and uncertainty.

58. Some representatives expressed doubt about whether article 17 was concerned merely with the interpretation of provisions of the Uniform Law or whether article 17 authorized the filling of gaps on which ULIS set forth no rule. Some of these representatives suggested the deletion of article 17, others supported revision of the language to clarify its meaning, others suggested a provision that gaps or unsolved problems under the law would be decided pursuant to the rules of private international law or the law of the *forum*.

59. Some representatives expressed their approval of article 17. It was explained that the drafters of the ULIS wished it not to be narrowly and restrictively interpreted and were aware of the fact that in many legal systems rules on solving gaps and questions of interpretation are narrow and restrictive. They wished to free judges from having to look to national law for the solution of these problems, an avenue that would lead to disunity. The general principles in article 17 are the general ideas which inspired the Uniform Law. These principles can be gathered from the provisions of the Uniform Law, from the legislative history of the 1964 Hague Convention and from commentary on the Uniform Law.

60. One representative referred to the special problems which are faced in some common law systems as a result of traditions favouring literal interpretation, the use of national rules in filling gaps, and the resistance to the use of *travaux préparatoires* and other legislative history as aids to interpretation; he suggested that article 17 or a similar provision was needed. Another representative stressed that since article I of the Convention states that the Uniform Law shall be incorporated into national legislation, there is a danger that judges may not give full effect to its international origin. For this reason, article 17 was useful as a reminder that the provisions of the Uniform Law reflect common elements arrived at as a result of negotiation among numerous delegations.

61. Several alternatives to the present language of article 17 were suggested. One was that gaps in ULIS be filled by recourse either to the rules of private international law or to the *lex fori*. Another suggestion was to restate article 17 in such a way as to direct the Court's attention to the international nature of ULIS and its goal of unification, and the need to promote a system of international case-law.

62. The Working Group requested representatives who were concerned about the present language of article 17 to prepare a proposed revision that would meet these difficulties.

63. One delegate proposed that article 17 be revised to read as follows:

In the English text:

"The present law shall be interpreted and applied so as to further its underlying principles and purposes, including the promotion of uniformity in the law of international sales."

In the French text:

"La présente loi sera interprétée et appliquée conformément aux principes généraux dont elle s'inspire et à ses objectifs, en particulier la promotion de l'uniformité du droit en matière de vente internationale."

64. In support of this proposal, the delegate recalled the earlier discussion of the dangers of construing international uniform legislation in terms of local rules and understandings. This proposal did not authorize extension of the scope of the Uniform Law; it was concerned with the approach to solving problems falling within the law. This language could be useful to encourage an international and unifying (rather than local) approach to the law, and could encourage courts to consult legislative history of the Uniform Law and constructions of the law in other States. Some other delegations supported this proposal.

65. On the other hand, it was suggested that this proposal, like ULIS article 17, referred to principles and purposes that were not stated, and therefore was unclear.

66. A second proposal called for the revision of article 17 to read:

In the English text:

"Private international law shall apply to questions not settled by ULIS."

In the French text:

"Le droit international privé sera applicable aux questions non réglées par la présente loi."

67. It was noted that this proposal had the advantage of using the same approach for interpreting the law as for filling gaps; this was advisable since it is difficult or impossible to distinguish the one from the other. Two other delegations supported this proposal.

68. In opposition to the proposal it was suggested that this language dealt with areas excluded from ULIS. The provision might be helpful in connexion with article 8 of the Uniform Law, which excluded subjects from the Law, but was not a substitute for article 17 as a rule of interpreting the Uniform Law. On the other hand, it was mentioned that the text intends to cover both questions not governed and governed but not settled by ULIS. If this would create difficulties, the text put forward in paragraph 66 above could be amended as follows: "... shall apply to questions governed but not settled by ULIS".

69. In opposition to the proposal mentioned in paragraph 66 above, it was stated that this text would be

useless and dangerous. It is useless in so far as it refers to subjects which are excluded from the scope of ULIS by article 8. However, in so far as it provides a rule to be applied whenever a jurist could observe that the text does not specifically resolve a given problem or that it raises difficulties of interpretation it would be an invitation to disregard this law for those who would wish to avoid its application.

70. Two representatives suggested that the two proposals set out in paragraphs 63 and 66 above dealt with different problems and were not inconsistent. It was therefore suggested that, at the end of the first proposal (paragraph 63) it might be possible to add language such as, "otherwise, the rules of private international law shall apply".

71. One representative considered that a proposal which was made during the discussion of this question to delete article 17 altogether should also be mentioned in the report.

72. No one of the various proposals was supported by a majority of the Working Group. The Working Group therefore decided to refer the matter to the Commission.

E. The binding effect of general usages

73. Issues raised by States and organizations with respect to provisions of ULIS concerning usages were analysed in part III, chapter E, of the Working Paper (paras. 59-63).

74. Paragraph 1 of article 9 of ULIS provides in part:

"1. The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract. . ."

75. Discussion was primarily concerned with paragraph 2 of the article, which provides:

"2. They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present law, the usages shall prevail unless otherwise agreed by the parties."

76. Several representatives objected to paragraph 2 of article 9 on the ground that this provision gave excessive effect to usages. It was noted that under this language usages became binding without any reference to them in the contract. Under some circumstances a party might be bound by a usage without knowing of its existence, since the language gives effect to usages which "reasonable persons in the same situation as the parties usually consider as applicable". It was suggested that the possibility of being bound by unknown usages led to uncertainty with respect to the obligations of the parties.

77. It was also observed that the language of article 9, paragraph 2, was unclear and could lead to divergent interpretations. For these reasons several representatives were of the opinion that paragraph 2 should be deleted. Certain of these representatives suggested that paragraph 1, in giving effect to usages which the parties had "impliedly made applicable to their contract"

might be so broadly construed as to be subject to criticisms directed at paragraph 2.

78. One representative expressed the view that paragraph 3 of article 9, on the interpretation of expressions commonly used in commercial practice, was subject to similar criticism as paragraph 2 of that article and should be modified.

79. Several representatives supported the objective of paragraph 2 of article 9. It was noted that much commerce was conducted quickly and informally through the exchange of telegrams or other brief communications; it was not convenient or customary to make specific references to usages which the parties regarded as applicable.

80. Attention was drawn to the references to usage in articles 25, 42-1(c), 50, 60 and 61-2. Even in parts of the Uniform Law where usage was not mentioned, recourse to usage was necessary to make the law workable; an example was article 19-2, since the provision failed to take account of the usage that, in carriage by sea, risk did not pass on delivery of the goods to the "carrier" but only when the goods were loaded on the vessel.

81. Some representatives who objected to the role of usage called attention to the following provision in article 9-2: "In the event of conflict with the present law, the usages shall prevail unless otherwise agreed by the parties." In reply, it was noted that under article 3, the Uniform Law generally yielded to the parties' agreement, and therefore the usages made binding by the Uniform Law could be regarded as an aspect of the agreement of the parties.

82. Attention was also drawn to article 8 which provides that the Uniform Law "shall not . . . be concerned . . . with the validity of the contract or of any of its provisions or of any usage". It was observed that mandatory rules of a State that would invalidate an unreasonable or oppressive provision of an agreement would also be operative to invalidate an unreasonable or oppressive provision of a usage. Attention was also drawn to the term "reasonable" in article 9-2.

83. Several representatives supported the suggestion that attempts should be made to redraft paragraph 2 of article 9 to remove the objections that had been directed to the present language. Written proposals were made by three representatives; the sponsors of these proposals were requested to consult with a view to securing agreement on a single text.

84. The Working Group later resumed consideration of this question. Two specific proposals were offered.

85. One proposal would retain the present language of paragraphs 1 and 3 of article 9, and substitute for paragraph 2 the following,

In the English text:

"2. Among the usages which the parties shall be considered to have impliedly made applicable to their contract shall be any usage which has such regularity of observance and the existence of which is so widely known as to justify an expectation that it will be observed with respect to an international sale such as

the one in question as, for example, in sales on internationally recognized commodity markets and exchanges, and at trade fairs and auctions of an international character."

In the French text:

"2. Sont notamment considérés comme des usages auxquels les parties sont réputées s'être tacitement référées ceux qui sont si régulièrement observés et si largement connus qu'on doit s'attendre à ce qu'ils soient observés dans une vente internationale telle que la vente en question, s'agissant par exemple de ventes effectuées sur des marchés internationalement reconnus et dans les foires ou ventes aux enchères de caractère international."

86. A second proposal, also retaining paragraphs 1 and 3 of article 9, would revise paragraph 2 to read as follows,

In the English text:

"2. The parties shall also be bound by any usage which has such regularity of observance and the existence of which is so widely known as to justify an expectation that it is observed by the parties to the contract involved [in particular, in sales on internationally recognized commodity markets and exchanges, and at trade fairs and auctions of an international character]."

In the French text:

"2. Les parties sont également liées par les usages qui sont si régulièrement observés et si largement connus qu'on doit s'attendre à ce qu'ils soient observés par elles [en particulier dans les ventes effectuées sur des marchés internationalement reconnus, et dans les foires ou ventes aux enchères de caractère international]."

87. A sponsor of this second proposal noted that it was narrower in invoking usage than the first proposal quoted above. A majority of the representatives supported the second proposal; some noted that the language was an acceptable compromise among divergent positions.

88. Some representatives expressed doubt about the illustrations contained in the second proposal. It was suggested that the illustrations were not typical of important types of commercial practices, and hence did not clarify the text. Some doubt was expressed about when an auction was "of an international character". To indicate these doubts so that the matter could be considered further, the illustrations were put in brackets.

89. One representative noted its view that effect should only be given to usages to which the parties had specifically referred. The proposal referred to in paragraph 2 above goes beyond this acceptable scope.

90. One representative commented on the proposal set out in paragraph 86 above. In his opinion article 9-1 of ULIS mentions "impliedly" and article 9-2 does not, a difference which might lead to the improper conclusion that only usages that fall within article 9-1, and not those that fall within article 9-2, may effect the "implied" exclusion of ULIS contemplated by article 3. This conclusion would be unfortunate and would be

counter to the second sentence of the present article 9-2. To carry out the sense of the proposal, the language "expectation that it is observed" should read "expectation that it will be observed" or "expectation that it would be observed".

F. Continuing need for uniform rules on choice of law: the 1955 Hague Convention

91. The Working Group gave preliminary attention to the problems under this heading presented in part III, chapter F, of the Working Paper (paras. 64-67). The Working Group noted that a decision on this matter depended on the prior resolution of issues presented by article 2 of the Uniform Law (see part II, chapter A, *supra*). At the time of this discussion, the problems presented by article 2 of ULIS had not yet been resolved. For this reason, it was not feasible to reach a decision at this session on the present topic. Some delegations however stressed the interest the 1955 Hague Convention could have apart from matters covered by ULIS.

G. Use of abstract or complex legal terms in drafting: ipso facto avoidance and notice to the other party to a sales transaction

92. The problem discussed under this heading was analysed in the Working Paper in part III, chapter G (1) (a) (paras. 68-73).

93. One representative drew attention to the problem presented by the example stated in the Working Paper at paragraph 71. In this example, a seller delays making a demand for payment for goods which he has delivered to the buyer. It was observed that *ipso facto* avoidance of the contract in such situations cast doubt on the seller's right to recover the price for goods which the buyer had received; under the present text of the Uniform Law a solution seemed difficult. Other representatives expressed support for this view.

94. The concept of *ipso facto* avoidance without a corresponding declaration was questioned by some representatives. It was put forward that the legal hypothesis in articles 25, 26, 30 and 62 leaves considerable uncertainties and, therefore, a declaration as to avoidance on the part of the buyer in articles 25, 26 and 30 and on the part of the seller in article 62 should be required.

95. Several representatives expressed the view that the expression "*ipso facto* avoidance" was abstract and confusing; the difficulty of translating this expression into other languages was also noted. It was suggested that the language "shall be *ipso facto* avoided" might be more clearly expressed in English as "shall be considered as cancelled".

96. Other representatives defended the concept of *ipso facto* avoidance within the context of a fundamental breach of contract, since the concept of *ipso facto* avoidance was, in certain sales, consistent with commercial practice. The Uniform Law had incorporated the measures necessary to ensure that *ipso facto* avoidance was only applied with the desired flexibility (e.g., articles 26 and 3). Moreover, to require notice in every case would deprive one party of his rights if he had not complied with a formality that would be completely

unnecessary in certain circumstances. Finally, the party who had to give notice would be obliged to retain proof of it; thus, a simple clarification of the situation by telephone would be rendered impossible.

97. The Group referred the problem to a Working Party (Working Party III) consisting of the representatives of France, Hungary, Japan, Norway and the United States of America. The observers of international organizations concerned were also invited to participate.

98. Working Party III later reported its recommendation that article 62 of the Uniform Law be amended to read as follows,

In the English text:

"1. (Unchanged)

"2. If the buyer requests the seller to make known his decision under paragraph 1 of this article and the seller does not comply promptly, the contract [shall be *ipso facto* avoided] [be considered as cancelled].

"3. If, however, the buyer has paid the price before the seller has made known his decision under paragraph 1 of this article and the seller thereafter does not exercise promptly his right to declare [the contract avoided] [the cancellation of the contract] the contract cannot be [avoided] [considered as cancelled].

"4. Where the seller has required the buyer to pay the price and does not obtain the payment within a reasonable time, the seller may declare the contract [avoided] [cancelled].

"5. (Identical with the present paragraph 2.)"

In the French text:

"1. (*Sans changement*)

"2. *Si l'acheteur demande au vendeur de lui faire connaître sa décision et que le vendeur ne lui répond pas dans un bref délai, le contrat est résolu de plein droit.*

"3. *Si cependant l'acheteur a payé le prix avant que le vendeur ait fait connaître sa décision et que le vendeur ne déclare pas la résolution du contrat dans un bref délai, toute résolution du contrat est écartée.*

"4. *Lorsque le vendeur a choisi l'exécution du contrat et qu'il ne l'obtient pas dans un délai raisonnable, il peut déclarer la résolution du contrat.*

"5. (*Semblable au paragraphe 2 actuel.*)"

99. The Chairman of the Working Party reported that the above revision was designed to make article 62 (on avoidance by the seller) correspond with the provisions of article 26 (on avoidance by the buyer).

100. One representative submitted a proposal to modify paragraph 3 of the above revision to read as follows,

In the English text:

"3. If, however, the buyer has paid the price or the goods have been handed over to him before the seller has made known his decision under paragraph 1

of this article and the seller thereafter does not exercise promptly his right to declare [the contract avoided] [the cancellation of the contract] the contract cannot be [avoided] [considered as cancelled]."

In the French text:

"3. *Si cependant l'acheteur a payé le prix ou si la chose lui a été remise avant que le vendeur ait fait connaître sa décision et que le vendeur ne déclare pas la résolution du contrat dans un bref délai, toute résolution du contrat est écartée.*"

101. The sponsor of this modification noted that this proposal would insert in paragraph 3 the phrase "or the goods have been handed over to him". In support of this modification it was noted that where the goods have been handed over to the buyer the effect of "*ipso facto* avoidance" would be unjustly to jeopardize the seller's right to recover the price for the goods. Other representatives supported this position.

102. The Chairman of Working Party III stated that the Working Party had not considered this proposal. Hence he suggested that this proposal be reported to the Commission without a recommendation; the problem is complex since under the Uniform Law the goods may be deemed to be "delivered" or "handed over" to the buyer while they are in the course of carriage. One representative stated his opposition to the proposal particularly because its notion of delivery of the goods might be vague in this context.

103. The Working Group approved the recommendation of Working Party III, but noted that the underlying problem seemed to present difficulties that deserved further attention. The Working Group therefore recommended that the Commission request the Secretariat to prepare an analysis of the problem for later consideration at a subsequent session of the Working Group on Sales. The Working Group also noted that further consideration should be given to the suggested substitute for the phrase "*ipso facto* avoided".

104. In the course of the discussion, some representatives called attention to the fact that avoidance of the contract required the application of the concept of "fundamental breach of contract". These representatives noted that the definition of this concept in article 10 of ULIS presented difficulties that needed further consideration.

H. *Time and place for inspection; time for notification of defects in delivered goods*

105. The present problem was analysed in the Working Paper in part III, chapter G 1 (b) (paras. 74-75).

106. Several representatives stated that article 38 of the Uniform Law required buyers to inspect goods under circumstances that would often be inconvenient or impractical. The difficulty centred on paragraph 3 of the article, which seemed designed to modify the general rule of paragraph 1 in a manner that was unworkable when the buyer reshipped goods to a customer, and was particularly difficult to apply to a series of resales ("chain contracts"). The problem was also serious in containerized shipments when it would be impractical to break into the general container.

107. It was noted that a failure to inspect and discover defects within the time prescribed in article 38 of the Uniform Law led to serious consequences since under article 39, if the buyer fails to notify the seller promptly after he ought to have discovered a lack of conformity in the goods, the buyer "shall lose the right to rely" on this lack of conformity. One representative observed that delay in notifying the seller of defects when goods are reshipped might properly bar the buyer from rejecting the goods, but the same strict rule should not govern a buyer's claim for damages or for reduction of the price with respect to goods that prove to be defective.

108. The Working Group decided to constitute a Working Party to consider the problem. This Working Party (Working Party IV) included the representatives of France, Japan, Kenya, Norway and the United States of America. The observers of international organizations concerned were also invited to participate.

109. Working Party IV later reported to the Working Group its recommendation that article 38 of the Uniform Law should be revised as follows,

In the English text:

"1. (no change)

"2. In the case of carriage of the goods, examination may be deferred until the goods arrive at the place of destination.

"3. If the goods are redispached by the buyer without a reasonable opportunity for examination by him and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redispach, examination of the goods may be deferred until they arrive at the new destination.

"4. (no change)."

In the French text:

"1. (sans changement)

"2. *En cas de transport de la chose, l'examen peut être retardé jusqu'à son arrivée au lieu de destination.*

"3. *Si la chose est réexpédiée par l'acheteur sans qu'il ait eu raisonnablement la possibilité de l'examiner et que le vendeur ait, lors de la conclusion du contrat, connu ou dû connaître la possibilité d'une telle réexpédition, l'examen peut être retardé jusqu'à l'arrivée de la chose à sa nouvelle destination.*

"4. (sans changement)."

110. In discussing this recommendation it was noted that in paragraph 2 the phrase "may be deferred" was employed to make clear that in the carriage of the goods there may be need to defer inspection; the present language of the Uniform Law ("shall examine") might not be understood in this sense. It was also reported that the revision of paragraph 3 was made primarily because the provisions of the Uniform Law with reference to "trans-shipment" proved difficult to construe and, under some readings, might require inspection when this was neither contemplated nor feasible. The more flexible language of the proposal was also designed to meet new conditions presented by the development of

containerized shipment, during which it would often be difficult or impossible to effect an inspection.

111. The Working Group approved this recommendation.

I. The concept of "delivery" (délivrance) and the definition of the seller's obligations

112. The problem under this heading was introduced in the Working Paper in part III, chapter G 1 (c) (paras. 76-77).

113. Various representatives noted difficulty with the application of the term which, in the English version, is "delivery" and the French version is "délivrance". One representative reported that business circles in his country had expressed doubt about the meaning of the definition in article 19 of the Uniform Law, and expressed concern as to its application to various important international contracts, such as contracts F.O.B. Buyer's City, F.O.B. third party's City, C.I.F. and the like. Another noted that, as used in the Uniform Law, the term was difficult to translate and in the setting of specific rules seemed to produce circular expressions or tautologies. The history of this expression in earlier drafts was also mentioned.

114. One representative noted that lawyers and merchants in his country had become accustomed to a more direct and concrete approach to legislative drafting; the abstract and artificial character of this aspect of the Uniform Law would be a barrier to adoption.

115. In reply, it was noted that the difficulties noted resulted from the fact that "délivrance" was a term of art. This, however, was an advantage in an international text since such a term emphasized that local and divergent understandings should not be employed. Caution was also advised with respect to changing this term since it was employed in many parts of the Uniform Law and referred to a fundamental concept of this law.

116. To assist in further examination of this problem, the Working Group decided to request the Secretariat to prepare an analysis of the use of the concept of delivery (délivrance) in the Uniform Law. The Working Group noted that the time for the preparation and presentation of this analysis would need to take account of the current work programme of the Secretariat; if the study cannot be prepared in time for consideration at the third session of the Commission it could be made available for consideration at a subsequent session of the Working Group.

117. The Secretary-General of UNIDROIT offered to assist with the analysis by preparing a study of the historical background of the use of this term in the drafts which led to the version adopted at the Hague Conference of 1964. One representative noted that he had prepared a brief analysis of the use of this concept in the Uniform Law and agreed to make this analysis available to the members of the Working Group and to the Secretariat.

J. Consumer protection and mandatory or regulatory rules of national law

118. A representative raised the problem of the extent to which the Uniform Law would override na-

tional regulation for the benefit of consumers, in those situations in which sales to consumers might be subject to the Law. Attention was drawn to article 7 of the Uniform Law which provides that the law shall apply "regardless of the commercial or civil character of the parties or of the contract".

119. It was noted that articles 4 and 8 indicated that the Uniform Law did not mean to override such protective legislation. Such legislation is primarily designed to invalidate oppressive and unfair contracts and contract clauses; hence these laws would seem to relate to "validity" of the contract and thus were protected by article 8. It was noted that such was the understanding expressed at the Hague Conference of 1964. On the other hand, article 5, paragraph 2, of ULIS specifically protects only one type of mandatory law - "a national law for the protection of a party to a contract which contemplates the purchase of goods by that party by payment of the price by instalments". This provision might lead to the conclusion that article 5, paragraph 2, implies that other mandatory rules will be overridden by the Uniform Law. The meaning of the Uniform Law on this point was thus left in doubt.

120. One representative suggested that the above difficulty might be met either by repealing article 5-2, or by broadening its scope to preserve all national mandatory rules for the protection of consumers. He offered the following formulation which could be substituted for article 5-2: "2. The present law shall not affect the application of any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of consumer goods primarily for personal, family or household purposes."

121. Another representative noted that the underlying problem was exceedingly difficult. Different legal systems follow differing approaches in deciding what rules are mandatory or imperative, and these concepts have no generally understood meaning. A general exception for local mandatory rules would undermine the uniformity of the law. On the other hand, it was recalled that at the Hague Conference many felt that the present solution was not wholly satisfactory.

122. It was suggested that members of the Working Group provide examples of national rules that were regarded as mandatory to aid in further work on the problem. The Working Group decided to recommend to the Commission that further attention be given to this problem in the light of this and other material that might be available.

123. One representative noted that in the replies and comments and in earlier discussion, the Union of Soviet Socialist Republics had noted its objection to article 15 of the Uniform Law on the ground that this provision would override its national mandatory rules that specified contracts must be expressed in writing. It was noted further that article 15 seemed to present a barrier to adoption of the Uniform Law by certain States.

124. The Working Group considered that the merits of article 15 presented a serious problem that merited

careful consideration at the third session of the Commission.

III. RECOMMENDATIONS AS TO FURTHER WORK

125. Due to the limited time available to it, the Working Group was not able to complete the work assigned to it by the Commission at its second session, as referred to in paragraph 1 above. Accordingly the Working Group submits this progress report to the Commission and recommends that the Commission should consider at its third session what further steps it wishes to take in order to further unification of the law in this field.

ANNEX I

List of participants

BRAZIL

Representative

Mr. Nehemias DA SILVA GUEIROS, Professor of Law, Ambassador.

Expert

Mr. Evaldo L. CABRAL DE MELLO, Second Secretary, Brazilian Mission to the United Nations.

FRANCE

Representative

Mr. André TUNC, Professor of Law, Faculté de Droit et des Sciences économiques de Paris.

GHANA

Representative

Mr. K. K. DEI-ANANG, Lecturer in Commercial Law, University of Ghana.

Alternate

Mr. E. SAM, Legal Counsellor, Permanent Mission of Ghana to the United Nations.

HUNGARY

Representative

Mr. Gyula EÖRSI, Professor of Law, "Eötvös Loránd" University, Budapest.

Alternate

Mr. Ivan SZASZ, Head of the Legal Department, Ministry for Foreign Trade.

INDIA

Representative

Mr. D. A. KAMAT, Assistant Legal Adviser, Ministry of External Affairs.

IRAN

Representative

Mr. Mansour SAGHRI, Professor of Commercial Law, University of Teheran.

JAPAN

Representative

Mr. Shinichiro MICHIDA, Professor of Law, University of Kyoto.

KENYA

Representative

Mr. Raphael Joseph OMBERE, Second Secretary, Permanent Mission of the Republic of Kenya to the United Nations.

MEXICO

Representative

Mr. Jorge BARRERA-GRAF, Professor of Law, University of Mexico.

NORWAY

Representative

Mr. Stein ROGNLIEN, Head of Department of Legislation, Ministry of Justice.

Experts

Mr. Jan HELLNER, Professor of Law, University of Stockholm;
Mr. A. VINDING KRUSE, Professor of Law, University of Copenhagen;
Mr. Heikki JOKELA, Professor of Law, University of Helsinki.

UNION OF SOVIET SOCIALIST REPUBLICS

Representative

Mrs. A. P. STRELIANOVA, Expert on Juridical Matters, Ministry of Foreign Trade.

UNITED KINGDOM

Representative

Mr. Anthony G. GUEST, Professor of English Law, University of London.

Alternate

Mr. Henri G. DARWIN, Legal Counsellor, United Kingdom Mission to the United Nations.

UNITED STATES

Representative

Mr. E. Allan FARNSWORTH, Professor of Law, Columbia University, School of Law.

Observers

A. GOVERNMENTS

Congo (Democratic Republic)

Mr. Nicolas BOFUNGA, Minister Counsellor, Permanent Mission of the Democratic Republic of the Congo to the United Nations.

Czechoslovakia

Mr. Jiri MLADEK, First Secretary, Permanent Mission of the Czechoslovak Socialist Republic to the United Nations.

Italy

Mr. Joseph NITTI, First Secretary, Permanent Mission of Italy to the United Nations.

Romania

Mr. Nita CONSTANTIN, Third Secretary, Permanent Mission of the Socialist Republic of Romania to the United Nations.

Spain

Mr. Ricardo CORTES, First Secretary, Permanent Mission of Spain to the United Nations;
Mr. Fernando ARIAS-SALGADO, Second Secretary, Permanent Mission of Spain to the United Nations.

B. INTERGOVERNMENTAL ORGANIZATIONS

Council of European Economic Community

Mr. Jean-Pierre PUISOCHET, Director of the Legal Department, Legal Adviser of the Council.

Hague Conference on Private International Law

Mr. Matthijs VAN HOOGSTATEN, Secretary-General.

International Institute for the Unification of Private Law

Mr. Mario MATTEUCCI, Secretary-General.

C. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS

International Chamber of Commerce

Mr. Lars A. E. HJERNER, Professor of International Law, Rapporteur to the ICC Commission on Law and Commercial Practices.

Secretariat of the Working Group

Mr. Blaine SLOAN, Representative of the Secretary-General, Director of the General Legal Division, Office of Legal Affairs;

Mr. John HONNOLD, Secretary of the Working Group, Chief, International Trade Law Branch;

Mr. Peter KATONA, Assistant Secretary of the Working Group, Senior Legal Officer;

Mr. Gabriel WILNER, Assistant Secretary of the Working Group, Legal Officer.

ANNEX II

Working Paper prepared by the Secretariat

CONTENTS

	<i>Paragraphs</i>
I. THE WORKING GROUP ON SALES: ESTABLISHMENT; MATERIALS	1-6
II. THE COMMISSION'S MANDATE TO THE WORKING GROUP; CONSIDERATIONS BEARING ON CHOICE AMONG WORKING METHODS	7-15
III. ISSUES RAISED BY THE STUDIES AND COMMENTS	16-77
A. Principles on choice of law in uniform legislation on sales; the relationship between the Hague Convention of 1955 and the Hague Conventions of 1964	16-18
1. The issues	16-17
2. Method of work	18
B. The character of the international sale that will invoke a uniform law; Questions arising out of article 1 of the Uniform Law on Sales and article 1 of the Uniform Law on Formation	19-22
1. The issues	19-21
2. Method of work	22
C. Relationships among unification projects; Reconciliation or consolidation	23-54

CONTENTS (continued)

	Paragraphs
1. The uniform law on formation and the uniform law on sales	24-33
(a) Background	24-30
(b) The issue	31
(c) Method of work	32-33
2. The Uniform Law on Sales and the proposed convention on time-limits and limitations (prescription)	34-49
(a) Background	34-47
(b) Issues; alternative approaches	48
(c) Method of work	49
3. Possible consolidation with other projects for unification with respect to the international sale of goods	50-54
(a) Background	50-52
(b) Issues; method of work	53-54
D. Recourse to general principles: article 17 of the Uniform Law on Sales	55-58
1. The issues	55-57
2. Method of work	58
E. Binding effect of general usages	59-63
1. The issues	59-62
2. Method of work	63
F. Continuing need for uniform rules on choice of law: the Hague Convention of 1955	64-67
1. Issues	64-66
2. Method of work	67
G. Use of abstract or complex legal concepts in drafting; <i>ipso facto</i> avoidance and notice to the other party to a sales transaction	68-77
1. Issues	70-76
(a) <i>Ipso facto</i> avoidance	70-73
(b) Notification by buyer to seller concerning defects in delivered goods; place for inspection	74-75
(c) The concept of "delivery" (<i>délivrance</i>) and the definition of the seller's obligation	76
2. Method of work	77
IV. OTHER ISSUES FOR POSSIBLE CONSIDERATION	78-83
A. Obligation to incorporate uniform law into national legislation versus use of uniform law as model	79
B. Exclusion of the uniform law by agreement	80
C. Deterioration of economic situation by one party: suspension of performance; stoppage in transit	81
D. The Uniform Law on Formation; circumstances under which offers are irrevocable	82
E. Uniform rules on choice of law; choice between the law of residence of seller or buyer	83
V. PROCEDURES FOR IMPLEMENTING CONCLUSIONS WITH RESPECT TO UNIFICATION	84
Appendix. - Organizations invited to attend meeting of working group	Page 198

I. THE WORKING GROUP ON SALES: ESTABLISHMENT; MATERIALS

1. The United Nations Commission on International Trade Law (UNCITRAL) at its second session decided to establish a Working Group of fourteen members to consider proposed measures to unify the law with respect to international sales

¹ Report of the United Nations Commission on International Trade Law on the work of the second session (1969), *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)*, para. 38.

of goods. Thus, the Commission's Report¹ recorded the decision:

"3. To establish a Working Group — composed of the following fourteen members of the Commission: Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America — which shall:

"(a) Consider the comments and suggestions by States as analysed in the documents to be prepared by the Secretary-

General² ... in order to ascertain which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose, or what other might be taken to further the harmonization or unification of the law of the international sale of goods;

"(b) Consider ways and means by which a more widely acceptable text might best be prepared and promoted, taking also into consideration the possibility of ascertaining whether States would be prepared to participate in a Conference;

"(c) Submit a progress report to the third session of the Commission;"

2. The meeting of the Working Group on Sales has been set for 5 to 16 January 1970 at the United Nations Headquarters in New York. In accordance with other portions of the Commission's resolution, invitations to attend this meeting of the Working Group have been addressed to members of the Commission not represented on the Working Group, to UNIDROIT, the Hague Conference on Private International Law and to other international organizations concerned.³

3. In accordance with a request by the Commission,⁴ the Secretary-General has completed two studies. One was a completion of an initial analysis that had been presented to the second session of the Commission;⁵ this analysis dealt with replies and studies of the Hague Conventions of 1964 received prior to the second session of the Commission. Thereafter, additional States submitted studies on this subject. In addition, during the second session of UNCITRAL there was substantial discussion of these Conventions; this discussion was summarized in annex I to the Report on the second session. In response to the request by the Commission this initial study has been superseded by an expanded Report on the Hague Conventions of 1964 by the Secretary-General: Analysis of the Studies and Comments by Governments (A/CN.9/31). A second study, made by the Secretary-General at the Commission's request, is the Analysis of the Studies and Comments on the Hague Convention of 1955 (A/CN.9/33).⁶

4. The Working Group on Time-limits and Limitations (Prescription) met in Geneva on 18 to 22 August 1969. At this meeting the Working Group requested the Working Group on Sales to give priority attention to one problem of common interest: the definition of international sale of goods for the purpose of defining the scope of uniform laws in this area (A/CN.9/30, para. 11 (ii)). This matter will be discussed further *infra* at paragraphs 34 to 49.

5. This Working Paper is designed to assist the Working Group on Sales in deciding on its programme. The documentation relevant to the Group's work is voluminous. Replies and studies on the Hague Conventions of 1964 and the appended uniform laws (herein termed the Uniform Law on Sales and the Uniform Law on Formation) have been transmitted by forty States.⁷ As has been noted, further comments on the

1964 Hague Conventions were made during the second session of the Commission and are summarized in annex I to the Commission's Report. These comments range widely over numerous provisions of the two 1964 Hague Conventions, the Uniform Law on Sales and the Uniform Law on Formation. In addition, several States transmitted comments or studies on the 1955 Hague Convention on the Law Applicable to the International Sale of Goods (A/CN.9/12 and Add.1 to 4); further observations made in the course of the second session of the Commission are summarized in annex II of the Commission's Report. As will be seen from the Secretary-General's analysis of these studies and comments (A/CN.9/31; A/CN.9/33) the Hague Conventions of 1955 and 1964 present related problems that expand the field of consideration by this Working Group.

6. In the interest of brevity, these various documents will be cited as follows: The Replies and Studies concerning the Hague Conventions of 1964 (A/CN.9/11) will be cited as *Replies: 1964*. This document (A/CN.9/11) is supplemented by six addenda; these will be cited *Replies: 1964, Add.1, Add.2, etc.* The Report of UNCITRAL on the work of its second session will be cited as *UNCITRAL Report*. The Secretary-General's analysis of these replies and studies concerning the 1964 Hague Conventions (A/CN.9/31) will be cited as *Analysis 1964*. Similarly, the replies with respect to the Hague Convention of 1955 (A/CN.9/12) will be cited as *Replies: 1955*; the addenda to that document will be cited as *Replies: 1955, Add.1, Add.2, etc.* The Secretary-General's analysis of these replies (A/CN.9/33) will be cited as *Analysis: 1955*.

II. THE COMMISSION'S MANDATE TO THE WORKING GROUP; CONSIDERATIONS BEARING ON CHOICE AMONG WORKING METHODS

7. The Commission's decision, quoted in paragraph 1, *supra*, expressed agreement on the goal of "harmonization or unification of the law of international sale of goods" but reflected doubts concerning the most effective route to reach this goal. These doubts primarily concerned the part that should be played by the Hague Conventions of 1955 and 1964.

8. The initial task assigned to the Working Group by the Commission's decision (para. 3 (a) quoted in para. 1, *supra*) was to "consider the comments and suggestions" that States have submitted with respect to these conventions. Presumably, the Working Group is expected to do more than catalogue these comments and suggestions, or express general opinions about the suitability of these conventions to promote the harmonization or unification of the law of international sales; this had already been done in the Replies and Analyses and in the debates at the second session of UNCITRAL.

9. It seems probable that one important contribution which the Commission expects from the Working Group is to subject the most important and basic issues raised by these replies and studies to intensive examination. By such an examination it may be possible for the Working Group to develop a clearer view concerning the substantiality of the objections and suggestions that have been expressed with respect to these conventions. It may be hoped that through such an intensive examination the Working Group may be able to help the Commission reach a wider consensus either supporting the provisions of the existing texts, or to ascertain (in the language of para. 3 (a) of the Commission's decision) "which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social or economic systems, or whether it will be necessary to elaborate a new text for the same purpose, or what other steps might be taken to further

² The documents to be prepared by the Secretary-General were described in paragraphs 1 and 2 of the Commission's decision. These documents are described more fully in this Working Paper at paragraph 3, *infra*.

³ The organizations invited to attend the meeting of the Working Group are listed in annex I to this Paper.

⁴ UNCITRAL, Report on Second Session (1969), *supra* note 1, para. 38, at paras. 1 and 2 of the Commission's decision.

⁵ A/CN.9/17.

⁶ As will be noted *infra*, for the sake of brevity these two studies will be cited, respectively, as *Analysis: 1964* and *Analysis: 1955*.

⁷ A/CN.9/11 and Add.1 to 6; A/CN.9/L.9. Some of the communications were brief reports on intent with respect to

ratification of or accession to the Convention. On the other hand, some studies are voluminous; some States submitted two studies.

the harmonization or unification of the laws of the international sale of goods".

10. Although, as we have seen, the Commission requested the Working Group to "consider the comments and suggestions" that have been submitted, the number of issues that have been raised in these comments and suggestions makes it impossible for the Working Group to give intensive examination to all of these issues within the allotted time. Some principle of selection is needed.

11. The Working Group may, therefore, wish to consider first those issues that are basic, in the sense that a decision on these issues would affect the method of approach to other issues. Part III of this Working Paper presents first those issues which seem to meet this test, and which also have been the subject of attention in a significant number of the replies and studies.

12. There are other issues which may well be deemed to be more suitable for this purpose; the Working Group probably will wish to consider, at the outset, whether there are other problems which should be added to or substituted for those listed in Part III.

13. The intensity of the treatment in this Working Paper is influenced by the degree to which the issues have been developed in the replies and studies and in the discussions before the Commission. Thus, the first of these issues (Part III A, *infra*, on choice of law) has been fully developed; consequently, the treatment of this issue in this Working Paper is relatively brief. In contrast, the third issue (Part III C, *infra*, on co-ordination among unification projects) seemed to require a fuller presentation. This is primarily the result of problems of relationship between the scope of (1) proposed uniform rules on the substantive laws of sales and (2) the proposed convention on time-limits and limitations (prescription) considered by the Working Group in August 1969 (A/CN.9/30), discussed *supra* at para. 4 and *infra* at paras. 34-49). These problems emerged only as the Working Group on Prescription developed the subject; therefore, these problems were not fully presented in the earlier papers presented to the Commission. Nevertheless, the relationship between conventions in this field present issues that will affect the further work on both subjects, and therefore may require careful attention at this stage.

14. Even where it is necessary to give careful attention to specific statutory provisions, it should not be necessary for the Working Group at this stage to attempt to solve problems of detail. In each case, the specific legal provisions probably should be examined only to the extent necessary to enable the Working Group to make an informed recommendation concerning the acceptability of the provision and, in some instances, concerning the choice of methods for future work on the problem. Where such specific problems or objections are analysed, the Working Group may wish to concentrate on this fundamental question: Is the problem presented by the present text of sufficient substance to interfere with widespread acceptance—the ultimate objective stated in the Commission's resolution. The Working Group may indeed consider it proper to suspend judgement on this fundamental question until the Group has considered all or most of the substantial problems that have been raised in the replies and studies.

15. It will be noted that this Working Paper, under most of the major problems, gives separate attention to (1) the issues and (2) methods of work. Under the second of these headings the Working Group is invited to consider whether the problem in question is ready for discussion by the entire Working Group, or whether the problem poses difficulties that could more effectively be approached with the help of a report and recommendation by a small working party. The different issues may call for varying working methods; the

Group will probably wish to choose an approach that it deems suitable to the problem at hand.

III. ISSUES RAISED BY THE STUDIES AND COMMENTS

A. Principles on Choice of Law in Uniform Legislation on Sales; The Relationship between the Hague Convention of 1955 and the Hague Conventions of 1964

1. The issues

16. The issue that received the most widespread attention in the Studies and Comments is the following: What (if any) rules should a uniform law for international sales contain with respect to the law's application to transactions involving one or more States that had not adopted the uniform law? The discussion of this issue centred on articles 1 and 2 of the Uniform Law on Sales and the Reservations permitted in articles III, IV and V of the 1964 Conventions.⁸ See *Analysis: 1964*, paras. 25-27 (art. III of the 1964 Convention); paras. 28-40 (art. IV of the 1964 Conventions, art. 2 of the Uniform Law on Sales, and art. 1 of the Uniform Law on Formation); paras. 41-54 (art. V of the 1964 Convention on Sales); *Analysis: 1955*, paras. 8-14.

17. The principal alternative approaches seem to be these:

Alternative I. The approach of the Uniform Law on Sales, article 2, directing the *fora* of contracting States to apply the Uniform Law to international sales without regard to the relationship between the transaction and a contracting State. *Analysis: 1964*, paras. 25-27, 32-40; *UNCITRAL Report*, annex I, paras. 36-40; *Replies: 1964*, p. 22 (Norway); *Add.1*, pp. 4-5, paras. 4-5 (Cz.); *Add.3*, pp. 4-8, paras. 1-4 (Hungary).

(a) Analysis of this approach presumably should include the effect of the opportunity for contracting States to make one or more of the reservations provided in articles III, IV and V of the Convention on Sales (cf. articles III and IV of the Convention on Formation). *Analysis: 1964*, paras. 25-27 (art. III); paras. 28-40 (art. IV); paras. 41-54 (art. V); *Replies: 1964*, p. 5 (Austria); p. 22 (Norway); *Add.1*, pp. 26-27 (Spain).

Alternative II. The inclusion in a uniform law of choice of law rules (cf. the Hague Convention of 1955) prescribing the relationship between the international sales transaction and a contracting State that would invoke the uniform law.

(a) The application of such rules could be illustrated as follows: Seller in State A sells to Buyer in State B. Assume further that the rules on choice of law are like those of the Hague Convention of 1955 and the transaction is such that these rules select the law of the seller (e.g. the order was not received in the buyer's country under the exception of paragraph 3 of Article 3 of the Hague Convention of 1955). Under this alternative, the uniform law on sales would be applicable if (and only if) State A—the seller's country—has adopted the uniform law.

(b) If the rules on choice of law set forth in the uniform law on sales are not the same as those of the Hague Convention of 1955, consideration would have to be given to the possibility of a reservation by States that adhere to that Convention. (Cf. the reservation allowed under Article IV of the 1964 Convention on Sales.)

Alternative III. A provision that the uniform law will apply only if parties to the transaction are located in different contracting States. (Cf. the reservation allowed under Article III of the 1964 Convention.)

(a) It should be noted that this approach might restrict the scope of the uniform law more narrowly than the use of

⁸ Substantially the same problems are presented by article 1 of the Uniform Law on Formation and the reservations permitted under articles III and IV of the accompanying Convention.

traditional rules on choice of law. e.g. Seller in State A sells to Buyer in State B; State A has adopted the uniform law but State B has not; assume further that traditional rules on choice of law would point to the law of State A. This alternative (following Article III of the 1964 Conventions) would seem to call for application of the local law of State A rather than the uniform law.

Alternative IV. Omitting any rules on choice of law from the uniform law and thereby remitting the question to the rules on choice of law of the *forum*: i.e., if the rules of the *forum* (whether under the Hague Convention of 1955 or other rules on choice of law of the *forum*: i.e., if the rules of the law on sales would be applicable to an international sale if (and only if) State A has adopted the uniform law.

(d) It is apparent that adoption of this alternative would increase the need for unification of the rules on choice of law applicable to international sale of goods. Cf. the discussion, in Part III F, paras. 64-67 *infra*, of the 1955 Hague Convention on the Law Applicable to the International Sale of Goods. *Replies: 1955; Analysis: 1955.*

2. Method of work

18. The above alternatives present differing levels of technicality and complexity.

(a) At one level are issues of general policy which have been examined in the Studies by States and Organizations and have been discussed at the second session of the Commission. In view of this preparation, the Working Group may wish to commence discussion of these issues without submitting them first to a small working party. Perhaps the discussion at this stage could be most effectively directed towards whether there is a substantial consensus either supporting or rejecting any of the alternatives as outlined in paragraph 17.

(b) If the Working Group as a whole can narrow the field of acceptable alternatives but cannot agree on a single approach, the Group may then wish to consider whether (i) to postpone work on the issue, or (ii) to designate a small working party to give closer attention to the problem with a view to developing a recommendation for consideration by the Working Group.

B. The character of the international sale that will invoke a uniform law; questions arising out of Article 1 of the Uniform Law on Sales and Article 1 of the Uniform Law on Formation

1. The issues

19. Several comments have been directed to the definition of the "international sale of goods" as a term that determines the applicability of the uniform laws. *Analysis: 1964*, paras. 58-66. In addition, the Working Group on Time Limits and Limitations (Prescription) requested the Working Group on Sales and UNCITRAL to give priority attention to this definition; this request reflected the decision of that Working Group (A/CN.9/30, para. 11) that "It would be desirable for a convention on prescription to contain the same definition of scope as a convention on the substantive law governing the international sale of goods".

20. The principal questions with respect to this definition fall under these headings:

(a) Under Article 1 (a) of the Uniform Law on Sales one alternative test for the Law's applicability is "where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another".⁹ Studies and Comments have raised questions con-

cerning the applicability of the uniform laws where the parties expect that the goods will be (or may be) supplied by the carriage of goods from one State to another, but where such an obligation (or expectation) is not expressed in the contract. More specifically, must the contract express such an obligation? Is it sufficient if the contract indicates an expectation of such carriage but imposes no obligation to this effect? (E.g., the contract permits the seller either to ship or to deliver locally.) Is the Law applicable if the parties expect carriage from one State to another but that expectation is not mentioned in the contract? Is the Law applicable if there is no understanding (or expectation) that the goods will be the subject of international carriage but such carriage in fact occurs?¹⁰ *Analysis: 1964*, paras. 61-66; *Replies: 1964*, p. 23 (Norway); *Add.1*, p. 7, para. 14 (Cz.); *UNCITRAL Report*, annex I, para. 31 (Japan), para. 33 (Cz.).

(i) The foregoing questions seemed to be primarily concerned with the clarity of the definition rather than the breadth or narrowness of coverage. Therefore, the Working Group may wish at the outset to give principal attention to the question of clarity.

(b) It was suggested that the Uniform Law be extended to include sales in the following situation: Seller, having his principal place of business in State A, brings stocks of goods into State B and then sells these goods in State B. *Analysis: 1964*, para. 65; *UNCITRAL Report*, Annex I, para. 32 (USSR).

(c) It was suggested that a requirement with respect to international shipment should be omitted. *Analysis: 1964*, para. 59; *Replies: 1964*, *Add.1*, p. 8, para. 18 (Cz.). Under this suggestion, the one controlling test would be whether the places of business of seller and buyer were in different States. (This view, standing alone, would broaden coverage, but was coupled with the suggestion (noted in sub-paragraph (e) *infra*) to restrict coverage to commercial transactions.)

(d) Attention was directed to article 1, paragraph 1, of the Uniform Law on Sales, under which the Law would apply only to contracts by parties "whose places of business are in territories of different States". It was suggested that the term "place of business" should be defined. *UNCITRAL Report*, para. 31 (Japan). Cf. *Analysis: 1955*, paras. 34-35. This suggestion seemed to raise the question whether the term "place of business", in relation to some legal systems, might refer to either (a) the location of central management or (b) a branch office.

(e) It has been suggested that the uniform laws should apply only to commercial transactions, as contrasted with sales to consumers for personal, non-business purposes. Cf. Uniform Law on Sales, art. 7; Uniform Law on Formation, art. 1 (8). *Analysis: 1964*, paras. 66, 76-77; *UNCITRAL Report*, Annex I, paras. 33, 35, 54; *Replies: 1964*, *Add.1*, p. 8 (Cz.).

(f) A similar query was directed to the Uniform Law on Formation in relation to local legislation giving consumers a period to disavow contracts negotiated at their homes. *Analysis: 1964*, para. 155; *UNCITRAL Report*, annex I, para. 113; *Replies: 1964*, p. 20 (Norway).

(ii) A closely related question concerns local rules designed to protect unwary buyers from clauses limiting their rights (e.g. by printed form clauses or technical language not likely to be understood by ordinary consumers). If such a domestic rule is stated in terms of "validity", presumably it would be preserved under article 8 of the Uniform Law on Sales; but if the rule is one of interpretation, the impact of the uniform laws may

⁹ Under paragraph 1 the parties must also have their "places of business in the territories of different States". The Uniform Law on Formation sets forth similar rules in article 1.

¹⁰ This last question may call for comparison of the English and French texts of article 1 (para. 1 (a)) of the Uniform Law on Sales. Compare "involves the sale of goods which are ... in the course of carriage or will be carried ..." with "implicue que la chose fait ... ou fera l'objet d'un transport ...".

be more doubtful. Cf. *Replies: 1964, Add.1*, p. 19, Part III-5 (Mexico).

21. Further problems as to scope have been noted. See *Analysis: 1964*, paras. 58-66. One such problem concerned doubt about whether the uniform laws would apply to contracts for the supply and erection of plant and machinery. *Replies: 1964, Add.5*, p. 6 (Sweden). The basis for this question seems to be doubt about whether a contract which was primarily one of engineering services would constitute a "sale" of goods, and whether a contract to build a permanent structure, like a manufacturing plant, would be a sale of "goods" within the meaning of articles 1 and 6 of the Uniform Law on Sale and article 1 (paras. 1 and 7) of the Uniform Law on Formation.

2. Method of work

22. The above problems call for careful analysis of rather complex statutory language in the light of various studies and comments. The Working Group may wish to consider whether its deliberations would be aided by advance study and report by a small working party.

C. Relationships among Unification Projects: Reconciliation or Consolidation

23. Replies and studies have suggested that certain of the

pending uniform laws contain overlapping and conflicting provisions. Some studies have raised the question whether these provisions should be reconciled. *Replies: 1964*, p. 6 (Austria); *Add.3*, p. 91 (Hungary); *Add.4*, p. 7 (USA). Others have suggested that closely related laws should be integrated into a single text. *Replies: 1964, Add.3*, p. 28 (UAR); *Add.4*, pp. 6-8 (USA); (A/CN.9/L.9 (USSR).

1. The Uniform Law on Formation and the Uniform Law on Sales

(a) Background

24. Questions have been raised concerning the relationship between the two uniform laws attached to the Hague Conventions of 1964. *Analysis: 1964*, paras. 78, 90, 144, 146; *Replies: 1964, Add.4, Part C (2)*. These questions seem to arise because of the following: (i) the Uniform Law on Formation and the Uniform Law on Sales were designed to apply to the same transactions, international sales of goods; (ii) at some points problems of formation merge into the substantive rules; (iii) the close relationship has raised questions as to gaps and the construction of overlapping provisions.

25. Further analysis of the relationship between these two uniform laws may be aided by the following table:

Uniform Law on Sales	Uniform Law on Formation	Subject of Article	Relationship
Art. 1 (1)-(5)	Art. 1 (1)-(5)*	Scope of law	Substantially the same**
2	1 (9)	Exclusion of rules of private international law	Identical
3	2 (1)	Exclusion of uniform law by parties	Differences in approach
5 (1)	1 (6)	Law inapplicable to specified sales	Substantially the same
6	1 (7)	Goods to be manufactured	Identical
7	1 (8)	Non-commercial sales included	Substantially the same
9 (1)	4 (2)*	Usages and practices made applicable by parties	Differences in approach
9 (2)	13 (1)	General usages; definition	Differences in approach
9 (3)	13 (2)	Commercial terms: interpretation	Identical
14	12 (2)	Means of communication	Identical
15	3	Writing; form	Substantially the same

* See also Art. I (3) of the Convention on Formation and the alternative Article 1 in annex II to the Uniform Law on Formation.

** Where the provisions are substantially the same the verbal difference usually resulted from the fact that the Uniform Law on Formation was unable to refer to a "contract" or "sale".

26. The degree of overlap can be viewed from two perspectives. The Uniform Law on Sales, which extends to 101 articles, is duplicated in minor part by the Uniform Law on Formation. On the other hand, the Uniform Law on Formation is overlapped in whole or in part with respect to six of its thirteen articles.

27. Studies have noted that the close relationship between the two laws creates problems of interpretation arising from divergencies in approach or language. In specific settings, the question has been raised whether such divergencies were accidental or whether they should be construed as deliberate rejection of the rule of the related statute.

28. One of these is whether a court should make fuller use of national law in construing the Uniform Law on Formation than in construing the Uniform Law on Sales. The Uniform Law on Sales contains a provision (Article 17) that is designed to limit such references to national, non-uniform law; the

Uniform Law on Formation has no such provision. This has led to the question whether this difference compels a different approach in construing the two laws. *Replies: 1964, Add.3*, page 19, para. 11 (a) (Hungary).

29. A similar question was whether the Uniform Law on Formation will override domestic legislation assuring to certain types of buyers a period of reflection before the contract becomes binding. *Replies: 1964*, page 20 (Norway). (Compare the discussion on whether the uniform laws should apply to non-commercial transactions, *supra*, at part III B, para. 20 (e).) In analysing this problem it will be noted that the Uniform Law on Sales provides (Article 8) that it is not concerned with the validity of the contract, whereas the Uniform Law on Formation has no such provision.¹¹ Thus the continuing effect

¹¹ The only reference to validity in the Uniform Law on Formation appears in Article 2 (2); and this is a rule which

of domestic regulatory law may depend on whether it is deemed to relate to the formation of the contract, or to the contract after formation.

30. It has also been suggested that some problems relating to definiteness are dealt with in the Uniform Law on Sales while related problems are dealt with in the Uniform Law on Formation. Thus it is noted that the Uniform Law on Formation (Article 4) states a general rule on whether an offer is sufficiently definite to permit the conclusion of a contract by acceptance, while the Uniform Law on Sales (Article 57) deals with the related problem of the effect of the failure to specify a price. Cf. Uniform Law on Sales, Article 67 on failure to specify "the form, measurement or other features of the goods"; *Replies: 1964, Add.4*, page 7, sec. C (2) (United States of America).

(b) *The issue*

31. The basic issue is whether the Working Group is of the opinion that uniform rules on international sales and on the formation of contracts for international sales would be more widely acceptable if they are presented as separate laws or as a single law.

(c) *Method of work*

32. This basic issue may well prove susceptible of treatment by the Working Group as a whole. If preliminary discussion proves that this is not the case, the Working Group may wish to request a small working party to bring a report and recommendation to the larger group.

33. In approaching this general issue it probably will be necessary to examine the specific questions that have been raised with respect to possible conflicts or gaps between the two uniform rules. However, the Working Group may well decide that working out ways to reconcile any divergencies between the two laws calls for technical drafting which would be premature at this stage.

2. *The Uniform Law on Sales and the proposed Convention on Time Limits and Limitations (Prescription)*

(a) *Background*

34. The Working Group on Prescription, at its meeting in August 1969, noted certain preliminary questions concerning the relationship between the scope of a proposed convention on prescription and that of a uniform law on sales. Certain basic lines of demarcation were laid down by UNCITRAL at its second session. The resolution that created the Working Group on Prescription noted that this "Working Group should not consider special time-limits by virtue of which particular rights of the buyer or seller might be abrogated (e.g. to reject the goods, to refuse to deliver the goods, or to claim damages for non-conformity with the terms of the contract of sale) since these could most conveniently be dealt with by the Working Group on the international sale of goods".¹²

35. The Working Group on Prescription approved the following draft provision on the scope of the proposed convention:¹³

"This Convention shall apply to the prescription of the rights of the seller and the buyer arising from a contract for the international sale of goods.

"The Convention shall govern the prescription of the rights and duties of the buyer and seller under such a contract, their

specifies a rule of invalidity with respect to terms of an offer stipulating that silence shall amount to acceptance. The term "invalid" as used in the English text (cf. "*est nulle*") may have a different meaning (cf. "*ineffective*") than the concept of "validity" in Article 8 of the Uniform Law on Sales.

¹² UNCITRAL report on second session (1969) (*supra* note 1), para. 46.

¹³ A/CN.9/30, para. 13.

successors and assigns, and persons who guarantee their performance. This Convention shall not apply to the rights and duties of other third persons."

36. This decision, to prepare a unified set of rules on prescription applicable to claims of both the buyer and seller, poses problems concerning the relationship between the Uniform Law on Sales and the proposed convention on prescription.

37. No serious problems of relationship between the two fields is presented by the various rules of the Uniform Law on Sales which set time-limits for notices by one party to the other party. See, e.g., Articles 26, 30 and 39. Such rules are placed outside the field of the proposed convention on prescription by the Commission's resolution quoted in paragraph 34, *supra*. Although legal rights may be lost by failure to give notice to the other party under the Commission's resolution, such defaults may be analogized to other defaults in performance under the contract, and are assimilated to the substantive law of sales. The convention on prescription was to deal with a different problem: the effect of delay in presenting claims to a tribunal for legal redress.

38. A problem of reconciliation is, however, presented by Article 49 of the Uniform Law on Sales. This article provides:

"1. The buyer shall lose his right to rely on lack of conformity with the contract at the expiration of a period of one year after he has given notice as provided in Article 39, unless he has been prevented from exercising his right because of fraud on the part of the seller.

"2. After the expiration of this period, the buyer shall not be entitled to rely on the lack of conformity, even by way of defence to an action. Nevertheless, if the buyer has not paid for the goods and provided that he has given due notice of the lack of conformity promptly, as provided in Article 39, he may advance as a defence to a claim for payment of the price a claim for a reduction in the price or for damages."

39. The above provision sets an outer limit for recourse to a tribunal for legal redress, and thus falls within the scope of the proposed convention on prescription.

40. The Commission's resolution creating the Working Group on Prescription requested the Group to deal with nine specified problems; these were listed as clauses (a) through (i) in paragraph 3 of the Commission's decision. *UNCITRAL Report*, paragraph 46. The rules embodied in Article 49 of the Uniform Law on Sales, quoted above in paragraph 38, touch on the first three of these problems specified by the Commission. These are:

"(a) The moment from which time begins to run"; (i.e., the giving of notice);

"(b) The duration of the period of prescription"; (i.e., one year);

"(c) The circumstances in which the period may be suspended or interrupted"; (i.e., the effect of fraud by the buyer; other problems falling under this heading but not dealt with in the Uniform Law on Sales are discussed in the Report of the Working Group on Prescription (A/CN.9/30) at paragraphs 63-66, 72-73 and 74-81).

41. The Uniform Law on Sales does not deal with other problems specified in the Commission's resolution creating the Working Group on Prescription. See *UNCITRAL Report*, paragraph 46, sub-paragraph 3 (d), (e) and (f). Cf. sub-paragraphs 3 (g), (h) and (i).¹⁴

42. Problems of interpretation may arise from the fact that the prescriptive limit provided in Article 49 of the Uniform

¹⁴ The point raised in sub-paragraph (d) of the Commission's resolution, just quoted, was dealt with by the Report of the Working Group on Prescription in paragraphs 82-89; the point

Law on Sales deals specifically with some, but not all, of the problems posed by a prescriptive period. Article 17 of the Law provides:

"Questions concerning matters governed by the present law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

If the prescriptive limit for claims by buyers with respect to conformity of the goods is (in the language of Article 17) one of the "matters governed by the present Law"; it might be suggested that the Law's general principles must be sought to deal with the effect on the prescriptive period of events like acknowledgement of the obligation (verbally or by part payment), agreements extending the period, and other questions not deal with in the Law. But cf. *Analysis: 1964*, paragraph 35.

43. It will also have been noted that the prescriptive limit (statute of limitations) set forth in Article 49 of the Uniform Law on Sales covers only one of the various types of claims that may arise from an international sales transaction.

44. Thus, Article 49 deals only with buyer's claims arising from "lack of conformity with the contract"; this may refer only to claims with respect to defects in goods that have been "handed over" to the buyer.¹⁵ Thus, Article 49 of the Uniform Law on Sales may not set a prescriptive limit for claims by a buyer where a seller fails or refuses to hand over any goods, or where the seller's delay in delivery leads to a rightful cancellation ("avoidance") of the contract by the buyer.

45. Article 49 sets no prescriptive limit for seller's claims against the buyer. Such claims by seller may include: (a) recovery of the price of delivered goods; (b) claims for damages for buyer's failure to accept the goods either (i) by the buyer's wrongful advance notice that he will not receive the goods, or (ii) by a refusal to accept the goods based on an unfounded claim that the goods are defective. In this last situation, and in suits for the price under (a), the question of the conformity of the goods may be indisputable; claims for damages by the buyer might be governed by the one-year prescriptive limit specified in article 49, while the claim by the seller would not be governed by any prescriptive limit under the Uniform Law on Sales.

46. The recommendations of the Working Group on Prescription call for unified rules on prescription applicable to all claims by both buyers and sellers arising from an international sale. This approach is shown by the draft provision approved by the Working Group, which was quoted in paragraph 35, *supra*.

47. The recommendations of the Working Group on Prescription vary in other respects from the specialized rule on prescription in article 49 of the Uniform Law on Sales:

(a) The Working Group on Prescription favoured a period within the range of three to five years. *Report of the Working Group on Prescription* (A/CN.9/30), para. 50. (The reasons given by the Working Group are summarized in the above report at paras. 51-53; cf. *Analysis: 1964*, para. 119.) The Uniform Law on Sales states a period of one year.

(b) Members of the Working Group on Prescription supported alternative tests for the beginning of the period of prescription, none of which was the time of giving notice. See the above report at paragraphs 17 to 48. The Group specifically

raised in sub-paragraph (e) is dealt with in the Working Group's report at paragraphs 93-107; point (f) is dealt with in paragraphs 122-123 of the Working Group report. Other points raised by the Commission were deferred for further study.

¹⁵ The limitation starts from the time when the buyer "has given notice as provided in Article 39"; Article 39 deals with the inspection of goods that have been "handed over" to the buyer.

considered article 49 of the Uniform Law on Sales, and decided that the running of the prescriptive period should not be affected by the time the claimant gave notice to the other party. See the report of the Working Group, *supra*, paragraphs 46 to 47.

(b) *Issues; alternative approaches*

48. The relationship between the Uniform Law on Sales and the proposed convention on prescription presents the following alternative approaches:

Alternative I. The Commission might decide that the convention on prescription should be conformed to the rules of article 49 of the Uniform Law on Sales.

(a) This approach might be implemented either (1) by repeating the rule of article 49 or (2) by providing that States adhering to the Uniform Law on Sales could apply the prescription rule of article 49 rather than the rules of the conventions on prescription (cf. article IV of the Hague Conventions of 1964 with respect to States that had adhered to a convention on conflict of laws in respect of the international sale of goods).

Alternative II. A second approach would recommend omission of rules on prescription from the uniform rules on sales, so that all problems of prescription could be dealt with in a single convention.

Alternative III. A third approach would recommend steps leading to a merger of a uniform law on sales and general rules on prescription in international sales.

(a) In evaluating this alternative, the following considerations may be relevant:

(i) It might be concluded that merger into a single law would contribute to simplicity and clarity of terminology. Thus, definition of the time of the commencement of the period of prescription and the effect of advance repudiation and cancellation ("avoidance") of the contract could be more clearly stated in reference to a given structure of substantive law.

(ii) On the other hand, it might be concluded that producing a single law would increase the difficulty of securing adherence to the convention. Thus, adherence might be difficult if a State has serious objection to either (1) the substantive rules on the law of sales or (2) the rules on prescription.

(c) *Methods of work*

49. The Working Group may decide to deal with the broad issues of the relationship between substantive sales and prescription on the basis of general discussion by the entire Group. (This presumably would call for choices among alternatives such as those outlined in paragraph 48 above.) If preliminary discussion by the Working Group discloses that the Group cannot deal with these issues without further preparation, the Group may wish to refer the matter to a small working party for a report and recommendation.

3. *Possible consolidation with other projects for unification with respect to the international sale of goods*

(a) *Background*

50. In view of the foregoing suggestions for the consolidation of related projects, it may be relevant to note certain other projects related to international sales of goods that are in the course of preparation by the International Institute for the Unification of Private Law (UNIDROIT).

51. These projects include:

(a) A draft Uniform Law on the Protection of the *Bona Fide* Purchaser of Corporeal Moveables. This draft has been submitted to Governments for comments.

(b) A preliminary draft Uniform Law on the conditions of Validity of Contracts for the International Sale of Goods. This preliminary draft is approaching a third review by a Working Committee.

(c) A draft Uniform Law on Agency in Private Law Relations of an International Character. UNIDROIT has decided to submit this draft, together with comments by Governments, to a Governmental Experts Committee to prepare a final text to be submitted to a diplomatic conference.

52. The Working Group may wish to consider whether such projects should be considered as part of a more inclusive approach to unification of the law of international sales. In this regard, the following considerations may be noted:

(a) The draft on *Bona Fide Purchases* (paragraph 51 (a) *supra*) treats of one aspect of the rights of third persons. The subject of third-party claims merges into problems raised by security interests (conditional sale, hire-purchase, pledge, etc.). The entire field of third-party claims has been specifically excluded from the Uniform Law on Sales (article 8). The field is complex and difficult and touches various types of national regulatory laws. The Working Group might consider whether adding this subject to uniform legislation dealing with the rights and obligations of the parties to a sales transaction might unduly delay completion of the work and jeopardize acceptance of the resulting legislation.

(b) The preliminary draft on Validity (paragraph 51 (b) *supra*) also deals with a problem explicitly excluded from the Uniform Law on Sales (article 8). The subject of validity of contracts is also complex and touches sensitive issues of domestic policy. The Working Group might consider whether including this subject would also impede completion and acceptance of the final product.

(c) The draft on Agency (paragraph 51 (c) *supra*) is not precisely confined to the international sale of goods. The relationship between this draft and the present project may well be deemed insufficient to justify the delays resulting from joint consideration.

(b) Issues; method of work

53. The Working Group may wish to decide:

(a) Whether the field of work should be expanded beyond the rights and obligations of the parties to an international sale, and

(b) Whether questions of validity of the contract should be considered.

54. The Working Group might well feel in a position to approach these broad issues without advance preparation by a small working party.

D. Recourse to general principles; article 17 of the Uniform Law on Sales

1. The issues

55. An issue of general scope that has received substantial attention in the studies and comments is presented by article 17 of the Uniform Law on Sales, which provides:

"Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

56. Observations with respect to this provision are summarized in *Analysis: 1964* at paras. 95-97, cf. *id.* at paras. 34-35. One of the possible applications of article 17 has been mentioned in para. 42, *supra*, in connexion with questions regarding the prescriptive limit for buyers' claims. See also *Replies: 1964*, p. 5, Part I (2) (Austria).

57. In considering the effect of article 17, it may be useful to consider whether this provision:

(a) Would have the relatively narrow effect of guarding against the use of local (and divergent) legal concepts in construing specific provisions of the Uniform Law; or

(b) Would have the broader effect of authorizing tribunals to create new rules not directly based on provisions of the Uniform Law.

2. Method of work

58. Article 17 presents general issues of policy concerning the effect and acceptability of uniform legislation on sales; these issues have been developed in the underlying studies and in the discussion at the second session of UNCITRAL. Therefore, the Working Group may well decide that it is prepared to discuss these issues without a report by a small working party.

E. Binding effect of general usages

1. The issues

59. Another general issue that has received attention in the studies and comments is the binding effect of general usages. *Analysis: 1964*, paras. 79-84, 156.

60. Article 9 of the Uniform Law on Sales, after giving effect in paragraph 1 to usages which the parties "have expressly or impliedly made applicable to their contract . . .", adds:¹⁰

"2. They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present Law, the usages shall prevail unless otherwise agreed by the parties."

61. In considering the effect of this provision it may be helpful to consider whether this language:

(a) Comprises a relatively narrow extension of the implied undertakings of the parties made effective under paragraph 1, or

(b) Gives legal effect to general usages which the parties to the contract in question may not have considered binding in their case.

62. The studies have also raised this related question: Does the Uniform Law override a national rule that a usage is invalid? See Uniform Law on Sales, article 8: "... the present Law shall not, except as otherwise expressly provided therein, be concerned . . . with the validity of the contract or of any of its provisions or of any usage". *Analysis: 1964*, paras. 79, 83.

2. Method of work

63. Although this question has been discussed in the underlying studies and at the second session of the Commission, further attention to the problem might be aided by close attention to the relationship between various provisions of the Uniform Law. To facilitate this study, the Working Group may consider it appropriate to refer the problem to a small working party for advance consideration.

F. Continuing need for uniform rules on choice of law: the Hague Convention of 1955

1. The issues

64. An important general issue, raised in several of the studies and discussed at the second session of UNCITRAL, is this: Would the adoption of uniform rules on the substantive law of international sales obviate the need for uniform rules on choice of law? More specifically, the question involves the need for provisions such as those contained in the Hague Convention of 1955. *Analysis: 1964*, paras. 29-40; *Analysis: 1955*, paras. 8-17.

¹⁰ Similar questions may arise under article 13 of the Uniform Law on Formation although this language is substantially different from that of article 9 of the Uniform Law on Sales.

65. Although this question bears some relationship to the issues raised above in part III A (paras. 16-18), the precise issue is different. Part III A above, presented this question: What rules on applicability should be contained in a uniform law on the substantive law of sales? The present issue concerns the need for uniform rules on choice of law apart from and in addition to such a uniform law.

66. This issue was not listed immediately following part III A above, since the Group's work on the problems noted in parts III C and III D, above, may shed light on the present question. Thus, the need for separate rules on choice of law is affected by the extent to which the various problems arising from international sales transactions are solved by uniform substantive rules. The Uniform Law on Sales annexed to the Hague Convention of 1964 is concerned with the mutual rights and obligations of the parties to the sales contract. Questions of formation of the contract are left to another uniform law offered for separate consideration; questions of validity of the contract, the rights of third persons and most problems of prescription are also excluded. The scope of unification of the substantive rules may also be affected by the Group's views with respect to article 17 of the Uniform Law on Sales (part III D *supra*), since article 17 was designed, to some extent, to displace national rules on questions related to the provisions of the uniform law.

2. Method of work

67. After examination of the above-mentioned related issues as to the scope of proposed substantive rules on sales, the Working Group may feel that it is prepared to consider this issue without advance study by a small working party.

G. Use of abstracts or complex legal concepts in drafting; *ipso facto* avoidance and notice to the other party to a sales transaction

68. Studies and comments have raised the question whether the Uniform Law on Sales may, at certain points, use concepts that are abstract or complex; it has been suggested that such concepts, when applied to concrete situations, may produce unintended results or may lead to divergency of interpretation.

69. Since these questions are difficult to discuss in general terms, it may be advisable to examine certain of the specific provisions that have given rise to the above suggestions. One group of provisions that may be helpful for this purpose is the rules on required notices by one party to another, since these rules call for application of the Law's concept of *ipso facto* avoidance.

1. Issues

(a) *Ipso facto* avoidance

70. Several studies and comments have raised questions as to the practical effect of "*ipso facto* avoidance" of the contract when the buyer fails to pay for goods he has received. *Replies: 1964, Add.5*, p. 4 (Sweden); *UNCITRAL Report*, annex I, paras. 62-67 (Hungary, Japan, Australia, United Kingdom, International Chamber of Commerce).

71. It may be helpful to approach these questions in the setting of the following facts: Seller delivers goods to Buyer on 1 January; the contract permits payment as late as 1 February. Buyer does not pay on that date or for a substantial period thereafter, and Seller does not demand payment until six months later. On such facts, it has been suggested that, because of Seller's delay in requiring Buyer to pay the price, under article 62 "the contract shall be *ipso facto* avoided" (*résolu de plein droit*), with these consequences:

(a) The seller may recover the goods from the buyer (article 78, para. 2);

(b) The seller may not recover the price from the buyer. (Article 78, para. 1. The seller, under article 63, para. 1, may

claim damages, but these are measured (article 84, para. 1) by "the difference between the price fixed by the contract and the current price". *Analysis: 1964*, para. 129.)

72. It has been suggested, however, that these consequences were probably unintended and therefore some other construction of the Act must be found. *Replies: 1964, Add.4*, part D (3), p. 14 (USA).¹⁷

73. "*Ipso facto* avoidance" has led to this further comment: When avoidance occurs by operation of law and without a notice or declaration, a party may be left in uncertainty as to his rights under the contract. Article 62 (para. 1) provides that if the buyer's "failure to pay the price at the date fixed amounts to a fundamental breach of contract" and the seller fails to inform the buyer of his choice of remedies within a reasonable time, "the contract shall be *ipso facto* avoided". It has been suggested that whether a breach is "fundamental" may not be clear to the parties, and the buyer needs to know that the seller is going to refuse to ship so the buyer may make arrangements to purchase elsewhere. It has been suggested that a buyer who is in doubt about his position should have the right to insist that the seller make known his decision ("interpellation"); attention has been directed to such a right given sellers in article 26, para. 2. *Analysis: 1964*, paras. 127-129; *Replies: 1964*, p. 26 (Norway); *Add.4*, p. 14, Section D (3) (USA).

(b) Notification by buyer to seller concerning defects in delivered goods; place for inspection

74. A further problem raised in the *Replies* may be analysed in relation to the following facts: A contract calls for Seller to send goods to Buyer in City X. Before the goods arrive, Buyer finds a customer for the goods in City Y; on arrival of the goods in City X, Buyer directs the carrier to send the goods to the customer in City Y. Buyer does not inspect the goods in City X or on their arrival in City Y. A month later, when the customer uses the goods he finds they are defective, and demands redress from Buyer. Has Buyer lost his claim against Seller because of his failure to inspect the goods?

75. It has been suggested that under article 38, the carriage of the goods from City X to City Y may be deemed "transshipment", and that Buyer has violated the law's obligation to inspect the goods at "destination" (City X); from this it may follow that the notice of defects was not given "promptly" after Buyer "ought to have discovered" the defect. Under article 39, para. 1, on failure to give prompt notice after inspection at the place prescribed in article 38 above, the "buyer shall lose the right to rely on a lack of conformity of the goods". It has been noted that although "transshipment" to a more distant place might appropriately cut off the buyer's right to reject the goods, there is no justification for cutting off his right to reduce his payment of the price or to claim damages because of defects in the goods. *Analysis: 1964*, paras. 114-115; *Replies: 1964, Add.4*, pp. 14-16 (USA); *UNCITRAL Report*, Annex I, para. 89 (Japan).

(c) The concept of "delivery" (*délivrance*) and the definition of the seller's obligations

76. Questions of approach similar to those raised with respect to *ipso facto* avoidance have been raised in connexion with the concept of *délivrance* as employed in the Uniform Law on Sales. *Analysis: 1964*, paras. 98-107, 140-143. One suggestion was that the Uniform Law would be clearer if the *délivrance*

¹⁷ It has been intimated that a flexible reading of the concept of "damages" provided in article 63 might meet the problem. *Replies: 1964, Add.4*, Part D (3), p. 14 (USA), cf. article 96 (obligation to pay the price where the risk has passed). Conceivably the instant problem might be avoided by concluding that articles 61-64 deal with the situation prior to the handing over of the goods.

concept were supplanted by specific terms speaking more directly to the commercial act required by the parties. *Replies: 1964, Add.1*, p. 29, part II (Spain); *Add.4*, pp. 8-12, Part D (1)-(2) (USA).

2. Method of work

77. The above questions concern the interrelationship of several provisions of the Uniform Law on Sales. General discussion by the Working Group might therefore be aided by a report of a small working party.

IV. OTHER ISSUES FOR POSSIBLE CONSIDERATION

78. If the Working Group decides to give attention to the issues listed in part III above, there may not be sufficient time at this session to reach other questions raised in the studies and comments. However, the Group may decide that some issues listed in part III are not appropriate for consideration or that others should be given priority. Following are certain further issues which the Group may wish to consider.

A. Obligation to incorporate uniform law into national legislation versus use of uniform law as model

79. The above issue was raised in several of the comments, and was also discussed at the second session of the Commission. *Analysis: 1964*, paras. 20-23. These questions related to the requirement, expressed in article I of both 1964 Hague Conventions, "that a contracting State shall 'incorporate' the annexed Uniform Law into its legislation"; under paragraph 2 of article I, the contracting State may incorporate the Uniform Law "into its own legislation either in one of the authentic texts or in a translation into one of its own language or languages". A subsidiary question is whether it would be consistent with this undertaking to enact the uniform law with a definition of scope that would make the law applicable to domestic transactions excluded by the terms of the Uniform Law. (Cf. the definition of international sale in article 1 of the Uniform Laws on Sales and on Formation.) *Analysis: 1964*, para. 21.

B. Exclusion of the uniform law by agreement

80. Certain studies raised questions about the power of the parties, under article 3, of the Uniform Law, to exclude the Law's provisions, either (a) by implied rather than express agreement or (b) without indicating the rules or law that should be applicable. *Analysis: 1964*, paras. 67-70. Cf. *Analysis: 1955*, para. 30.

C. Deterioration of economic situation by one party: suspension of performance; stoppage in transit

81. Article 73 of the Uniform Law on Sales gives certain powers to one party when the other's economic situation has seriously deteriorated; these provisions have been the subject of comment. *Analysis: 1964*, paras. 132-133. Cf. Uniform Law on Sales, article 76; *Replies: 1964, Add.3*, p. 24 (UAR).

D. The Uniform Law on Formation; circumstances under which offers are irrevocable

82. Various studies and comments raised questions about the rules of article 5 of the Uniform Law on Formation concerning the circumstances under which an offer cannot be revoked. *Analysis: 1964*, paras. 150-154.

E. Uniform Rules on Choice of Law; choice between the Law of Residence of Seller or Buyer

83. Article 3 of the Hague Convention of 1955 states a basic rule (paragraph 1) choosing the domestic law of the country in which the vendor has his habitual residence; this rule is subject to certain exceptions (e.g. para. 2) invoking the domestic law of the country in which the purchaser has his

habitual residence. Cf. article 3, para. 3 (sale at an exchange or public auction); article 4 (place of inspection). Studies and comments reflected conflicting views concerning the correctness and clarity of these provisions. *Analysis: 1955*, paras. 32-41.

V. PROCEDURES FOR IMPLEMENTING CONCLUSIONS WITH RESPECT TO UNIFICATION

84. At some point, consideration will need to be given to the choice of procedure to implement the Commission's objective to further the harmonization or unification of law for the international sale of goods. The Working Group, however, may well conclude that it would be most efficient to defer consideration of this question until after the Commission has considered the recommendations of the Working Group with respect to the more specific issues that have been presented in the studies and comments of States and organizations.

APPENDIX

ORGANIZATIONS INVITED TO ATTEND MEETING OF THE WORKING GROUP

Asian-African Legal Consultative Committee.
Commission of the European Communities.
Council for Mutual Economic Assistance.
Council of Europe.
Council of the European Communities.
European Economic Community.
Food and Agriculture Organization of the United Nations.
Hague Conference on Private International Law.
Institute of International Law.
Inter-American Juridical Committee.
Inter-American Institute of International Legal Studies.
International African Law Association.
International Association of Comparative Law.
International Association of Legal Science.
International Bar Association.
International Chamber of Commerce.
International Institute for the Unification of Private Law.
International Law Association.
Law Association for Asia and the Western Pacific.
Organisation for Economic Co-operation and Development.
Organization of American States.
Organization of African Unity.
United Nations Conference on Trade and Development.
World Peace through Law Center.

ANNEX III

Report by Working Party I to the Working Group on the International Sale of Goods

1. Working Party I established by the Working Group on the International Sale of Goods at its third meeting on 6 January 1970 held three meetings: on 7, 8 and 9 January 1970. Representatives of the members of the Working Party, i.e. of Ghana, Hungary, Norway, and the United Kingdom, took part in all meetings of the Working Party. Observers for the International Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law and the International Chamber of Commerce also attended the meetings of the Working Party and took part in its work.

2. The Working Party had as its task the study of the question raised under part III, chapter A of the Working Paper, that reads: "Principles on choice of law in uniform legislation on sales; the relationship between the Hague Convention of 1955 and the Hague Conventions of 1964".

3. The Working Party had before it written proposals by Hungary (annex A) and Norway (annex B) both submitted on

6 January 1970 and a further proposal by Norway (annex C) submitted on 9 January 1970.

4. After thorough discussions the Working Party decided to recommend to the Working Group the substitution of article 2 of ULIS by the text set forth in paragraph 5 below. One representative, however, stated that the existing text of the 1964 Hague Convention would be more widely acceptable if States proposing to ratify the Convention took advantage of the reservation permitted by article III. In his opinion the reintroduction of the rules on conflict of laws into the text of ULIS would tend to weaken uniformity, and would be unnecessary if the States generally utilized the article III reservation.

5. The Working Party recommended that in place of article 2 of ULIS the following text should be substituted:

"The law shall apply

"1. Where the places of business of the contracting parties are in the territory of States that are parties to the Convention and the law of both these States makes the Uniform Law applicable to the contract;

"2. Where the rules of private international law indicate that the applicable law is the law of a contracting State and the Uniform Law is applicable to the contract according to this law."

6. To illustrate the application of the text introduced in paragraph 5 above, the Working Party set up a number of examples. The examples are contained in paragraphs 7 and 8 below.

7. Illustrations for paragraph 1 of the recommended text:

(a) State X and State Y are both parties to the 1964 Hague Convention without reservations. S and B are parties to the contract; S has its place of business in State X, and B has its place of business in State Y:

(i) If litigation is brought before the courts of either X or Y, the courts of both States shall always apply the Uniform Law without looking into rules of private international law.

(ii) State Z is also a party to the Convention. If litigation is brought in State Z, the court of State Z will apply the Uniform Law. (Whether State Z has enacted the Uniform Law with reservation is immaterial.)

(b) State X and State Y are both parties to the 1964 Hague Convention. One of these States has enacted the Convention with reservation. S and B are parties to the contract; S has its place of business in State X and B has its place of business in State Y.

(i) Assume the reservation under article II of the Convention is made by State X with reference to a third State A; X and Y are to be considered as different States and consequently the courts of all contracting States will apply the Uniform Law.

(ii) Assume the reservation is made under article III of the Convention: the courts of all contracting States will apply the Uniform Law.

(iii) Assume the reservation is made under article IV or V of the Convention; paragraph 2 of the recommended text (paragraph 5 above) will apply.

8. Illustrations for paragraph 2 of the recommended text:

(a) State X and State Y are both parties to the 1964 Hague Convention. State X has ratified the Convention with the reservation permitted under article V of the Convention. S and B are parties to the contract; S has its place of business in State X and B has its place of business in State Y.

If suit is brought in State X, Y or Z, the courts of each State must decide which law is invoked by the rules of private international law. If these rules point to the law of

State X, the court will only apply ULIS if chosen by the parties.

(b) State X is a party to the 1964 Hague Convention; State Y is not a party. Suit is brought in State X.

(i) If the rules of private international law of State X point to the law of State Y, the domestic law of the latter State will apply.

(ii) If the rules of private international law of State X point to the law of State Z which State is party to the Convention, ULIS will apply. If, however, Z has ratified the Convention with reservation under article III of this Convention, the domestic law of Z will apply.

(c) State X is a party to the 1964 Hague Convention, State Y is not. Suit is brought in State Y.

(i) If the rules of private international law of State Y point to the law of X, ULIS will apply. If, however, X has ratified the Convention with the reservation permitted under article III of the Convention, the domestic law of X will apply.

(ii) Assume the rules of private international law of State Y point to the law of Z and Z is a party to the Convention: ULIS will apply. If, however, Z has ratified the Convention with the reservation permitted under article III of the Convention, the domestic law of Z will apply.

(d) State X is party to the 1964 Hague Convention, State Y is not. Suit is brought in State Z.

(i) Assume the rules of private international law of State Z point to the law of X or any other State that is party to the Convention. The result is the same, *mutatis mutandis*, as in paragraph 8 (b) above.

(ii) Assume the rules of private international law of State Z point to the law of Y or any other State that is not party to the Convention. The domestic law of that State will apply.

Annex A to the Report of Working Party I

PROPOSAL BY HUNGARY

1. The proposal concerning article 2 reads as follows:

(1) Unchanged.

(2) If the place of business of any of the contracting parties is in the territory of a State not being a member to the Convention the rules of private international law shall apply.

2. The idea of the above text is that:

(a) ULIS should always apply, irrespective of the conflict rules, between contracting parties from member States of the Convention.

(b) If one or both of the parties to the contract is/are from States not member(s) to the Convention, ULIS shall apply only where the conflict rule of the *forum* points to a member State of the Convention.

3. The possibility of reservation, article III should be preserved, as its main point is that a State having made this reservation will never apply ULIS in relation to non-contracting State(s).

REMARK: The problem of article 17 and other possible applications of conflict rules should be discussed separately.

Annex B to the Report of Working Party I

PROPOSAL BY NORWAY

ULIS article 2

Add the following provision as a new paragraph 2:

2. The provision of paragraph 1 of this article shall not apply where the parties or one of the parties have their

place of business or, in the absence of such place, their habitual residence outside the territory of any contracting State [and, according to the contract, the goods are to be delivered outside such territory].

Convention article III

Delete.

Annex C to the Report of Working Party I

PROPOSAL BY NORWAY

Article 2

The Law shall apply in each of the following cases:

(a) Where the principles of private international law indicate that the proper law of the contract is the law of a contracting State and the Uniform Law is applicable to the contract according to this law,

(b) Where the places of business of the contracting parties are in the territory of States that are members to the Convention and the law of both these States make the Uniform Law applicable to the contract.

NOTE: This text is intended to convey the same meaning as that of the Hungarian proposal. However, it also intends to avoid the misunderstanding that where the applicability of the Uniform Law is limited by reservations such as those permitted by articles II and V of the Convention, the Uniform Law shall apply without regard to these reservations when applied by a court belonging to a country which has itself ratified the Uniform Law.

ANNEX IV

Proposal of the Norwegian Delegation

ARTICLE IV OF THE 1964 HAGUE CONVENTION

Alternative A

1. Any State which is a party or may intend to become a party to one or more Conventions on conflict of laws in respect of the international sale of goods may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare by a notification addressed to the Government of the Netherlands that it will apply the Uniform Law in cases governed by one of those Conventions only if that Convention itself will lead to the application of the Uniform Law.

2. Same as ULIS.

Alternative B

Any State may, at the time of deposit of its instrument of ratification of or accession to the present Convention, declare by a notification addressed to the Government of the Netherlands that it will only apply the Uniform Law whenever its rules of private international law declare applicable the law of a State which adopted the Uniform Law without any reservation which would preclude its application to the contract.

ANNEX V

Report by Working Party II to the Working Group on the International Sale of Goods

1. Working Party II established by the Working Group on the International Sale of Goods, at its 4th meeting on 6 January 1970, held four meetings: on 7, 8, 9 and 12 January 1970. Representatives of the members of the Working Party, i.e., of France, Norway, the Union of Soviet Socialist Republics, the United Kingdom and the United States, took part in all meetings of the Working Party. Observers for the International Institute

for the Unification of Private Law and the International Chamber of Commerce also participated in the work of the Working Party.

2. The Working Party had as its task the study of the question raised under part III, chapter B of the Working Paper that reads: "The character of the international sale that will invite a uniform law; questions arising out of article 1 of the Uniform Law on Sale and article 1 of the Uniform Law of Formation".

3. The Working Party had before it, among others, written proposals by Norway (annex A and B) and the Union of Soviet Socialist Republics (annex C).

4. The Working Party noted that the English text of article 1, paragraph 1 (a), did not correspond with the French text of that paragraph. It recommends, therefore, that by considering the text of article 1, paragraph 1 (a) of ULIS, the Working Group should base its considerations on the French text. A more accurate translation of the text is as follows:

"(a) Where the contract contemplates that the goods are, at the time of the conclusion of the contract, or will be the subject of transport from the territory of one State to the territory of another."

5. With regard to article 1, paragraph 1 (a) the Working Group considered the question raised by the USSR (annex C) of extending the application of ULIS also to goods which had been carried from the territory of one State to the territory of another before the conclusion of the contract.

6. The Working Group, after consideration of the questions mentioned in paragraph 5 above, came to the conclusion that ULIS should not govern sales where the offer and acceptance have been effected in the territory of one State and the goods sold under the contract are in the territory of the same State at the time of the conclusion of the contract. In such cases the fact that one of the parties has its place of business in the territory of another State may not alone justify the application of ULIS. Consequently sales at exhibitions and fairs and sales of specific goods which are on stock in buyer's country will not be governed by ULIS.

7. Several members of the Working Party considered that ULIS should apply in cases where the contract leaves open the question whether the goods to be delivered under the contract are, at the time of the conclusion of the contract, in stock in buyer's country, or are in the course of transport or will be transported from the territory of any country to the territory of the buyer's country. To illustrate this suggestion the following example was given: A foreign trade organization of the Soviet Union sells vodka to a buyer in the United States. In order to expedite deliveries, the trade organization usually keeps a certain quantity of vodka on stock in the United States; after the contract, the organization will decide whether it will deliver the vodka which is at the time of the conclusion of the contract in stock or in the course of transport or whether it will ship vodka from the Soviet Union to the United States. The Working Party could, however, not find any adequate formulation which would unambiguously differentiate between cases mentioned in this paragraph and those mentioned in paragraph 6 above.

8. The representative of the United States expressed his concern about this problem: When does the transport end? Suppose that goods have arrived at a place of storage (like a bonded warehouse) but have not yet been delivered to the addressee: Are these goods to be considered as goods in the course of carriage or as goods for which the carriage has already been completed? Several members expressed the opinion that before the handing over of the goods to the addressee the transport cannot be considered as completed. The Working Party agreed, however, that this question calls for further study.

9. With regard to the preamble of article 1, one of the delegates observed that the term "place of business" was open to different interpretations in cases where one of the parties has establishments in different countries. Should the international character of the transaction be determined by reference to the principal place of business or to a place of the establishment that concluded the contract? The Working Party was of the view that this problem should be studied further.

10. A further problem discussed by the Working Party was that of the delivery of plants. It was observed that contracts for the sale of plants often include construction of buildings, the installation of machines in existing buildings, and the combined construction of a plant and machinery. There was general agreement that contracts for the construction of buildings or installation services without sale of goods did not fall in the scope of ULIS. However, ULIS would apply if the main purpose of the contract was the sale of goods and the construction of buildings or the installation services were only an incidental duty of the seller. The Working Group came, however, to the conclusion that the question is difficult and calls for further study.

Annex A to the Report of Working Party II

PROPOSAL BY NORWAY

Article 1, para. 1

..., where the contract implies

(a) That the goods, before or immediately after delivery, are to be carried from the territory of one State to the territory of another State, or

(b) That the goods are imported and that the seller is authorized to deliver goods regardless of whether they are imported before or after the time of the conclusion of the contract.

Annex B to the Report of Working Party II

PROPOSAL BY NORWAY

Definition of international sale

The definition of international sale in article 1 should be simplified so as to make it easier to be applied in practice and enable merchants to keep in mind on what conditions ULIS would come into play to the exclusion of national laws. In his opinion the essential thing was not to extend or restrict the scope of the present text, but to make the definition less complex and less dependent on so many different criteria.

The present text is based — besides on the place of business — on the three different criteria in sub-paragraphs (a), (b) and (c). Each one of these criteria contains terms which are not defined and which are open to different interpretations, and in some cases it will also be difficult to ascertain whether the facts fall within the scope of the different terms. For instance, in sub-paragraph (a) it will often be uncertain what the contract "implies" (involves) especially in relation to "ex works" sales, or how long the goods are "in the course of carriage" to (or through?) the territory of the second State. In sub-paragraph (b) there will be uncertainties as to the place where the contract has been concluded, especially where one party has an agent or an establishment in the State where the other party is situated. In sub-paragraph (c) there may be questions as to the term "delivery".

Questions of interpretation and ascertainment of facts are of course always unavoidable in borderline cases. But the present text of ULIS, by combining so many different criteria, could confuse the public. It would simplify the Law and reduce the number of uncertainties to rely on a limited set of criteria

and leave out the rest. This may result in a more restricted scope of the law, but that is no major objection, especially since the parties may place their contract subject to the Law (article 4).

In such a spirit Norway suggests the following alternatives to article 1:

Alternative I

1. The present law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, where the contract contemplates transport of the goods from the territory of one State to the territory of another.

2. Same as ULIS.

3. Same as ULIS.

4. Delete.

5. Same as ULIS.

Alternative II

1. The present law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, unless (a) the acts constituting the offer and the acceptance have been effected in the territory of one and the same State and (b) the goods are to be delivered in the territory of that same State without contemplated transport from the territory of another State.

2-5. Same as ULIS.

Alternative I is based on the criterion inter-State carriage or transport in ULIS, paragraph 1 (a), deleting the criteria in sub-paragraphs (b) and (c) and paragraph 4. Compared to ULIS sub-paragraph (a) the formulation is less restrictive by not mentioning the different stages and timing of carriage in relation to the time of the conclusion of the contract. This will be indifferent, provided the contract contemplates (implies) inter-State transport. The term "contemplates" ("implies") is of course quite vague, but will cover cases where the contract contemplates export or import effected by either party. Contrary to the present ULIS text, it is envisaged that the contract according to the circumstances may contemplate inter-State transport where the goods are already imported by the seller and the seller under the contract is authorized to deliver goods regardless of whether they are imported before or after the time of the conclusion of the contract.

Alternative II is based on the criteria in ULIS paragraph 1 (b) and (c), combined with a reference to inter-State transport. The scope of this alternative may be somewhat broader than the present text in ULIS, but simpler formulated. It will cover sales when the parties have their places of business in different States, unless all the other elements mentioned point to one and the same State.

Annex C to the Report of Working Party II

PROPOSAL OF THE UNION OF SOVIET SOCIALIST REPUBLICS

The provisions of sub-paragraph (a) of article 1, paragraph 1, should be extended to cover also the goods which have already been carried from the territory of one State to the territory of another but not yet sold (e.g., the goods stored at warehouses, exhibits).

Therefore, it would seem appropriate to word sub-paragraph (a) as follows:

(a) Where the contract involves the goods in the course of carriage or the goods which will be carried from the territory of one State to the territory of another, or the goods already carried before the conclusion of the contract but not yet sold.

ANNEX VI

Report of Working Party V: Article 49 of ULIS

1. There was a considerable doubt as to the correct interpretation of article 49 of ULIS. The Working Party has given the following explanation of the meaning of this article:

Explanation in English:

The right of the buyer to rely on lack of conformity with the contract shall lapse upon the expiration of a period of one year after he has given notice as provided in article 39, unless he continues to manifest an unequivocal intention to maintain the existence of this right whether by the commencement of legal proceedings or otherwise (except where he has been prevented from so doing by the fraud of the seller).

Explanation in French:

L'acheteur est déchu de ses droits s'il ne les fait pas valoir par une action en justice ou de toute autre manière manifestant sa volonté continue d'obtenir leur respect, un an au plus tard après la dénonciation prévue à l'article 39 (à moins qu'il n'en ait été empêché par suite de la fraude du vendeur).

2. In the light of the above explanation the Working Party was of the opinion that article 49 does not constitute a case of prescription and recommends its deletion. It is thought that the notice required under article 39 and the term of prescription whatever it may be provides for a sufficient technique to enforce the rights of the buyer and protect the interests of the seller. A third term as provided by the present article 49 seems to be unnecessary and may lead to difficulties in respect of its application to the individual cases.

3. If article 49 is regarded as providing for a term of prescription, it should be co-ordinated with the findings of the Working Group on prescription and its further consideration should be postponed. It is, however, thought that even in that case there might be no need for its conservation, for

(a) If the buyer goes to court or to arbitration, this case would be covered by the general rules on prescription,

(b) If the buyer manifests its intention otherwise, then a term of prescription is needed for the enforcement before the courts or arbitration.

4. If article 49 is maintained, the reference to fraud should be deleted.

B. Uniform rules on choice of law

Analysis of replies and comments by Governments on the Hague Convention of 1955: report of the Secretary-General

CONTENTS

	Paragraphs
I. INTRODUCTION	1-4
II. ANALYSIS OF THE REPLIES AND COMMENTS	5-44
A. Ratification of or accession to the Convention	5-7
B. Observations of a general character	8-24
(a) Need for uniform conflict rules; coexistence of uniform substantive rules and conflict rules	8-14
(b) General approval and disapproval of the Convention	15-22
(c) Equal protection of the interests of seller and buyer	23-24
C. Observations on specific articles of the Convention	25-44
(a) Article 1	25-27
(b) Article 2	28-31
(i) Paragraph 1 of article 2	28-29
(ii) Paragraph 2 of article 2	30-31
(c) Article 3	32-39
(i) General comments on article 3	32-33
(ii) Paragraph 1 of article 3	34-35
(iii) Paragraph 2 of article 3	36-39
(d) Article 4	40-41
(e) Article 5	42-43
(f) Articles 10 and 12	44

I. INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL) at its second session requested the Secretary-General to prepare an analysis of observations, outlined below, regarding the Hague Convention of 1955 on the Law Applicable to the International Sale of Goods (corporeal movables) and to submit the

analysis to the Working Group on the International Sale of Goods set up by the Commission.¹

2. Part of these observations resulted from the request made by the Commission at its first session that States be invited to indicate whether they intended to

¹ Report of the Commission on the work of its second session, (A/7618), para. 2.

* A/CN.9/33.

adhere to the 1955 Hague Convention, and to state the reasons for their position.² The replies to this invitation have been reproduced in documents A/CN.9/12 and Add. 1, 2, 3 and 4. At its first session, the Commission also requested the Secretary-General to transmit such replies to the Hague Conference on Private International Law for comments; the comments by the Secretary-General of the Hague Conference were reproduced in document A/CN.9/12/Add.2.

3. At the second session of the Commission there was a general discussion of the 1955 Hague Convention; a summary of the comments made in the course of this discussion is given in annex II to the Commission's report.³

4. The following analysis of the written replies (para. 2 *supra*) and of the comments made during the second session of the Commission (para. 3 *supra*) considers separately these questions: A. Ratification of or accession to the Convention; B. Observations of a general character with respect to the Convention; C. Observations on specific articles of the Convention.⁴

II. ANALYSIS OF THE REPLIES AND COMMENTS

A. Ratification of or accession to the Convention

5. As of the date of this report, the Hague Convention of 1955 on the Law Applicable to the International Sale of Goods (corporeal movables) had been ratified by Belgium, Denmark, Finland, France, Italy, Norway and Sweden.

6. The position of the other States that have submitted studies may be summarized as follows:

- (i) *States which have expressed the intention to ratify or to accede to the Convention:* Colombia,⁵ Cambodia,⁶ Hungary,⁷ Mexico,⁸ and Switzerland,⁹
- (ii) *States in which the Convention and/or the question of whether to ratify or accede is under*

consideration: Czechoslovakia,¹⁰ Greece,¹¹ Iraq,¹² Ireland,¹³ Japan,¹⁴ Romania,¹⁵ and Spain,¹⁶

- (iii) *States which do not intend to ratify or accede:* Austria,¹⁷ Botswana,¹⁸ Chile,¹⁹ China,²⁰ Federal Republic of Germany,²¹ Guyana,²² Iran,²³ Israel,²⁴ Laos,²⁵ Luxembourg,²⁶ Maldives,²⁷ Netherlands,²⁸ Sierra Leone,²⁹ Singapore,³⁰ Trinidad and Tobago,³¹ United Kingdom,³² and the United States.³³

7. In the reply by Luxembourg it was stated that the six member States of the European Economic Community (Belgium, Federal Republic of Germany, France, Italy, Luxembourg, Netherlands) had decided that those which had not yet ratified the Convention would not continue the procedure for obtaining parliamentary approval, while those which had already ratified that Convention would denounce it as soon as they had the option of doing so.³⁴

B. Observations of a general character

- (a) *Need for uniform conflict rules: coexistence of uniform substantive rules and conflict rules*

8. Several States held the view that the existence of uniform substantive rules obviated the necessity for uniform conflict rules. Thus, Austria considered that unification of the substantive law of the sale of goods and unification of conflict rules were incompatible.³⁵ The Netherlands was of the opinion that the removal of differences in various legal systems could be more fully realized by the application of the 1964 Hague Uniform Law than by the application of rules governing conflict of laws.³⁶ Israel stressed that ratification of the 1964 Convention would obviate the necessity to accede to the

² Report of the Commission on the work of its first session (A/7216), para. 17 A.

³ Report of the Commission on the work of its second session (A/7618). The discussion includes comments by representatives of States that are members of the Commission and by the representatives of international organizations who attended the session as observers.

⁴ The setting of these various observations may be identified by the foot-note references. The written replies (para. 2 *supra*) bear foot-note references to documents other than A/7618 (see foot-note 1). The comments made during the second session of the Commission bear the foot-note reference A/7618. As a further aid in identifying the source, the written replies are identified as the statement of the Government; statements made during the second session of the Commission are identified as a statement by the representative of the Government in question.

⁵ A/CN.9/12, p. 3.

⁶ Note of 12 May 1969 by the Permanent Representative of Cambodia to the Secretary-General.

⁷ A/CN.9/12, p. 8.

⁸ A/CN.9/12/Add. 1, p. 5.

⁹ A/CN.9/12, p. 10.

¹⁰ A/CN.9/12/Add.1, p. 4.

¹¹ A/CN.9/12/Add.4, p. 3.

¹² A/CN.9/12/Add.3, p. 3.

¹³ A/CN.9/12, p. 8.

¹⁴ A/CN.9/12/Add.4, p. 4 and A/7618, annex II, para. 4.

¹⁵ A/CN.9/12/Add.1, p. 11.

¹⁶ *Ibid.*, p. 12.

¹⁷ A/CN.9/12/Add.4, p. 2.

¹⁸ A/CN.9/12/Add.1, p. 3.

¹⁹ A/CN.9/12, p. 3.

²⁰ A/CN.9/12/Add.3, p. 2.

²¹ A/CN.9/12, p. 7.

²² A/CN.9/12/Add.4, p. 3.

²³ A/CN.9/12/Add.1, p. 4.

²⁴ A/CN.9/12, p. 8.

²⁵ A/CN.9/12/Add.2, p. 3.

²⁶ A/CN.9/12, p. 9.

²⁷ *Ibid.*

²⁸ A/CN.9/12/Add.1, p. 10.

²⁹ *Ibid.*, p. 11.

³⁰ *Ibid.*, p. 11.

³¹ A/CN.9/12, p. 10.

³² A/CN.9/12/Add.1, p. 13.

³³ A/CN.9/12/Add.2, p. 3 and A/7618, annex II, para. 4.

³⁴ A/CN.9/12, p. 9.

³⁵ A/CN.9/12/Add.4, p. 2.

³⁶ A/CN.9/12/Add.1, p. 10.

1955 Convention.³⁷ Belgium stressed that its decision to ratify the Hague Conventions of 1964 was determined, among other reasons, by the desire to put an end to the uncertainties involved in the application of the rules of private international law.³⁸ Hungary, on the other hand, held the view that a greater degree of security could be derived from international unification of the conflict of laws than from the Hague Conventions of 1964.³⁹

9. The Federal Republic of Germany pointed out that it was an essential aim of the standardization of substantive sales law to do away with any stipulation as to which national law should be applicable; moreover, the coexistence of the 1955 and 1964 Hague Conventions would lead to considerable difficulties of interpretation since the provisions of those two Conventions differed quite considerably on a number of points. The Federal Republic was therefore of the opinion that the declaration under article IV of the Convention on Sales would result in largely eliminating the benefits afforded by the Uniform Law through the standardization of substantive law.⁴⁰

10. The representative of the United Arab Republic observed that the field of application of the 1955 Hague Convention would become very limited if a uniform law on the international sale of goods were adopted by all countries of the world.⁴¹ Similar views were expressed by the Secretary-General of the Hague Conference: if the Uniform Law of 1964 should be adopted by all countries of the world, the rules of conflict would become almost entirely pointless. At the same time, however, the Secretary-General of the Hague Conference emphasized that this was not now the case and that it could not be hoped that the Uniform Law would be accepted without subsequent alteration by the great majority of countries. He further pointed out that several aspects of the sales of goods were not covered by the Uniform Law and that, therefore, rules of conflict would in any event continue to be of importance in all such matters.⁴²

11. The representative of Norway shared the opinion expressed by the Secretary-General of the Hague Conference: unified conflict rules would be needed even in the event of world-wide adoption of the 1964 Hague Conventions as the latter did not cover every aspect of international sale.⁴³ It was suggested therefore by Norway that article 2 of the Uniform Law on Sales be deleted or amended, so as to make the application of the Uniform Law dependent on the rules of private international law of the State of the *forum*. As an alternative solution Norway suggested that article IV of the Convention on Sales be amended in such a way that it should make it permissible also for a contracting State to accede in the future to conventions on conflict of laws in the

field of the law on sale.⁴⁴ The United States noted that provisions such as article 2 of the Uniform Law on Sales had been the subject of considerable controversy at the Hague Conference of 1964 and might be deterring States from becoming parties to the convention on Sales.⁴⁵

12. The need for unified conflict rules was voiced also by the representative of the Union of Soviet Socialist Republics, who suggested the deletion of article 2 of the Uniform Law on Sales.⁴⁶ The observer of the International Chamber of Commerce made a similar suggestion, and noted that the 1964 Hague Uniform Law on Sales, in accordance with article 8 of that Law, was not concerned with several aspects of the contract of sale, such as the formation and the validity of the contract or any of its provisions.⁴⁷ The observer of UNIDROIT pointed out that several matters (e.g. prescription) which were not dealt with in the Uniform Law of Sales could not be settled in conformity with the general principles of that Law as provided for in article 17 of the Uniform Law; in such cases recourse should be had to rules of private international law.⁴⁸

13. Czechoslovakia stated that unification of substantive norms reduced the conflicts of national laws but did not wholly remove them; therefore it was also necessary to strive for the unification of conflict rules.⁴⁹ It further expressed the view that uniform rules should only be applied if the conflict norms of the *forum* referred to the substantive law of a State which had enacted those uniform rules. Unification of conflict rules should therefore precede unification of substantive rules.⁵⁰ The representative of Romania observed that conflict rules were complementary to substantive rules and consequently stressed the need for a convention on conflict rules.⁵¹

14. Mexico considered it advisable to ratify both the Hague Convention of 1955 and the Hague Conventions of 1964. In support of this view attention was directed to contracts involving parties whose countries have not ratified the 1964 Conventions and contracts which excluded the application of those Conventions. In both cases, problems of conflicts of law would be solved by the rules of the 1955 Convention. At the same time, however, Mexico noted specific points on which the 1955 and 1964 Conventions were inconsistent.⁵² Spain noted that the 1955 Convention should be brought in line with the 1964 Convention on Sales once the latter Convention is finalized.⁵³

(b) *General approval and disapproval of the Convention*

15. Colombia stated that its intention to adhere to

³⁷ A/CN.9/12, p. 8.

³⁸ A/CN.9/11, p. 12.

³⁹ A/CN.9/11/Add.3, p. 6.

⁴⁰ A/CN.9/12, p. 7.

⁴¹ A/7618, annex II, para. 5.

⁴² A/CN.9/12/Add.2, p. 5.

⁴³ A/7618, annex II, para. 6.

⁴⁴ A/CN.9/11, p. 22.

⁴⁵ A/CN.9/11/Add.1, p. 35.

⁴⁶ A/7618, annex I, para. 38.

⁴⁷ A/7618, annex II, para. 6.

⁴⁸ A/7618, annex I, para. 39.

⁴⁹ A/CN.9/12/Add.1, p. 4.

⁵⁰ A/CN.9/11/Add.1, pp. 4-5.

⁵¹ A/7618, annex II, para. 5.

⁵² A/CN.9/12/Add.1 p. 7.

⁵³ *Ibid.*, p. 13.

the 1955 Convention followed the recommendation of the Inter-American Juridical Committee that there was no need to adopt a regional instrument in the matter, since the Convention satisfactorily met the requirements of the countries of the American continent.⁶⁴

16. The representatives of Argentina, Italy, Mexico, Tunisia and the United Arab Republic and the observer of the International Chamber of Commerce expressed the view that while some of the provisions of the Convention might be improved, it was, in general, a satisfactory instrument.⁶⁵

17. Spain approved of the Convention in principle.⁶⁶

18. Czechoslovakia pointed out that in preparing the Czechoslovak law of 1963 on private international law and law of procedure, the Czechoslovak legislature had adopted the fundamental principles of the Convention.⁶⁷

19. Sierra Leone expressed general agreement with articles 1, 2, 5, 8, 9, 10, 11 and 12 of the Convention. Because of the wording of other articles, however, Sierra Leone could not express agreement with the Convention as a whole.⁶⁸

20. Noting that the 1955 Hague Conference was attended by only sixteen States, none of which was a socialist or developing State, the USSR expressed the opinion that the text of the Convention could not be used for the elaboration of a universal international agreement on the law applicable to the international sale of goods.⁶⁹

21. Chile,⁶⁹ the Federal Republic of Germany,⁶¹ and the United Kingdom⁶² disapproved of the Convention, noting differences between the provisions of the Convention and those of their own legal systems.

22. The United Kingdom stressed, *inter alia*, that its courts ordinarily applied the rules of a single legal system in determining the rights and obligations arising out of a contract. Although there were exceptions to this principle, the application of more than one system of law to the same contract was unusual.⁶³

(c) *Equal protection of the interests of seller and buyer*⁶⁴

23. The United States doubted whether an adequate solution had been worked out in the Convention with respect to the balancing of interests as between buyer and seller.⁶⁵ On the other hand, the representative of Mexico expressed the opinion that the provisions of the

Conventions were objective and protected the rights of both buyer and seller.⁶⁶

24. The representative of Hungary, admitting that the time was not yet ripe to restrict or abolish the autonomy of the parties, noted that the unrestricted autonomy of the parties to designate the law of the contract, favoured the stronger party.⁶⁷

C. *Observations on specific articles of the Convention*

(a) *Article 1*

25. The representative of the USSR expressed the view that the term "international sale of goods" should be defined in order to make it clear what relationships the Convention sought to regulate.⁶⁸ A similar view was expressed by the representative of the United Arab Republic who raised the question whether the definition contained in the 1964 Uniform Law on the International Sale of Goods could be applied.⁶⁹

26. The representative of Italy expressed the view that a definition of the term had been omitted because the objective criteria contained in the Convention, such as the receipt of an offer or the existence of an establishment, clearly defined the cases in which the Convention was to be applied.⁷⁰ The Secretary-General of the Hague Conference informed the Commission that a definition of the International sale of goods had deliberately been omitted from the text because other provisions of the Convention clearly defined its field of application.⁷¹

27. Mexico suggested that sales of money and of electricity should be excluded from the field of application of the Hague Convention of 1955, since the Hague Conventions of 1964 did not apply to those sales and the reasons invoked for excluding them from the field of application of those Conventions were also valid in respect of the Hague Convention of 1955.⁷²

(b) *Article 2*

(i) *Paragraph 1 of article 2*

28. The use of the expression "domestic law" instead of "substantive domestic law" was regretted by the representative of Czechoslovakia on the ground that the terminology used in the Convention did not exclude the application of the conflict rules of the law designated by the parties and, consequently, did not exclude the question of *renvoi*.⁷³ The representative of Hungary disagreed with that view; in his opinion the application of the conflict rules was excluded in cases where the parties designated the law applicable to their contract.⁷⁴

29. The Secretary-General of the Hague Conference stated that the term "domestic law", in contrast with

⁶⁴ A/CN.9/12, p. 3.

⁶⁵ A/7618, annex II, paras. 1 and 4.

⁶⁶ A/CN.9/12/Add.1, p. 12.

⁶⁷ *Ibid.*, p. 4.

⁶⁸ *Ibid.*, p. 11.

⁶⁹ A/CN.9/12/Add.1, p. 12.

⁷⁰ A/CN.9/12, p. 3.

⁷¹ *Ibid.*, pp. 4-7. Objections with respect to the practicality of specific provisions (art. 3, para. 2) are noted *infra*.

⁷² A/CN.9/12/Add.1, p. 13.

⁷³ *Ibid.*

⁷⁴ See also paragraphs 34-35 below concerning comments on the second paragraph of article 3 of the Convention.

⁷⁵ A/CN.9/12/Add.2, p. 3.

⁶⁶ A/7618, annex II, para. 3.

⁶⁷ *Ibid.*, para. 12.

⁶⁸ *Ibid.*, para. 10.

⁶⁹ *Ibid.*, para. 10.

⁷⁰ *Ibid.*, para. 11.

⁷¹ *Ibid.*, para. 11.

⁷² A/CN.9/12/Add.1, p. 8.

⁷³ A/7618, annex II, para. 13.

⁷⁴ *Ibid.*, para. 15.

the term "law" that included conflict rules also, was chosen precisely in order to exclude *renvoi*, since it meant substantive law, excluding rules of conflict.⁷⁵ This distinction between the two terms was objected to by the representative of Italy who observed that the equivalent Italian words do not make that distinction.⁷⁶

(ii) *Paragraph 2 of article 2*

30. The representative of Czechoslovakia pointed out that the provisions of paragraph 2 of article 2 of the Convention were not in harmony with those of Article 3 of the 1964 Hague Uniform Law. Paragraph 2 of the 1955 Convention excluded the implied choice of law or a partial choice. On the other hand, under the 1964 Hague Uniform Law the parties to a contract were free to exclude the application of a law⁷⁷ not only expressly but also implicitly, and not only entirely but also partially.

31. The United Kingdom and the Federal Republic of Germany also commented on the provision contained in paragraph 2 of article 2. The Federal Republic of Germany opposed that provision on the ground that it did not permit the interpretation that agreement on a national institutional arbitral tribunal was at the same time considered to constitute an agreement on the application of the law prevailing at the seat of that tribunal.⁷⁸ The United Kingdom, although it was not expressly opposed to the provision of that paragraph, raised the same objection.⁷⁹

(c) *Article 3*

(i) *General comments on article 3*

32. The United Kingdom noted that the provisions of article 3 would involve a change in its national law. Where there was no express choice of law clause the rule of English law was that the applicable law was to be inferred by seeking to determine the intention of the parties by an examination of the terms and nature of the contract and the surrounding circumstances. The United Kingdom further observed that the application of the rule set out in article 3 would tend to produce legal consequences which the parties had not contemplated and might produce anomalous results, e.g. in cases where the parties had not designated an applicable law so as to make the provisions of article 2 applicable but nevertheless had contracted in terms which made it clear that they did not contemplate the application of the law of the seller's country.⁸⁰

33. Chile noted that the provisions of article 3 were based on principles totally different from those obtaining in the Chilean system; in cases where the parties had not indicated the law applicable to their contract, Chilean law applied not the law of the seller's country or that of the buyer's country, but the *lex loci contractus* and the *lex rei sitae*.⁸¹

(ii) *Paragraph 1 of article 3*

34. Sierra Leone suggested the need for a more precise expression than the term "habitual residence" which, in Sierra Leone's opinion, may not be easily ascertainable.⁸²

35. The Federal Republic of Germany objected to the scope of exceptions to the basic principle expressed in the first sentence that the seller's law shall govern the contract. One of these exceptions was contained in the second sentence of paragraph 1 which points to the law of the place where a seller's "establishment" (such as a branch office) is situated if the order is received there, rather than at the principal office in another country. The comments made by the Federal Republic of Germany referred to proposals which were submitted to the Eighth and Ninth Hague Conferences suggesting that the provision contained in the second sentence of article 3, paragraph 1, should be confined to cases in which the seller maintained an establishment with a delivery stock of goods of the type in question.⁸³

(iii) *Paragraph 2 of article 3*

36. Opinions regarding paragraph 2 of article 3 differed as to whether this paragraph favoured the stronger party. Iran stressed that the Convention suited the economically developed countries which were essentially exporting countries. It was for that reason that stress had been laid on the law of the seller, i.e. on the law of the economically stronger party. Article 3, paragraph 2, assigned only a very modest role to the law of the buyer.⁸⁴ At the second session of the Commission, the representative of Iran stated that the application of the law of the country of the seller by the judge of the buyer's country might cause practical difficulties, which would not be the case if he had to apply the *lex fori*.⁸⁵ The representative of France expressed however the opinion that the application of the law of the buyer did not necessarily favour the buyer and, similarly, the application of the law of the seller did not necessarily favour the seller, since the laws of all countries sought to give equal rights to seller and buyer.⁸⁶ The opinion of the representative of France was also shared by the Secretary-General of the Hague Conference.⁸⁷

37. The representative of the USSR considered that the terms "order" and "given the order" should be clarified and the point at which an order was to be deemed to be given should be specified.⁸⁸

38. The Federal Republic of Germany objected to the exception to the principle applying the law of the seller's country whereby the law of the buyer's habitual residence was applicable if the order has been received in such country "whether by the vendor or his representative, agent or commercial traveller". This provision

⁸² A/CN.9/12/Add.1, p. 11.

⁸³ A/CN.9/12, p. 6. For a related objection by the Federal Republic of Germany see the discussion under paragraph 2 of article 3, *infra*.

⁸⁴ A/CN.9/12/Add.1, p. 5.

⁸⁵ A/7618, annex II, para. 17.

⁸⁶ *Ibid.*, para. 18.

⁸⁷ A/CN.9/12/Add.2, p. 9.

⁸⁸ A/7618, annex II, para. 20.

⁷⁵ *Ibid.*, para. 14.

⁷⁶ *Ibid.*, para. 14.

⁷⁷ *Ibid.*, para. 15.

⁷⁸ A/CN.9/12, pp. 4-5.

⁷⁹ A/CN.9/12/Add.1, p. 14.

⁸⁰ *Ibid.*, pp. 13-14.

⁸¹ A/CN.9/12, p. 3.

was said to be unsystematic and without material justification, since, pursuant to an obsolete theory, it declared the *lex contractus* to be applicable, and made the applicable law contingent upon arbitrary and frequently unforeseeable incidental circumstances.⁸⁹

39. According to other views, however, the place where the order was given and received was different from that where the contract was concluded. Thus, the representative of Iran expressed the opinion that it would be preferable if the applicable law were the *lex loci contractus* instead of that of the place where the order was given.⁹⁰ The Secretary-General of the Hague Conference noted that the *lex loci contractus* was one of the most controversial questions and that it was for that reason that the law of the place where the order was given was chosen in the Convention.⁹¹ The representative of Italy pointed out the usefulness of eliminating the criterion of the place where the contract was concluded.⁹²

(d) *Article 4*

40. In the opinion of the United Kingdom, one of the disadvantages of the Convention was that article 4 of the Convention involved a more frequent application of more than one law to a single contract, which tended to complicate rather than to simplify the legal rules affecting international transaction.⁹³

⁸⁹ A/CN.9/12, pp. 6-7.

⁹⁰ A/7618, annex II, para. 19.

⁹¹ *Ibid.*, para. 19.

⁹² *Ibid.*, para. 19.

⁹³ A/CN.9/12/Add.1, p. 14.

41. The representative of the USSR suggested that since inspection of goods might take place in two stages, namely a preliminary inspection in the country of the seller and a final one in the country of the buyer, it should be made clear in article 4 which inspection is intended.⁹⁴

(e) *Article 5*

42. The representative of the USSR proposed the inclusion in sub-paragraph 2 of the words "and procedures for their signing", noting that the law of the USSR provided for a special procedure for signing international sale contracts.⁹⁵

43. Mexico considered that the relationship established in sub-paragraph 3 of article 5 between the transfer of ownership and the transfer of risk was a defect resulting from the rule *res perit domino*, for which it submitted there was no justification.⁹⁶

(f) *Articles 10 and 12*

44. The representative of the USSR considered that article 10 and paragraph 4 of article 12 were contrary to the 1960 Declaration of the United Nations General Assembly on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV) of 14 December 1960) and that the provisions of the said articles, therefore, could not be included in a new international convention.⁹⁷

⁹⁴ A/7618, annex II, para. 21.

⁹⁵ *Ibid.*, para. 22.

⁹⁶ A/CN.9/12/Add.1, p. 8.

⁹⁷ A/7618, annex II, para. 23.

C. General conditions of sale and standard contracts, incoterms and other trade terms:

1. *Promotion of wider use of existing general conditions of sale and standard contracts: report of the Secretary-General**

CONTENTS

	— Paragraphs
I. INTRODUCTION	1-5
II. ACTIVITIES OF ORGANIZATIONS IN THE FIELD OF GENERAL CONDITIONS OF SALE AND STANDARD CONTRACTS	6-8
III. PURPOSE AND NATURE OF GENERAL CONDITIONS OF SALE AND STANDARD CONTRACTS ..	9-15
IV. SOME FACTORS IMPEDING A WIDER USE	16-19
V. PROMOTION OF THE WIDER USE OF SELECTED GENERAL CONDITIONS AND STANDARD CONTRACTS	20-29
A. General observations	20-23
B. Selection of existing formulations or preparation of new ones	24
C. Methods that could be used in carrying out the work	25-30

Annexes

	Page
I. Organs and organizations requested by the Secretary-General to submit comments and suggestions on item "General Conditions of Sale and Standard Contracts"	212
II. Replies of organs and organizations	212
III. General conditions of sale and standard forms of contract sponsored by the ECE	215

* A/CN.9/18.

I. INTRODUCTION

1. The United Nations Commission on International Trade Law, at its first session, decided to include in its work programme, as a priority topic, the law of international sale of goods. The Commission selected, as one of the items falling within the scope of the international sale of goods, the subject "general conditions of sale, standard contracts, Incoterms and other trade terms".¹

2. With respect to general conditions of sale and standard contracts, the Commission requested the Secretary-General "in consultation with the secretariats of ECE, the other regional economic commissions and other organizations concerned, to submit to the second session of the Commission a preliminary report examining the possibility of promoting the wider use of the existing general conditions of sale and standard contracts".² The Commission also specified that the report "should state the considerations and factors which are impeding a wider use of general conditions of sale [and] standard contracts".³

3. Pursuant to the above request of the Commission, the Secretary-General invited the organs and organizations listed in annex I to this report to submit comments and suggestions on the matter. He also asked these organs and organizations to assist the Secretariat by providing information that may be helpful in obtaining the texts of general conditions of sale and standard contracts prepared by or under the auspices of international or national organizations and used in international trade, and, if possible, to supply copies of those instruments.

4. The secretariats of the following United Nations organs and intergovernmental organizations have sent substantive replies to the Secretary-General's request: the Commission of the European Communities, Economic Commission for Europe, Economic Commission for Latin America, Food and Agriculture Organization, Latin American Free Trade Association and the Organization of American States. A substantive reply was also received from the secretariat of the International Chamber of Commerce. The substantive portions of the replies are reproduced in annex II to this report.

5. In addition, several organizations have supplied the Secretariat with the texts of a number of general conditions and standard contracts.

II. ACTIVITIES OF ORGANIZATIONS IN THE FIELD OF GENERAL CONDITIONS OF SALE AND STANDARD CONTRACTS

6. With respect to activities in this field by intergovernmental organizations, the United Nations Economic Commission for Europe has undertaken the most extensive work to date. The Commission sponsored the drawing up of thirty general conditions of sale and standard contracts. It also sponsored the preparation of unified regulations for the standardization of methods

of sampling and general conditions for international furniture removal. It is presently engaged in finalizing a guide on the international transfer of know-how. The list of general conditions and standard contract forms prepared by the Economic Commission for Europe is contained in annex III of this report.

7. In addition to the Economic Commission for Europe, a large number of international as well as national organizations have been or are active in the field of general conditions of sale and standard contracts. Most of these organizations, primarily trade associations, have prepared instruments for the use in international trade by their own members. Not infrequently, however, these instruments are also used by non-members and in transactions concluded outside the country of the association which originally prepared them.

8. Some organizations have been dealing with the legal principles underlying general conditions of sale and standard contracts. For example, the International Association of Legal Science devoted its conferences and colloquia in Helsinki (1960), London (1962) and New York (1964) to comparative law problems relating to international trade including also general conditions of sale and standard contracts.⁴ The International Institute for the Unification of Private Law (UNIDROIT) selected the subject "Unification and harmonization: the criteria governing the choice between the various methods" as the theme of the fourth meeting of the organizations concerned with the unification of law, held in Rome from 22 to 24 April 1968. Among others, the following matters were considered at the meeting: unification or harmonization by means of legal instruments that have no binding force, and unification and harmonization by means of standard contracts general conditions, etc.⁵

III. PURPOSE AND NATURE OF GENERAL CONDITIONS OF SALE AND STANDARD CONTRACTS

9. The principle purpose of general conditions of sale and standard forms has been described as "undoubtedly to facilitate international trade by the avoidance or reduction of the uncertainty that sometimes surrounds international sales contracts due to the vagaries of private international law, on the one hand, and the difficulties of obtaining evidence on a system of foreign law, on the other hand. Notwithstanding the importance of this aspect of the general conditions, reference should also be made to their operation as a means of codifying trade usages with the resultant uniformity of

¹ Report of the Commission on the work of its first session, (A/7216), para. 12 (iv).

² *Ibid.*, para. 19.

³ *Ibid.*, para. 21.

⁴ The reports presented at, and the records of, the Helsinki colloquium have been published in *Some Problems of Non-Performance and Force Majeure in International Contracts of Sale* (Helsinki, 1961, Institutum Jurisprudentiae Comparativae Universitatis Helsingiensis), those of the London colloquium in *The Sources of the Law of International Trade*, edited by C. M. Schmitthoff (London, 1964, Stevens and Sons) and those of the New York colloquium in *Unification of the Law Governing International Sale of Goods*, edited by J. Honnold (Paris, 1966, Librairie Dalloz).

⁵ On the latter method, see the report by C. M. Schmitthoff in *The International and Comparative Law Quarterly*, 1968, Vol. 17, part 3, pp. 551 ff.

law, and that they offer a possibility to persons to enter into contracts that are not completely one-sided by their provisions. The latter aspect of the general conditions of sale and the standard forms of contract is more or less the application to the international field of the maxim 'equality is equity'.⁶

10. General conditions and standard contracts differ in their form from each other. General conditions "provide a list of clauses which the parties to a contract can incorporate or refer to in their own contract. The printed document itself, in which the general conditions of sales are found, is, however, not supposed to constitute the parties' contract".⁷ The standard contracts "are the printed document which the parties to a contract can use as the contract itself, provided that they sign it and fill in those clauses which require completion, such as those relating to the names of the parties, price, port of dispatch, quantity and description".⁸ According to another definition, a standard contract "can be described as a model contract or set of standard conditions in the written form, the term of which have been formulated in advance by an international agency in harmony with international commercial practice or usage, and which has been accepted by the contracting parties after having been adjusted to the requirements of the transaction in hand".⁹

11. The term "standard contract" is used in two different meanings, denoting model contract forms and contracts of adhesion: "These two meanings are by no means identical. A model contract form is a specimen form to which the lawyer or businessman will turn when charged with the duty of drafting a contract and which will be altered and adapted to meet the situation in hand. A contract of adhesion is a form proposed by one of the contracting parties to the other as the definitive form of the contract which is intended to be unalterable except in trifling and unimportant detail; the party to whom this type of contract is offered may 'take it or leave it' but cannot negotiate its terms and conditions".¹⁰

12. A distinction between general conditions and standard contracts is also made in respect of their field of application. According to one view, "a scientific study of the subject of standard contracts or trading rules will distinguish between standard contracts or trading rules on two levels: the general conditions of general character applying to all commodities or trades and the standard contracts or trading rules applying only to certain commodities or trades".¹¹ With respect to general conditions and standard contracts it has also been suggested that vertical standardization occurs where trade usages are standardized in a particular trade, while horizontal

standardization applies across the board to all types of international sales.¹²

13. Most of the existing general conditions of sale and standard contracts are the result of vertical standardization, i.e. they apply only to certain commodities or trades. Only two existing general conditions of sale apply to all commodities or trades: Incoterms 1953 prepared by the International Chamber of Commerce and the "COMECON GCD of 1968".

14. Incoterms 1953 is a set of international rules for the interpretation of nine terms¹³ used in foreign trade contracts. Accordingly, its scope differs from that of other general conditions of sale and standard contracts, which generally contain a more or less complete set of rules on most aspects of international sales of goods. The possible promotion of the wider use of Incoterms 1953 is dealt with in a separate study prepared by the International Chamber of Commerce¹⁴ for submission to the second session of UNCITRAL. This report, therefore, does not deal with that subject.

15. The "COMECON GCD of 1968"¹⁵ applies to all contracts of sale concluded between foreign trade organizations of the member States of the Council for Mutual Economic Assistance. The application of the General Conditions has been made mandatory by the competent legislative organs of each member State. Under the preamble of the General Conditions, the parties may, however, modify any of its provisions, if, when entering into the contract, they arrive at the conclusion that the special character of the goods or of the transport demands such modification. In view of its partly mandatory and partly optional character, the COMECON GCD may be characterized as a borderline case between uniform law and general conditions.

IV. SOME FACTORS IMPEDING A WIDER USE

16. While insufficient information is available to the Secretariat as to the extent of the use of general conditions of sale and standard contracts in international trade,¹⁶ it is possible to identify some of the factors that

¹² F. Eisemann, *Die Incoterms in Handel und Verkehr*, 1963, Vienna, p. 4, n. 2. (referred to in C. M. Schmitthoff *supra* note 5, *op. cit.*, p. 556).

¹³ Ex works, for-fot, fas, fob, c and f, cif, freight or carriage paid to..., ex ship..., ex quay...

¹⁴ A/CN.9/14.

¹⁵ The COMECON GCD (General Conditions of Delivery) of 1968, an expanded text of the COMECON General Conditions of Delivery of 1958, entered into force on 1 January 1969. The full title of the General Conditions is: "General Conditions for Delivery of Goods between organizations of the Member States of COMECON* (COMECON GCD of 1968)".

* Wording of 1968.

¹⁶ According to a report prepared by the American Bar Association, a study had been made on the use of general conditions and standard contracts. In the preparation of the study, a large number of American trade associations was approached to obtain information. Forty-seven and two-tenth per cent of the consulted importers' trade associations and 39.7 per cent of the consulted exporters' trade associations confirmed the use of standard contracts in international trade, and 50 per cent and 22.7 per cent, respectively, of these associations recommended the use of such contracts. The report does not contain any information whether the formula-

⁶ Peter Benjamin, ECE General Conditions of Sale and Standard Forms of Contract, in *The Journal of Business Law*, 1961, p. 114.

⁷ Shinichiro Michida, Possible Avenues to Preparation of Standard Contracts, in *Unification of the Law Governing International Sale of Goods*, *op. cit.*, p. 257.

⁸ *Ibid.*, p. 256.

⁹ C. M. Schmitthoff, *op. cit. supra* note 5, p. 557.

¹⁰ *Ibid.*, p. 551.

¹¹ S. Michida, *op. cit.*, p. 255.

tend to impede their wider use. The large number and variety of existing general conditions and standard contracts is one of these factors.

17. As regards the general conditions and standard contracts applying to certain commodities, the abundance of general conditions and standard contracts in existence which apply to the same type of goods may be illustrated by those relating to the sale of cereals. The Economic Commission for Europe prepared sixteen such instruments,¹⁷ the London Corn Trade Association forty,¹⁸ and others have been prepared by various national organizations. Formulations prepared by the same organization are basically identical showing "only minor variations depending on the types and categories of grain, and their origin, destination and method and form of shipping,"¹⁹ but for the most part they differ from formulations prepared by other organizations. A great variety of general conditions and standard contracts used in international trade is also found in respect of the sale of other commodities such as seeds, timber, cotton, coal, rubber, silk, coffee, etc.

18. The large number of existing formulations may often result in difficulties and uncertainties for the parties. "The would-be user is very often confronted with an embarrassingly large choice of forms of contract which he could use. He is also confronted with the fact that nearly all these instruments refer to one legal system alone, and have been drawn solely with that system in view, namely, that of the country of the trade association or organization that drafted them. Hence, not only is the would-be user exposed to the possible conflicts of interpretation. . . , but he is often faced with the fact that while he may prefer a particular form of contract or a series of clauses to be found in a particular form of contract, the other party may prefer to see the contract concluded on the basis of a totally different form of contract, or on the basis of clauses to be found therein."²⁰ This may lead to "one hazard in the use of standard forms" i.e. "the danger of causing 'a battle of the forms'. This may occur when an exporter sends out one form and a buyer accepts on his own form which contains printed terms inconsistent with those on the seller's form, the difference not being noticed in the ordinary course of events."²¹ It has therefore rightly been

tions referred to by the associations as used by their members where drawn up by a formulating agency by the exporters and importers themselves, respectively. See *Unification of International Private Law*, Report of the American Bar Association Special Committee on International Unification of Private Law, American Bar Foundation, Chicago 1961, Appendix A, pp. 46-47. Concerning the use of the ECE General Conditions outside Europe, the ECE secretariat has indicated that the ECE General Conditions of Sale in the engineering industry are sometimes used in international contracts between European exporters and importers in Latin America, Africa, the Near East and Asia, on the initiative of the European vendor (see annex II reply of the ECE, para. 42).

¹⁷ See annex III.

¹⁸ See reply of the FAO, annex II.

¹⁹ *Ibid.*

²⁰ P. Benjamin, *op. cit.*, p. 114.

²¹ M. Meek and I. Feltham, Foreign sales, distribution, licensing and joint venture agreements, *De Paul Law Review*, vol. XVII (1967), p. 50.

stated that "although the efforts for legal formulation of international trade practice are inspired by the desire to remove uncertainty and insecurity, it cannot be denied that they have resulted in the creation of numerous and various forms of standard contracts which, owing to the lack of common principles, often bring contracting parties into unexpected situations".²²

19. Besides the difficulties caused by the great number of competing formulations, there is another factor that might reduce the use of general conditions and standard contracts. As already stated, most of the general conditions of sale and standard contracts applicable to particular commodities have been drawn up by trade associations representing primarily the interests of the sellers or that of the buyers. These forms "are often drafted with reference to a particular system of law, sometimes designed to be somewhat onesided in safeguarding either the seller's interests to the detriment of the buyer's interests, or vice versa, or sometimes drawn up many years ago and only adaptable with difficulty to the needs of modern trade".²³ In the view of another author, "the weakness of such standard contracts or general conditions drawn up by trade associations of producers or sellers of goods and services derives, in a legal or rather *judicial* — context, from the fact that they emanate from one economic force which offers them to buyers or users who are dispersed or unorganized; this is the reason why they are regarded with a certain amount of suspicion. . . . A promising development in certain sectors has been the collective contract negotiated by spokesmen for all the groups concerned, sometimes under the auspices of a national or international authority and sometimes with the endorsement of the executive power."²⁴

V. PROMOTION OF THE WIDER USE OF SELECTED GENERAL CONDITIONS AND STANDARD CONTRACTS

A. General observations

20. As there is a great number of existing general conditions of sale and standard contracts, many of which are applicable to the same commodities, it would appear necessary, in the first instance, for the Commission to select those the wider use of which it might find desirable to promote.

21. A selection might be based on the considerations quoted in paragraph 19 above that the rights of both sellers and buyers are better reflected in the general conditions and standard contracts that have been drawn up with the participation of representatives of sellers and buyers, by independent organizations such as the Economic Commission for Europe, than in those prepared by international or national organizations representing either the sellers or the buyers which often

²² A. Goldstajn, International conventions and standard contracts as means of escaping from the application of municipal law, in *The Sources of the Law of International Trade*, *op. cit.*, p. 116.

²³ S. Michida, *op. cit.*, p. 256.

²⁴ Ch. del Marmol, Standard clauses in contracts, a factor in the unification of commercial law. *Liber Amicorum Baron Louis Frédericq*, Ghent Faculty of Law, 1966, p. 313.

contain onesided terms.²⁵ This might lead to the conclusion that the general conditions and standard contracts prepared by the ECE and similar independent organizations are more widely used than those prepared by trade associations or other organizations interested, under which the interests of the sellers and buyers are less well balanced, and that the possibility of promoting the wider use of the former offers better prospects. On the other hand, there are also indications that in some instances business circles might prefer the formulations of trade associations.²⁶

22. In addition to the possibility of promoting certain existing instruments in their present form, consideration might also be given to a revision of these formulations, if necessary, or the drawing up of new general conditions and standard contracts which might be more readily acceptable to both sellers and buyers on either regional or world-wide level.

23. It would appear that, should the Commission decide to prepare new general conditions and standard contracts, whether of a general or a specific character, the preparation of such new formulations should be preceded by, and based on, an analysis of existing ones. Such an analysis might help in assessing what, in the existing formulations, is common to all commodities²⁷ or to a certain category of commodities and what are the main differences which should be resolved. As the United States stated in its reply concerning The Hague Conventions of 1964: "The development of standard contracts and general conditions of sale must be based upon full information regarding the rules, customs and practices employed not only in the various parts of the world but also in the many fields of international trade. In collecting, analyzing and collating these data it will be necessary to make full use of the experience of all organizations and bodies in the world that have been concerned in this field. An important and immediate task for UNCITRAL is the determination and adoption of

methods by which all the necessary activities can be organized and co-ordinated."²⁸

B. Selection of existing formulations or preparation of new ones

24. In the light of the foregoing observations the Commission might wish to consider:

- (a) Promoting the wider use of ECE general conditions. This could be done in the following ways:
 - (i) Promoting the wider use of all ECE general conditions in their present form;
 - (ii) Selecting from the ECE general conditions those which have proved to be best suited to international trade, and promoting their wider use;²⁹
 - (iii) Revising the ECE general conditions and promoting the use of the revised texts;³⁰
- (b) Promoting general conditions and standard contracts other than those drawn up by the ECE. This could be done in the following ways:
 - (i) Selecting certain general conditions and standard contracts which are widely used in international trade, and promoting the use of such formulations in their present form;
 - (ii) Revising the formulations mentioned in (b) (i) above in order to make them more widely acceptable, and promoting the use of the revised texts;
- (c) Preparing new general conditions and standard contracts. This could be done in the following ways:
 - (i) Drawing up of "additional standard contracts and conditions for separate commodities, other than those which are now available";³¹
 - (ii) Preparing, for world-wide use, "standard contracts for the principal categories of commodities, such as Machinery and Equipment, Durable Consumer Goods, Agricultural Products, and the like, coupled, where necessary, with annexes to meet the special problems of particular commodities";³²

²⁵ Under the Standard Contract Law of 1964 of Israel, restrictive terms of standard contracts should be approved by a Board appointed for the purposes of the Restrictive Trade Practices Law. Section 15 of the Law enumerates the onerous clauses which are deemed to be restrictive terms. Such clauses may be refused approval by the Board, or the restrictive term of any part of it may be regarded as void by a court. See Ole Lando: *Standard Contracts. A proposal and a perspective*. Appendix: Israeli Standard Contracts Law 1964, *Scandinavian Studies in Law*, (Almqvist and Wiksell, Stockholm), pp. 129 ff.

²⁶ See annex II, p. 27. For example, in the opinion of the Timber Trade Association of the United Kingdom, the ECE Standard Contracts for the Sale of Sawn Softwood and Sawn Hardwood are not well suited for practical use in the trade and the Association's own standard contracts are therefore preferred in the United Kingdom.

²⁷ In the opinion of E. A. Farnsworth, "what is really needed is a common core of contract provisions... From this base of 'core' regional variations could be made as needed." (*Unification of the Law Governing International Sales of Goods, Summary of the Proceedings*, op. cit., p. 396.) C. M. Schmitt-hoff suggested that "the standard form contracts be analyzed to find what is common to all of them. It is only possible to have a core if there is sufficient material to work from — if there are enough recurring problems. Although some problems are treated differently, there are already some regularly recurring problems emerging from the present contract." (*Ibid.*, p. 398.)

²⁸ A/CN.9/11/Add.1, p. 38.

²⁹ There are indications that some of the ECE general conditions might also be accepted outside of Europe, e.g. in the United States: "It does seem likely that the need for and willingness to use ECE forms will increase in the United States. The growing economic strength of the European states will decrease the willingness of European firms to accept American terms in international dealings." See Richard J. Cummins: *The General Conditions and Trading Form Contract of the United Nations Economic Commission for Europe*, New York University Law Review, 1963, vol. XXXVIII, p. 568.

³⁰ According to the comments submitted by the ECE secretariat, the experts of some European countries feel that the ECE formulations "might be re-examined by interested parties in non-European countries, with a view to their possible adaptation to conditions in those countries," whereas the experts from other European countries "emphasize the desirability of establishing a universally applicable document." See annex II, para. 49, p. 10.

³¹ S. Michida, op. cit., p. 263.

³² J. Honnold, A comparison of national unifications of the law of sales and avenues toward their harmonization: prospects and problems, in *Unification of the Law Governing International Sales of Goods*, op. cit., p. 32.

- (iii) Formulating general conditions of a general character for all categories of commodities coupled, where necessary, with annexes to meet special problems of the principal categories of commodities or of particular commodities.

C. Methods that could be used in carrying out the work

25. Should the Commission wish to promote on a world-wide basis the use of general conditions drawn up by the ECE or of any other formulation already used in international trade, one approach that might be considered could be the establishment of a joint committee of the four United Nations Regional Economic Commissions to make the necessary selection.³³ It would seem desirable that such a committee should include also representatives of business associations of both sellers and buyers of the four regions, who would be best qualified to consider which of the existing formulations meet the requirements of all interested parties. It should also be taken into consideration that existing general conditions and standard contracts are used for the sale of a great variety of goods and that this might require that separate committees be established for each principal category of commodities.

26. Should the Commission wish to promote the wider use of certain general conditions and standard contracts on a regional basis a selection of the most suitable formulations might be made by separate committees established within the framework of each regional Economic Commission. This method would possi-

bly result in the selection of different formulations for the different regions, depending on the particular requirements of the regions concerned.

27. If the Commission considers that it would be desirable to enlist the participation of the United Nations Regional Economic Commissions in this work it would be necessary, of course, to undertake appropriate consultations with the Regional Economic Commissions on the subject. In considering the most suitable organizational arrangements for that purpose it would seem desirable to take also into account the possibility of utilizing such existing machinery or facilities as may be available within the Regional Economic Commissions.

28. The selection of general conditions of sale and standard contracts might also be carried out by a working group of members of the Commission, or, subject to the approval of the financial implications, by retaining experts, if necessary. The same method might be used for drawing up new formulations.

29. Whatever method or procedure may be selected by the Commission, a certain amount of preparatory work would have to be performed in collecting and making a preliminary analysis of existing general conditions and standard contracts.

30. It does not seem necessary, at this stage, to discuss the possible ways and means by which the wider use of formulations selected by the Commission might be promoted. It may be noted, however, that certain suggestions in this respect have been made by the secretariat of the ECE in its reply to the Secretary-General's request for comments on this topic.³⁴

³³ A suggestion along these lines was made by C. M. Schmitt-hoff. See *op. cit. supra* note 5, p. 570.

³⁴ See reply of the ECE, para. 46, annex II.

ANNEX I

Organs and organizations requested by the Secretary-General to submit comments and suggestions on item "General Conditions of Sale and Standard Contracts"

[Annex not reproduced]

ANNEX II

Replies of organs and organizations

CONTENTS

	<i>Page</i>
<i>United Nations organs and specialized agencies</i>	
Economic Commission for Europe [reproduced in part]	213
Economic Commission for Latin America [not reproduced]	
United Nations Food and Agriculture Organization	214
<i>Other intergovernmental organizations</i>	
Commission of European Communities [not reproduced]	
Latin American Free Trade Association [not reproduced]	
Organization of American States [not reproduced]	
<i>International non-governmental organizations</i>	
International Chamber of Commerce [not reproduced]	

United Nations organs and specialized agencies

*Economic Commission for Europe*EXTENSION OF THE USE OF THE GENERAL CONDITIONS OF SALE
AND STANDARD CONTRACTS DRAWN UP UNDER THE AUSPICES OF
THE ECONOMIC COMMISSION FOR EUROPEI. *Introduction - Procedure*

1. Having been requested by the secretariat of the United Nations Commission on International Trade Law to submit comments and suggestions on the two points raised in paragraphs 19 and 21 of the document reproduced in paragraph 48 of the Commission's report on the work of its first session (A/7216), namely:

- (a) "The possibility of promoting the wider use of the existing general conditions of sale and standard contracts;
- (b) Factors which are impeding a wider use and acceptance of general conditions of sale, standard contracts, ...", the ECE secretariat addressed a preliminary inquiry to the experts of the national industrial federations which took part in the preparation, under ECE auspices, of the General Conditions of Sale in the Engineering Industry¹ in order to ascertain the views of the parties concerned on these points.

2. The following questionnaire was sent to each of the experts in this connexion:

(a) To what extent do the bodies you represent use the General Conditions of Sale for Plant and Machinery (No. 188 *et seq.*, No. 574 *et seq.* and No. 730) outside the ECE region? Is the use of these documents outside the ECE region tending to increase?

(b) In your opinion, would it be useful to take special measures to promote the application of these General Conditions to regions other than that of ECE? If so, what measures do you suggest?

(c) Do you consider that changes are needed in the text in order to make the General Conditions of Sale applicable to regions other than that of ECE? If so, what clauses are, in your opinion, particularly likely to require modification?

3. Replies to this questionnaire were submitted by the representatives of industrial associations using the General Conditions of Sale in Belgium, the Federal Republic of Germany, France, Hungary, Italy, Sweden, the United Kingdom and Yugoslavia. Extracts from these replies are reproduced below so that conclusions can be drawn from them.

II. *Use of the ECE General Conditions of Sale for Engineering Products outside Europe*

[Not reproduced here. The gist of the replies from eight countries is given in the conclusions under part V of this annex.]

III. *Measures which might facilitate a wider use of the General Conditions of Sale outside Europe*

[Not reproduced here. The gist of the replies from six countries is given in the conclusion under part V of this annex.]

¹ Nos. 188 and 574: General Conditions for the Supply of Plant and Machinery for Export.

Nos. 188A and 574A: General Conditions for the Supply and Erection of Plant and Machinery for Import and Export.

Nos. 188B and 574B: Additional Clauses for Supervision of Erection of Plant and Machinery Abroad.

Nos. 188D and 574D: General Conditions for the Erection of Plant and Machinery Abroad.

No. 730: General Conditions of Sale for the Import and Export of Durable Consumer Goods and of other Engineering Stock Articles.

IV. *Possible modification of certain clauses*

[Not reproduced here. The gist of the replies from eight countries is given in the conclusion under part V of this annex.]

V. *Conclusions*

41. It appears possible to draw the following conclusions from the opinions of the various experts which reflect fairly well the general point of view of ECE:

1. *Observations of fact*

42. The ECE General Conditions of Sale in the Engineering Industry are sometimes used in international contracts between European exporters and importers in Latin America, Africa, the Near East and Asia, on the initiative of the European vendors.

43. They are only beginning to be known, however, in countries outside Europe.

44. In particular, the Governments and importers of these countries do not use the ECE Conditions in their tenders.

2. *Recommendations as to procedure*

45. The experts all recognize the need to promote wider use of the ECE General Conditions of Sale outside Europe.

46. In order to achieve this, they all recommend that measures be taken to inform potentially interested parties. In this connexion, the following action was proposed:

(a) Promotion of the ECE Conditions of Sale among firms making tenders;

(b) (i) A campaign to publicize them among Governments and business circles in non-European countries;

(ii) Recourse, for this purpose, to the good offices of the various regional economic commissions of the United Nations;

(iii) A recommendation and dissemination of the Conditions of Sale by UNCITRAL;

(iv) Recourse also to the International Chamber of Commerce and its national committees;

(c) Publication by ECE of an information pamphlet on the General Conditions of Sale;

(d) Convening of an international meeting for purposes of information and discussion.

3. *Substantive recommendations*

47. *Desirability of arranging for a revision of the text.* Whereas the French, Italian and Swedish experts consider that a revision of the present texts is unnecessary and might present some danger, the Belgian expert considers that these documents have so far presented no difficulty, but reserves his position regarding the future; the United Kingdom expert sees no need for any major changes if the texts are to be used in countries whose legal system is based on one of the European systems, but thinks that changes would be necessary if the texts were to be applied in countries with an entirely different system of law; the German expert expresses a similar view. The Hungarian expert and the two Yugoslav experts, while not necessarily supporting a revision of the texts, favoured at least giving all Governments an opportunity to study them and propose any necessary amendments — even if only for psychological reasons, so that these documents will not appear as texts imposed on them by ECE exporters, but rather as instruments in whose preparation they took part and which take into account in a balanced manner the interests of both vendors and purchasers.

48. *Danger to be avoided.* All the experts draw attention to the danger of having several texts on the same subject. It should not be impossible, however, to envisage the possibility of some amendments being made to the original text, to be valid for specific regions or groups of countries.

49. *Requirements for a re-examination of the present texts.* Among the experts who feel that the General Conditions of Sale

might be re-examined by interested parties in non-European countries, with a view to their possible adaptation to conditions in those countries, the experts from Belgium and the Federal Republic of Germany emphasize the desirability of establishing a universally applicable document; the Belgian expert draws attention to the difficulty of that solution, which would probably require considerable time; in any event, he does not think that ECE should take the initiative since it lacks knowledge of the legal problems arising in countries outside Europe; he considers therefore that the other countries should first study the General Conditions of Sale and propose to ECE changes in certain provisions, if necessary; the Yugoslav expert also believes that the establishment of several texts on the same subject should be avoided, but considers that ECE should take the initiative in calling for talks.

4. General conclusion

50. It would seem that a compromise solution might be supported by all the experts. First of all, a campaign should be organized to publicize among interested circles in non-European countries the texts drawn up by ECE.

51. This campaign might have several of the features mentioned above.

52. It should be desirable that the other regional economic commissions of the United Nations publicize the General Conditions of Sale of the Economic Commission for Europe and recommend their use to interested Governments and industrialists of their region.

53. In case of difficulties or reservations made by the possible interested parties on these texts, the Economic Commission for Europe should be informed so that problems might be jointly considered by experts from both regions.

54. It should be understood that this study, at the world level, of the existing texts should not necessarily lead to any major changes, since the ECE Conditions of Sale appear to have been found satisfactory in those cases where they are already being used outside Europe.

Food and Agriculture Organization of the United Nations

We have endeavoured to assemble some material that we felt might be of assistance to UNCITRAL at its second session, with particular reference to texts or sources of instruments used for agricultural products in international trade. While the World Food Programme does, to a limited extent, purchase foodstuffs where not enough of a given commodity has been pledged by contributing Governments, FAO as an organization does not engage in any commercial transactions involving agricultural commodities and therefore has not developed any standard contracts covering the purchase or sale of such commodities. It may be noted that the World Food Programme has no standard contracts of its own either but uses, as a rule, the contract forms developed by the trade associations dealing with particular commodities.

In selecting the sources which might be of interest to UNCITRAL, we have relied almost exclusively on the standard contracts and general conditions elaborated by trade associations that have not been listed among the non-governmental organizations in annex I to document A/CN.9/4 as having been invited to submit comments on the work programme of UNCITRAL, and which may therefore be of some assistance in the further development of standard instruments under the auspices of UNCITRAL.

1. London Corn Trade Association Ltd.

The above Association has published a collection of contract forms entitled "Forms of Contracts in Force — 1963", which

contains some forty standard forms. Most of these forms show only minor variations depending on the types and categories of grain, and their origin, destination and method and form of shipping (cargoes, parcels). The aforementioned collection also contains standard rules regarding mainly the weight of various types of grain, as well as forms for grain futures.

The forms are kept up-to-date by means of separate leaflets issued by the Association from time to time.

The Standard Contracts contain provision concerning, *inter alia*, the following subject matters: quality, quantity and weight, sampling, ship's classification, ports of shipment, destination, contract price, freight, payment, policies and certificates, discharge, notice of appropriation and provisional invoice, proof of shipment, and default. In addition, most contracts contain strike and war risk, and war deviation clauses, and all contracts provide for arbitration. The arbitration rules of the Corn Trade Association are declared applicable to each contract but are not included *in extenso* in the Volume of Contract Forms.

2. The Incorporated Oil Seed Association (London)

The above Association has published a similar collection of Contract Forms to be used for transactions in various types of oil seed (linseed, rapeseed, gingellyseed, poppyseed, cottonseed, groundnuts, soyabeans, etc.). The collection contains approximately sixty different Contract Forms for the various types of seed, the variations as between individual clauses depending also on such criteria as origin, destination, and shipping terms (i.e. "ex ship" or "C.F. and I Terms").

The Forms are kept up-to-date by means of separate leaflets issued by the Association from time to time.

The Standard Contracts contain provisions concerning, *inter alia*, the following subject matters: warranty, declaration of shipment, payment, strikes, war risks and deviation, discharge, sampling and analyses, quality and condition, rules of admixture, default, cancellation and insolvency. All the contracts contain arbitration clauses and the Arbitration Rules are printed as an Annex to each Contract Form included in the aforementioned Volume. The Oil Seed Association also supplies simplified Forms of Contract and "Appropriation" containing specific references to the full Standard Contract Form relating to the goods to be covered by the transaction.

3. The Cocoa Association of London Ltd.

A collection of ten Standard Contracts has been issued by the above Association in a revised edition in September 1966. The Standard Contracts of the Cocoa Association likewise show certain variations based on origin and destination of the commodities, as well as delivery terms (c.i.f., f.o.b., in/ex store, arrival and/or delivery options).

Certain of the typical clauses enumerated above with respect to corn trade and oil seed transactions also appear in the Cocoa Association's standard contracts but the latter appear to be somewhat less detailed and the variations between the individual contract forms appear to be more extensive. All contract forms, even the very short form intended for "spot contracts", contain a clause providing for the settlement of disputes by arbitration in accordance with the Rules, Regulations and Bye-Laws of the Cocoa Association. The text of the aforementioned Rules, Regulations and Bye-Laws are, however, not included in the collection of contract forms.

4. London Cattle Food Trade Association (Inc.)

The series of Contract Forms in use for trading in cattle food, which was published in 1962 by the above Association, includes twelve Standard Contract Forms covering various types of feeding cakes and meals (groundnut, cottonseed, fishmeal, meat and bone meal, etc.), as well as three general contracts in which

the provisions regarding commodities and certain related clauses (quality, outturn, sampling, etc.) are left blank.

All contracts provide for arbitration and the Rules relating to arbitration are printed on the back of most contract forms, exception being made for the so-called short forms.

The collection is kept up-to-date by way of leaflets containing any amendments to the contract forms that the Association decides on. With the contract forms, the Association has also

put out rules for the sampling of meals, extractions, expellers and slab cakes at the port of discharge.

The four collections described above should be regarded as examples; undoubtedly, a number of other sets of standard contracts have been elaborated, covering a wide range of agricultural commodities including industrial crops (e.g. tobacco, cotton, fibres) as well as timber, fishery and animal products (e.g. wool, hides, meat, bones).

ANNEX III

General Conditions of Sale and Standard Forms of Contract sponsored by the ECE

1. CONTRACTS FOR THE SALE OF CEREALS

Nos.	
1 A	C.I.F. (maritime); Non-reciprocal; Cargoes and parcels; Weight and condition – final at shipment.
1 B	C.I.F. (maritime); Reciprocal; Cargoes and parcels; Weight and condition – final at shipment.
2 A	C.I.F. (maritime); Non-reciprocal; Cargoes and parcels; Conditions final at shipment; Full outturn.
2 B	C.I.F. (maritime); Reciprocal; Cargoes and parcels; Condition final at shipment; Full outturn.
3 A	C.I.F. (maritime); Non-reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge); Shipping weight final.
3 B	C.I.F. (maritime); Reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge); Shipping weight final.
4 A	C.I.F. (maritime); Non-reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge).
4 B	C.I.F. (maritime); Reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge); Full outturn.
5 A	F.O.B. (maritime); Non-reciprocal; Cargoes and parcels;
5 B	F.O.B. (maritime); Reciprocal; Cargoes and parcels.
6 A	Consignment by rail in complete wagon loads; Non-reciprocal.
6 B	Consignment by rail in complete wagon loads; Reciprocal.
7 A	C.I.F. (Inland Waterway); Non-reciprocal.
7 B	C.I.F. (Inland Waterway); Reciprocal.
8 A	F.O.B. (Inland Waterway); Non-reciprocal.
8 B	F.O.B. (Inland Waterway); Reciprocal.
9	Regulations for the Standardization of Methods of Sampling.

2. PLANT AND MACHINERY: DURABLE CONSUMER GOODS

188	General Conditions for the Supply of Plant and Machinery for Export.
188 A	General Conditions for the Supply and Erection of Plant and Machinery for Import and Export.
188 B	Additional Clauses for Supervision of Erection of Plant and Machinery Abroad.
188 D	Additional Clauses for Complete Erection of Engineering Plant and Machinery Abroad.
574	General Conditions for the Supply of Plant and Machinery for Export.
574 A	General Conditions for the Supply and Erection of Plant and Machinery for Import and Export.
574 B	Additional Clauses for Supervision of Erection of Plant and Machinery Abroad.
574 D	Additional Clauses for Complete Erection of Plant and Machinery Abroad.
730	General Conditions of Sale for the Import and Export of Durable Consumer Goods and of other Engineering Stock Articles.

3. MISCELLANEOUS

- 312 General Conditions for the International Sale of Citrus Fruit.
 410 General Conditions for Export and Import of Sawn Softwood
 420 General Conditions for the Export and Import of Hardwood. Logs from the Temperate Zone.
 Sales 16 General Conditions for the Export and Import of Solid Fuels.
 Trans/263 General Conditions for International Furniture Removal.

2. Implementation of the Commission's decisions relating to general conditions of sale, standard contracts and incoterms: report of the Secretary-General*

I. DECISION OF THE COMMISSION AT ITS SECOND SESSION

1. At its second session the United Nations Commission on International Trade Law made the following decision concerning "general conditions of sale and standard contracts, Incoterms and other trade terms":¹

"The Commission decides:

"With regard to general conditions of sale and standard contracts:

"1. (a) To request the Secretary-General to transmit the text of the ECE general conditions relating to plant, machinery, engineering goods and lumber to the Executive Secretaries of the Economic Commission for Africa (ECA), the Economic Commission for Asia and the Far East (ECAFE), and the Economic Commission for Latin America (ECLA), as well as to other regional organizations active in this field;

"(b) To request the Secretary-General to make the aforementioned general conditions available in adequate number of copies and in the appropriate languages; the general conditions should be accompanied by an explanatory note describing, *inter alia*, the purpose of the ECE general conditions, and the practical advantages of the use of general conditions in international commercial transactions;

"(c) To request the regional economic commissions, on receiving the above-mentioned ECE general conditions, to consult the Governments of the respective regions and/or interested trade circles for the purpose of obtaining their views and comments on: (i) the desirability of extending the use of the ECE general conditions to the regions concerned; (ii) whether there are gaps or shortcomings in the ECE general conditions from the point of view of the trade interests of the regions concerned and whether, in particular, it would be desirable to formulate other general conditions for products of special interest to those regions; (iii) whether it would be desirable to convene one or more committees or study groups, on a world-wide or more limited scale, whereby with

the participation (if appropriate) of an expert appointed by the Secretary-General, matters raised at a regional level would be discussed and clarified;

"(d) To request the other organizations to which the ECE general conditions are transmitted to express their views on points (i), (ii) and (iii) of subparagraph (c) above;

"(e) The views and comments sought from the regional economic commissions and other organizations should be transmitted to the Secretary-General, if possible, by 31 October 1969;

"(f) To request the Secretary-General to submit, together with the relevant ECE general conditions, a report to the third session of the Commission which should contain (if appropriate) an analysis of the views and comments received from the regional economic commissions and other organizations concerned;

"(g) To give, at an appropriate time, consideration to the feasibility of developing general conditions embracing a wider scope of commodities than the existing specific formulations. Consideration of the feasibility of this work should be taken up after there has been an opportunity to study the views and comments requested under subparagraphs (c) and (d) above.

"(h) To welcome the generous offer made by the representative of Japan to contribute to the work of the Commission by preparing for its use a comparative study of the ECE general conditions;

"With regard to General Conditions of Delivery (GCD) of 1968 prepared by the Council of Mutual Economic Assistance (CMEA):

"2. (a) To request the Secretary-General to invite the CMEA to furnish an adequate number of copies of the General Conditions of Delivery (GCD) of 1968 in English, accompanied by an explanatory note;

"(b) To request the Secretary-General to transmit in the four languages of the Commission, as appropriate, the above-mentioned General Conditions of Delivery and explanatory note to members of the Commission and to the Economic Commission for Africa, the Economic Commission for Asia and the

¹ Report of the Commission on the work of its second session (A/7618), para. 60.

Far East, the Economic Commission for Europe and the Economic Commission for Latin America, for information.

"With regard to Incoterms 1953:

"3. (a) To request the Secretary-General to inform the International Chamber of Commerce that, in the view of the Commission, it would be desirable to give the widest possible dissemination to Incoterms 1953 in order to encourage their world-wide use in international trade.

"(b) To request the Secretary-General to bring the views of the Commission concerning Incoterms 1953 to the attention of the United Nations regional economic commissions in connexion with their consideration of the ECE general conditions."

2. The General Assembly in resolution 2502 (XXIV) took note with appreciation of the Commission's report on its second session and recommended that the Commission should continue its work on the topics to which it decided to give priority.

II. IMPLEMENTATION OF THE DECISION

3. Pursuant to paragraph 1 of the Commission's decision, by a letter dated 14 August 1969, the Secretary-General transmitted the text of the ECE General Conditions relating to plant, machinery, engineering goods and lumber to the Economic Commission for Africa, the Economic Commission for Asia and the Far East, the Economic Commission for Latin America, the Asian-African Legal Consultative Committee, the Organization of African Unity and the Organization of American States. This letter included the request for consultation with Governments and trade circles on the matters specified in paragraph 1 (c) of the decision.

4. At the time of the preparation of this report, replies have been received from the following States Members of the United Nations: Burma, China, Cuba, and from Fiji and Hong Kong. The substantive parts of these replies are reproduced in the annex to this report.

5. Discussions have been instituted between the Secretariat and the United Nations Economic Commission for Africa (ECA) with respect to the holding of a seminar for the intensive review of certain of the ECE General Conditions. The suggested purpose of this seminar was to secure information from Governments and trade circles as to whether the existing General Conditions meet the interests and circumstances of the region. To this end, consideration has been given to the possible selection for intensive study of one set of gen-

eral conditions of special interest to African buyers, such as the General Conditions relating to the sale of plant and machinery, and one set of general conditions of special interest to African sellers, e.g. the ECE standard contracts for the sale of sawn softwood (No. 410) or hardwood logs (No. 420).

6. Pursuant to paragraph 2 (b) of the Commission's decision, the Secretary-General has sent copies of the General Conditions of Delivery (GCD) of 1968 prepared by the Council for Mutual Economic Assistance (CMEA), and the explanatory note prepared in accordance with the request of the Commission, to all economic commissions of the United Nations. The Secretary-General further brought to the attention of the United Nations regional economic commissions the views concerning Incoterms, 1953, that were expressed in paragraph 3 of the Commission's decision.

III. FURTHER WORK

7. Subject to any further decision of the Commission, the Secretariat intends to continue with the present programme of implementation of the Commission's decision (para. 1 (c) and (d) quoted *supra* in section I) directed towards examination of the ECE General Conditions. The Commission may wish to consider whether it approves the tentative plans (described *supra* in para. 5) for the review of specific ECE General Conditions, and whether the regional economic commissions should be encouraged to place on their agenda the question of the development of plans for the review of specific ECE General Conditions and possibly for the ascertaining of views within the region as to the desirability and feasibility of unifying or harmonizing international trade through the more widespread use of general conditions of sale relating to specific commodities or wider categories of goods.

8. The Commission may recall its decision at the second session (sub-para. 1 (g) quoted *supra* in section I) to give, at an appropriate time, consideration to the feasibility of developing general conditions which embrace a wider scope of commodities than the existing specific formulations. The Commission may now wish to consider when it might be appropriate to institute preliminary studies bearing on alternative means for the development of such general conditions.

ANNEX

Replies from Governments in connexion with the ECE General Conditions of Sale

[Not reproduced in this volume.]

D. Time-limits and limitations (prescription) in the field of international sale of goods.

*Report of the Working Group on time-limits and limitations (prescription), first session, 18-22 August 1969**

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1-4
I. GENERAL DEBATE	5
II. SCOPE OF THE CONVENTION	6-16
A. Definition of international sale of goods	6-12
B. Types of transactions and claims	13-16
III. COMMENCEMENT OF THE PERIOD OF PRESCRIPTION	17-48
A. The basic test governing the commencement of the period	17-28
(i) Alternative tests examined by the Working Group	19-22
(ii) Examination of the alternative tests on commencement of the period	23-28
B. Claims based on defects in delivered goods	29-36
(i) The general rule	29-33
(ii) Proposed exception with respect to injury to person or property occurring subsequent to delivery (products liability)	34-36
C. Effect of express guarantee	37-40
D. Commencement of the prescriptive period where the contract is cancelled prior to the promised date for performance	41-44
E. Effect of required notices to the other party on the commencement of the period	45-48
IV. LENGTH OF THE PRESCRIPTIVE PERIOD	49-62
A. The number of years	49-54
B. Calculation of time	55-59
(i) The initial day	56-57
(ii) Holidays	58-59
C. Applicability of prescriptive period to enforcement of claims established by judgement	60-62
V. SUSPENSION OR PROLONGATION OF THE PRESCRIPTIVE PERIOD	63-73
A. Impossibility to sue by reason of external circumstances (<i>force majeure</i>)	63-66
B. Fraud	67-70
C. Other possible bases for suspension	71
D. Proceedings that fail to reach decision on the merits	72-73
VI. INTERRUPTION OF THE PERIOD	74-92
A. Acknowledgement of the debt	74-81
(i) Effectiveness to interrupt the period	74
(ii) Definiteness and form	75-77
(iii) Acknowledgements after the running of the period	78-80
(iv) Part payment	81
B. The legal action necessary to interrupt (or satisfy) the prescriptive period	82-89
C. Warning notices (" <i>litis denunciatio</i> ") in successive sales, etc.	90-91
D. Effects of interruption: applicability of convention to delay in enforcing judgements	92
VII. GENERAL PROBLEMS	93-126
A. Modification of the period by agreement of the parties	93-107
(i) The general power to modify by agreement	93-104
(ii) Prolongation during negotiation	105-107
B. Relation of the convention to conflict of laws	108-110
C. Whether the prescriptive rules should have the effect of substance or procedure	111-114
D. Characterizing the effect of expiration of the period	115
E. Recourse to barred claims by counter-claims or set-off	116-118
F. Voluntary payment (or other fulfilment) of barred claims	119-121
G. Whether the issue of prescription should be raised by the court <i>suo officio</i> or only at the instance of the parties	122-123
H. Matters deferred for later attention	124
I. Programme for completion of the work	125-126

Annexes

	<i>Pages</i>
I. List of participants	231
II. List of documents and working papers before the Working Group	232

* A/CN.9/30

INTRODUCTION

1. The Working Group, established by the United Nations Commission on International Trade Law at its second session, consists of the following seven members of the Commission: Argentina, Belgium, Czechoslovakia, Japan, Norway, United Arab Republic and the United Kingdom of Great Britain and Northern Ireland. The terms of reference of the Working Group are as follows:

"The Working Group shall:

"(a) Study the topic of time-limits and limitations (prescription) in the field of international sale of goods with a view to the preparation of a preliminary draft of an international convention;

"(b) Confine its work to consideration of the formulation of a general period of extinctive prescription by virtue of which the rights of a buyer or seller would be extinguished or become barred; the Working Group should not consider special time-limits by virtue of which particular rights of the buyer or seller might be abrogated (e.g. to reject the goods, to refuse to deliver the goods, or to claim damages for non-conformity with the terms of the contract of sale) since these could most conveniently be dealt with by the Working Group on the international sale of goods.

"The Working Group shall, in its work, pay special attention, *inter alia*, to the following points:

"(a) The moment from which time begins to run;

"(b) The duration of the period of prescription;

"(c) The circumstances in which the period may be suspended or interrupted;

"(d) The circumstances in which the period may be terminated;

"(e) To what extent, if any, the prescription period should be capable of variation by agreement of the parties;

"(f) Whether the issue of prescription should be raised by the court *suo officio* or only at the instance of the parties;

"(g) Whether the preliminary draft convention should take the form of a uniform or a model law;

"(h) Whether it would be necessary to state that the rules of the preliminary draft convention would take effect as rules of substance or procedure;

"(i) To what extent it would still be necessary to have regard to the rules of conflict of laws."¹

2. The Working Group met at the United Nations Office at Geneva from 18 to 22 August 1969. All the members of the Working Group were represented. The meeting was attended also by observers from the Hague Conference on Private International Law and the International Institute for the Unification of Private Law (UNIDROIT).

3. The Working Group elected the following officers:

Chairman: Mr. Stein Rognlien (Norway);

Rapporteur: Mr. Ludvik Kopac (Czechoslovakia).

¹ See the report of the Commission on the work of its second session (A/7618), para. 46.

4. The Working Group had before it the studies submitted by Belgium, Czechoslovakia, Norway and the United Kingdom of Great Britain and Northern Ireland (A/CN.9/16 and Add.1 and 2) and the comments thereon by Nigeria (A/CN.9/16/Add.3) and the International Institute for the Unification of Private Law (UNIDROIT) (A/CN.9/16/Add.4). The Working Group had also before it a secretariat note reproducing a working paper prepared by Professor John Honnold as consultant to the secretariat (A/CN.9/WG.1/CRD.1). In addition, the secretariat of the Council of Europe made available to the Working Group copies of the document entitled "Replies made by Governments of Member States to the Questionnaire on 'Time-limits'" (European Committee on Legal Co-operation, Council of Europe, 1968), and of the secretariat memorandum on the proceedings of the fourth meeting of the Committee of Experts for the Standardization of the Concept of "Time-Limits" [EXP/Delai (69)3], held in Strassbourg in March 1969. The latter document contains (appendix I) the "Draft European Rules on Extinctive Prescription" which are referred to herein under that designation. The documents and working papers before the Working Group (including the documents produced in the course of the session, are listed in annex II. The list of participants is contained in annex I.

I. GENERAL DEBATE

5. The Working Group considered that the principles formulated should be certain, objective and, as far as possible, should be independent of the rules of any individual legal system. It was also pointed out that the law of limitation must, by its very nature, be definite in its operation, and the number of exceptions to the running of the prescription period should therefore be strictly limited for the sake of certainty and commercial convenience.

II. SCOPE OF THE CONVENTION

A. *Definition of international sale of goods*

6. The Commission requested the Working Group to study the topic of time-limits and limitations (prescription) in the field of international sale of goods. The Working Group considered, therefore, whether the draft convention² should contain a definition of the concept of international sale of goods.

7. Different views were expressed in this matter. One proposal was that the draft convention on prescription should incorporate the definition of international sale of goods in the Uniform Law on the International Sale of Goods (ULIS) annexed to the 1964 Hague Convention.

8. Another view was that the convention should follow the approach of article 1 of the 1955 Hague Con-

² The references to a draft "convention" are not intended to indicate any choice among alternative means for implementing uniform rules. For example, these references are not intended to indicate any position on the question mentioned in sub-paragraph (g) of the Commission's resolution, as to a choice between the use of a uniform or model law.

vention on the Law Applicable to the International Sale of Goods by providing that the convention shall apply to the international sale of goods (subject to the exclusion of certain items) without attempting to define that concept. Under this approach it would be left to the competent courts to determine whether a transaction constituted an international sale of goods within the scope of the draft convention. In further explanation of this approach, it was suggested that the convention should specifically exclude certain items (e.g. stocks, negotiable instruments or money, ships, electricity) which are excluded from the scope of application of ULIS (see article 5 of ULIS).

9. Some representatives objected to the adoption of the ULIS definition of international sale of goods on the ground that this definition was not satisfactory.

10. Other representatives pointed out that the present Working Group should not attempt to define the concept of international sale of goods as it would be more appropriate for this question to be considered by the Working Group on the International Sale of Goods established by the Commission at its second session. In this connexion, however, one representative referred to the difficulty of harmonizing definitions in texts of conventions which might not be concluded at the same time, especially if the text of a future convention should serve as a model for an earlier one. Even if the Working Group on Sales and UNCITRAL reached a provisional decision on a definition of international sale of goods, one could not be sure that this definition would eventually be incorporated in a future convention on that subject. This difficulty would arise if a convention on prescription is to be adopted and opened for signature and ratification before a convention on the sale of goods.

11. The Working Group reached the following decision:

(i) It would be desirable for a convention on prescription to contain the same definition of scope as a convention on the substantive law governing the international sale of goods;

(ii) The Group requests the Working Group on Sales and UNCITRAL to give priority attention to the definition of international sale of goods;

(iii) Pending such action by the Working Group on Sales and by UNCITRAL, the Working Group on Prescription would not attempt to draft a definition of the international sale of goods;

(iv) If it should not be possible promptly to reach a decision on this problem by means of a recommendation from the Working Group on Sales, in preparing a convention on prescription it would be necessary to decide whether a definition of the international sale of goods was needed and, if so, the terms of such a definition. In the meantime, for the purpose of defining the general nature of the problems it faced in drafting rules on prescription, the Working Group agreed that the field for its work would be the international sale of goods, without attempting a precise definition. The Group, however, agreed that the types of transactions excluded by article 5 of ULIS (e.g., stocks, shares, negotiable instruments, ships, electricity) would also be excluded

from a draft convention on prescription. It was further agreed that sales of goods by means of documents (such as bills of lading) would be governed by the convention on prescription.

12. The representative of Japan reserved his Government's position with respect to the above decision in that it failed to implement its proposal expressed in paragraph 7 above. Under this proposal the convention on prescription would supplement the provisions of ULIS annexed to the 1964 Hague Conventions.

B. Types of transactions and claims

13. The Working Group also considered the proposed convention's applicability to various types of claims and claimants related to an international sale of goods. After discussion, the matter was referred to the Drafting group. The Drafting Group prepared language to express the central idea that the convention's rules should apply only to the rights of the seller and the buyer arising from a contract for the international sale of goods. A draft provision to implement this view, as approved by the Working Group, was as follows:

"This Convention shall apply to the prescription of the rights of the seller and the buyer arising from a contract for the international sale of goods.

"The Convention shall govern the prescription of the rights and duties of the buyer and seller under such a contract, their successors and assigns, and persons who guarantee their performance. This Convention shall not apply to the rights and duties of other third persons."

14. It was suggested that the problem of the relationship of the convention to claims under invalid contracts might be subject to further consideration. For future work defining the scope of the convention, attention was directed to the Draft European Rules on Extinctive Prescription with special reference to Rule No. 15 (2).

15. One representative wanted either to exclude from the convention damage to the person or property of the buyer (other than the goods sold), his successors and assigns ("products liability"), or to provide an added prescriptive period for such cases, as is noted in paragraph 36, *infra*.

16. The question was raised whether the convention should cover recourse actions (i.e., actions between successive buyers and sellers). It was agreed that, in principle, such recourse actions should be outside the scope of the convention unless the transaction in question was also an international sale of goods. The Working Group was of the view that this problem should be studied further.

III. COMMENCEMENT OF THE PERIOD OF PRESCRIPTION

A. The basic test governing the commencement of the period

17. The Working Group recognized that in preparing a draft convention on prescription one of the important and difficult problems was the development of the basic

test to govern the commencement of the prescriptive period. Following general discussion, the Chairman appointed a Drafting Group which was requested to prepare a draft provision dealing with this problem. The Drafting Group consisted of the representatives of Czechoslovakia, United Kingdom of Great Britain and Northern Ireland and Argentina; the representative of Belgium was later added to the Group.

18. The Drafting Group met and discussed alternative approaches to the problem and prepared a report; this first report by the Drafting Group noted that its recommendations were influenced largely by these considerations:

"1. It seemed wise to set a starting point that would be as definite as possible; to this end the Group thought it important to avoid the use of events subject to conflicting evidence, such as the time when a party claimed that he learned of a defect.

"2. It seemed necessary to work from a basic concept that is sufficiently flexible to relate to varying circumstances — such as differing national laws defining the rights of the parties and the wide variety of requirements imposed by the terms of individual contracts. The Group was of the view that the concept of the date of 'breach of contract' was probably the most suitable for this purpose.

"3. The Group came to the view that although this concept provided a helpful starting point, this concept might not be applied to certain important specific situations in the same way by the courts of different States. Thus the mere use of a general formula might lead to unification in name only, without producing unification of result on the difficult, concrete problems that will arise in practice. Therefore, it was thought important to add to the basic formula certain important specific instances of its application."

The Drafting Group noted, however, that in the brief time available for its work, the Group could not be confident that it was able to envisage all of the important areas of divergency, that may arise under this basic formula, and recommended that continuing attention be given to this matter.

(i) *Alternative tests examined by the Working Group*

19. The attention of the Working Group was principally centred on three alternative approaches to the definition of the commencement of the period. Two of these were embodied in two reports of the Drafting Group. Under the first alternative, designated as alternative A, the period would commence on "the date on which the breach of contract occurred". Alternative B, also discussed in the report of the Drafting Group, proposed that the period should commence on the date "on which action could have been taken". Under a third proposal, designated as alternative C, the period would run "from the date on which the fulfilment of the obligation first became due", but subject to the added provision that "the obligation is deemed to have become due not later than the date on which the breach of contract occurred". These three basic tests, together with related qualifying provisions and the discussion of considerations relevant to the choice among the alter-

natives, appear in the following extracts from the second report of the Drafting Group, and a written proposal which a representative subsequently presented to the Working Group.

20. In paragraph 18 above, reference was made to the first report of the Drafting Group, and extracts from that report were quoted suggesting general considerations which should govern the selection of a general formula. Following general discussion in the Working Group the problem was recommitted to the Drafting Group so that the alternatives could be more fully developed. The second report of the Drafting Group contained the following proposed statutory text based on alternative A, together with illustrations and comments:

ALTERNATIVE A

Proposed statutory text

1. The period of limitation shall run from the date on which the breach of contract occurred.
2. Where defective goods are delivered, the period will run from the date of delivery without regard to the date on which the defect is discovered or damage therefrom ensues.
3. Where, as a result of a breach by one party before performance is due, the other party exercises his right to treat the contract as discharged, the period will run from the date of the first breach from which such right arises.
4. No account shall be taken of any period within which a notice of default may be required to be given by one party to the other.
5. Where the contract contains an express guarantee relating to the goods which is stated to be in force for a specific time, the period of limitation in respect of any action based on the guarantee shall expire one year after the expiration of such time or [3] [5] years after the delivery of the goods to the buyer, whichever shall be the later.

Illustrations

The following illustrations are given as examples of the application of the above text to particular circumstances:

- (i) In the case of non-delivery or late delivery, the period will run from the date on which, under the terms of the contract, the goods ought to have been delivered;
- (ii) In the case of non-acceptance or late acceptance, the period will run from the date on which, under the terms of the contract, the goods ought to have been accepted;
- (iii) In the case of a failure by the buyer to pay the price, the period will run from the date on which payment of the price became due, but remained in whole or in part unpaid.

Comments

Breach (*inexécution du contrat*) is the most relevant factor from a legal and commercial point of view. All rights of action arising from the contract normally stem from breach of the contract. It is the breach which causes the businessman to seek a remedy in the courts. Breach contains within it the idea that performance is due, since (except in the case of anticipatory breach) there can be no breach until performance is due. It is also an objective factor, and does not depend (as would any test based on the ability to commence legal proceedings) upon the rules of the applicable law or of the *lex fori*.

21. There was support within the Drafting Group for alternative B, as outlined above (paragraph 19). The second report of the Drafting Group set forth the

following proposed statutory text and supporting comments:

ALTERNATIVE B

Proposed statutory text

The time-limit shall be reckoned as from the day on which action could first have been taken.

Comments

Alternative B has the following advantages:

- (i) Since prescription is extinctive, reference to the day on which action could have been taken is the most logical approach;
- (ii) There is need for a more abstract criterion than breach of contract, and therefore one which could more easily be accepted by the different legal systems;
- (iii) Alternative B also has the advantage over breach of contract in providing a starting point not open to question; breach of contract implies the need for a previous judicial statement to deal with the contention that there had been no failure to carry out the contract and hence no commencement of the period;
- (iv) This test is more appropriate than fixing a prescriptive period which would run from the day 'on which the performance of the obligation becomes due', for the reasons stated in document A/CN.9/WG.1/CRD.1, section III, 11, B;
- (v) A similar solution has been adopted in article 4 of the draft on the subject prepared by the Council for Mutual Economic Assistance, which implies that there is a broad consensus on the subject;
- (vi) Alternative B disposes of some of the problems connected with the calculation of time-limits dealt with in Council of Europe, annex II.

22. One delegate offered a third alternative approach to defining the commencement of the period. This proposal (after later modification of the language in paragraph 6 below) was as follows:

ALTERNATIVE C

Article X (the period)

1. The period of limitation shall be [3] [5] years.
2. Subject to the provisions of paragraphs 3-6 of this article, the period shall run from the date on which the fulfilment of the obligation first became due. [The obligation is deemed to have become due not later than at the date on which the breach of contract occurred.]
3. When goods are delivered, the period for claims relying on a lack of conformity of the goods shall run from the date of delivery.
4. Where the contract contains an express guarantee relating to the goods and stated to be in force for a specified time, the period of limitation in respect of any action based on the guarantee shall not run out before one year after the expiration of such time, even if the period provided for in paragraph 3 of this article has expired.
5. When the fulfilment of the obligation is dependent upon the creditor giving notice to the debtor, the period shall run from the earliest day to which the creditor could have caused the obligation to become due; [except in cases provided for by paragraph 6 of this article].
6. Where as a result of a breach of contract by one party before performance is due, the other party exercises his right to treat the contract as discharged (cancelled), the period shall run from the date of the breach on which such right is based.

If the right to treat the contract as discharged (cancelled) is exercised on the basis of a breach as to an instalment delivery or payment, the period shall run from the date of such breach, even in respect of any connected previous or subsequent instalment covered in the contract.

(ii) *Examination of the alternative tests on commencement of the period*

23. Some of the considerations relevant to the framing of a rule on the commencement of the period were mentioned in the first report of the Drafting Group, quoted at paragraph 18, *supra*, and in the second report of the Drafting Group, quoted in paragraphs 20 and 21, *supra*. These and other considerations were discussed by the Working Group.

24. With respect to alternative B based on "the day on which action could have been taken", the objection was raised that recourse to some system of law would be necessary to define whether the action could be brought. One suggestion to solve this problem would be to specify the applicable law — such as the *lex fori*. In reply it was noted that a plaintiff may choose the forum — and hence that law may not be known in advance.

25. In connexion with such formulae that referred to the existence of a right of recovery ("the day on which action could have been taken"; "breach of contract", etc.), it was noted that the basic function of a prescriptive period was to prevent litigation of the merits of the claim. In actual practice a plea based on prescription would be interposed before the merits of the case were decided, in response to the assertion of a claim; in practice, the crucial question would be whether the facts alleged as the basis for the plaintiff's claim occurred more than [e.g.] five years prior to the commencement of the action. To minimize problems of choice of law and increase definiteness, it was suggested that consideration be given to a test starting the prescriptive period on "the date of the occurrence of the events on which the claim is based".

26. In offering alternative C above, the representative suggested that this proposal was designed in part to overcome difficulties which, in his view, were presented by alternative A — the test using "breach of contract" as the starting point. Where a contract was invalid, "breach of contract" provided an inadequate formula since a claim for restitution of benefits conferred under the invalid contract could hardly be deemed a claim for "breach of contract".

27. As an objection to alternative C, the Drafting Group in its second report noted that it did not favour a test which referred to the date when the obligation "became due", in part because of problems arising from repudiation or cancellation in advance of the due date specified in the contract. In response to this objection, the representative who had introduced alternative C prepared a revised paragraph 6, in the form that appears in paragraph 22, *supra*.

28. At the conclusion of extended discussion, the members of the Working Group were unable to reach agreement on a formula to determine the commencement of the prescriptive period. Three delegates pre-

ferred a test based on breach of contract (see alternative A); three supported the formula that included the test relating to the date when "the fulfilment of the obligation became due" (see alternative C). One delegate preferred the test of alternative B — "the day on which action could have been taken"; this delegate noted that if he must choose between a test based on alternative A and one based on alternative C, he would prefer the latter. It was agreed that further study of the problem would be required.

B. Claims based on defects in delivered goods

(i) The general rule

29. The Working Group considered the proposal on the commencement of the period with respect to claims that goods were defective, as set forth in the second report of the Drafting Group (paragraph 20, *supra*). This proposal was as follows:

"Where defective goods are delivered, the period will run from the date of delivery without regard to the date on which the defect is discovered or damage therefrom ensues."

30. The Working Group recalled the interest in definiteness in the starting of the prescriptive period which was developed in support of this provision in the first report of the Drafting Group, as quoted *supra* at paragraph 18 (sub-paragraph 1).

31. Some representatives thought that ambiguity might arise out of the concept of "delivery", and attention was given to the two closely related concepts in the ULIS: (a) delivery (*délivrance*) and (b) handing over (*remise*). Under ULIS, "delivery" may occur before receipt or the right to possession. To meet this problem, one delegate suggested that the concept of delivery might be defined as follows:

"If the goods sold are to be shipped to the buyer, in the absence of agreement to the contrary 'delivery' takes place when the goods reach him."

It was agreed that this suggestion deserved consideration in the drafting process.

32. Minor drafting changes were made in paragraph 2. The provision was approved by the Working Group in the following form:

"Where goods are delivered, the period for claims relying on a lack of conformity of the goods shall run from the date of delivery [without regard to the date on which the defect is discovered or damage therefrom ensues]."

33. The concluding phrase was enclosed in brackets to indicate that some representatives thought that the language duplicated the thought in the first part of the paragraph and therefore was unnecessary; other representatives thought that the concluding phrase might be useful as an aid to clarity.

(ii) Proposed exception with respect to injury to person or property occurring subsequent to delivery (products liability)

34. The Working Group considered whether the general rule quoted in paragraph 32 above, should be subject to an exception for claims based on physical

injury to the buyer. It was proposed that the prescriptive period for such claims should commence on a date later than delivery of the goods, and more specifically at the time when injury was suffered. In support of such a rule, it was noted that the goods might cause physical injury to the buyer at a time when much (or possibly all) of the prescriptive period had run, and that in such cases it might be too harsh to apply the prescriptive period to claims for physical injury. It was suggested that the proposed exception might also apply where the goods caused damage to other property of the buyer.

35. The Working Group noted that it had not been inclined to make any exception for damage that occurs after delivery, even by the provision of a short supplementary period running from the time of such damage. A majority of the Group decided that to maintain the certainty and effectiveness of the general prescriptive period, special exceptions should not be made for claims because of personal injury or property damage. In taking this decision, the Working Group noted that prescriptive rules would govern only contractual claims between the seller and buyer in an international sale of goods; in view of the commercial character of most of these transactions, physical injury to the buyer would seldom arise. The Group noted further that since the convention would have no effect on subsequent purchasers (unless the resale was also an international sale), most claims for physical injury, including claims against remote suppliers (sometimes termed "products liability"), would not be governed by the convention.

36. One delegate reserved his position on this question and referred to the earlier discussion at paragraph 15 on whether the convention should govern products liability. If actions based on such liability are not to be excluded clearly and completely from the scope of the convention, a special provision should be included in the text to the effect that the period of prescription in respect of claims for damages for personal injuries should only commence to run from the date on which the damage occurred.

C. Effect of express guarantee

37. Related to the problems just discussed (paragraphs 29-36), with respect to the commencement of the period of prescription for claims based on defects in goods, was the effect of a claim for breach of an express guarantee. The Drafting Group's recommendation on the effect of guarantees was embodied in paragraph 5 of its second report, paragraph 20, *supra*. The proposal was for an exception from the basic rule on the commencement of the period, to read as follows:

"Where the contract contains an express guarantee relating to the goods which is stated to be in force for a specified time, the period of limitation in respect of any action based on the guarantee shall expire one year after the expiration of such time or 3-5 years after the delivery of the goods to the buyer, whichever shall be the later."

38. Drafting problems were discussed with respect to the provision on guarantees. They included: (a) the nature of the promise that might be termed an "express guarantee"; (b) the effect of guarantees relating

to amount of performance rather than time; e.g. mileage of an automobile.

39. In response to an inquiry whether there was empirical justification for the one-year period, it was noted that the draft was a tentative hypothesis that could lead to comments and counter-proposals. The representative of Japan noted his reservations with respect to selecting the period.

40. The proposal quoted in paragraph 37, *supra*, was given further examination, and was approved by the Working Group.

D. Commencement of the prescriptive period where the contract is cancelled prior to the promised date for performance

41. The Working Group considered whether the various basic formulae on the commencement of the prescriptive period might call for a supplementary provision to avoid ambiguity where further performance under the contract is cancelled (or discharged) in advance of the date specified in the contract.

42. Examples considered as illustrative of the problem included the following: A contract made in January calls for the seller to ship in June. In February the seller informs the buyer that he will not perform the contract. In March the buyer notifies the seller that because of this repudiation, the contract is cancelled. Does the prescriptive period start to run in February, in March or in June? It was suggested that similar problems of dating the commencement might arise when seriously defective deliveries at early stages of a long-term contract led the buyer to notify the seller that the buyer would not accept future deliveries.

43. Attention was given to paragraph 3 proposed by the Drafting Group in alternative A at paragraph 20, *supra*. This proposal was as follows:

"Where, as a result of a breach by one party before performance is due, the other party exercises his right to treat the contract as discharged, the period will run from the date of the first breach from which such right arises."

44. Suggestions were made for improving this language. One delegate proposed the following:

"If the obligation [or a part of it] is deemed to have become due before the time otherwise provided for, because of a breach of contract on the part of the debtor, the period shall run not earlier than from the date on which the creditor has given notice to the debtor that the exercises his right."

This proposal was not approved, but the Group recommended that further attention be given the drafting of paragraph 3. For this purpose one representative referred to his proposal set forth under alternative C (paragraph 22, *supra* — see part 6). The language, including a formula to take care of the problem of instalment deliveries, provided:

"Where, as a result on a breach of contract by one party before performance is due, the other party exercises his right to treat the contract as discharged (cancelled), the period shall run from the date of the breach on which such right is based. If the right to

treat the contract as discharged (cancelled) is exercised on the basis of a breach as to an instalment delivery or payment, the period shall run from the date of such breach, even in respect of any connected previous or subsequent instalment covered in the contract."

No final decision was reached concerning these alternative approaches and it was agreed that the problem required further study.

E. Effect of required notices to the other party on the commencement of the period

45. The Working Group considered the need for a special provision to avoid ambiguity in the light of substantive rules under some legal systems that the success of a claim is dependent on the plaintiff's having given prior notice to the other party. See, e.g., ULIS articles 26, 30, 39. It was suggested that under some of the alternative formulae on commencements of the period, it might be concluded that the period of prescription did not run until notice had been given. Cf. ULIS 49-1. On the other hand, it could be argued that notice might have been given immediately in many cases, and that a party's prescriptive period should not be extended by his own delay.

46. Consideration was given to the following proposal on the point contained in the second report of the Drafting Group, quoted at paragraph 20, *supra*:

"4. No account shall be taken of any period within which a notice of default may be required to be given by one party to another."

47. The substance of the above proposal was approved. It was suggested, that in later drafting it be made clear that the "no account shall be taken" phrase will be understood as providing that the running of the prescriptive period would not be affected by the time of giving notice.

48. The Working Group also considered Rule No. 3 of the Draft European Rules on Extinctive Prescription. Rule No. 3 provides:

"If the performance of the obligation is dependent upon the creditor giving notice to the debtor, the prescriptive period shall run from the earliest day on which such notice could have taken effect."

The Working Group was of the opinion that this provision presented drafting difficulties, and should be studied further.

IV. LENGTH OF THE PRESCRIPTIVE PERIOD

A. The number of years

49. The Working Group considered the appropriate length for the prescriptive period. There was general support for the view that the convention should set a single basic period governing all claims by both parties to an international sales contract — subject only to the possibility of limited exceptions for special problems.

50. Nearly all delegates favoured a period within the range of three to five years, with opinion about equally divided between these two periods.

51. Those inclined to favour three years called attention to the relatively short periods in the Warsaw Convention of 1924 on International Carriage by Air, the International Convention concerning the Transport of Goods by Rail (Berne, 1924; revised in Rome, 1933), the Geneva Convention of 1956 on International Carriage of Goods by Road, and the Geneva Convention of 1930 providing a Uniform Law for Bills of Exchange and Promissory Notes. It was also observed that the Draft European Rules on Extinctive Prescription sets a basic three-year period. See Rule No. 4(1). Further it was pointed out that the rules on prescription should serve as a pressure for timely fulfilment or settlement of matured claims, whether substantiated or unfounded, before available evidence is lost. In general, speedy settlement would be in the interest of both parties, buyers as well as sellers. Attention was also called to the relations between prescription rules and the rules on notification in ULIS, which often require speedy action to avoid the loss of rights (see, e.g., ULIS articles 39 and 49).

52. Those inclined to the shorter period noted, however, that holding to this view depended on whether the convention would have adequate provision for suspension or interruption of the period when it would be impossible to bring legal action, and reserved their final view until the provisions of the convention could be considered as a whole.

53. Those who favoured the longer period stressed the difficulty of negotiating across the great distances that may be involved in international trade, and also the difficulty and time that may be involved in securing an attorney in remote areas. One representative stressed the need for further study about commercial practices, with special reference to the terms of standard contracts.

54. The Working Group agreed to refer the matter to UNCITRAL for consideration at the forthcoming session.

B. Calculation of time

55. The Working Group gave preliminary consideration to the detailed rules contained in the Draft European Agreement on the Calculation of Time-Limits (Council of Europe 1969).³ The extent to which such rules were needed in the proposed convention on prescription was referred to the Drafting Group.

(i) The initial day

56. The Drafting Group was of the opinion that it would be useful to specify whether the prescriptive period should commence on the day of the event instituting the period or on the day following this event. The sec-

ond report of the Drafting Group recommended the following provision:

"For the purpose of computing, the day of the event instituting the prescriptive period shall not be counted."

57. The Working Group approved this recommendation.

(ii) Holidays

58. On the question whether the convention should include a provision with respect to the effect of holidays on the calculation of the prescriptive period, the Drafting Group reported as follows:

"The Group considered whether a rule was needed on prescriptive periods ending on a holiday. The Group agreed that in view of the length of the proposed periods of prescription, it was not necessary to extend the prescriptive period by a day or two to avoid hardship. The only possible need was to contribute to precision.

"If a provision was needed for the purpose of precision, the Group preferred not to extend the prescriptive period. The Group did not think that such a provision was important, but thought that it might be advisable to reconsider the matter after considering a possible general provision on the extent to which the uniform law would supersede local law."

59. A majority of representatives approved this view. Three had reservations and recommended further study; one of these mentioned the problem of leap years. Reference was also made to the Draft European Agreement on the Calculation of Time-Limits, articles 3, 4 (c) and 5. One representative expressed the view that the main purpose for having a provision on periods ending on a holiday was to protect the creditor from being trapped because of lack of knowledge of national holidays in a foreign country. He thought that the problems arising from the observance of different holidays in different countries could be solved by referring to the holidays observed at the place where the act of interruption was to be performed.

C. Applicability of prescriptive period to enforcement of claims established by judgement

60. In connexion with the discussion of the appropriate length of the prescriptive period, attention was called to Rule 4(2) of the Draft European Rules of Extinctive Prescription which sets a ten-year prescriptive period for claims established by a "final and conclusive judgement, by an arbitral award and by any other document on which immediate enforcement can be obtained".

61. The view was presented that the time for enforcement of a judgement was a procedural matter for the forum. Special problems arose in the case of arbitral awards (see paragraph 124 (a) *infra*). It was also noted that it might be difficult to justify a different prescriptive period for suits on judgements arising from international sale of goods than for judgements arising from other transactions.

³ The Draft European Agreement on the Calculation of Time-Limits appears as appendix II to the document entitled, "Committee of Experts for the Standardization of the Concept of 'Time-Limits'" (Council of Europe EXP (Delai) (69) 3). This Draft European Agreement is designed (see article 1) to solve problems of interpreting time-limits set by laws, by tribunals and by the parties. This Draft Agreement is thus very different from the Draft European Rules on Extinctive Prescription, which appear in appendix I to the above document.

62. The Working Group came to the conclusion that the UNCITRAL convention should not apply its limitation period to actions to enforce judgements. It was also agreed that the draft convention should clearly state that this matter is outside the scope of the convention (see part II (B), *supra*, at paragraphs 11 to 16, dealing with other problems of the scope of the convention, e.g., paragraph 11: the exclusion of claims based on negotiable instruments for the payment of money). One member reserved his position on this issue. Others wished to have the issue studied further at a later stage. A preliminary view was expressed that the convention should, in general, exclude (a) documents on which immediate enforcement can be obtained and (b) settlements in court.

V. SUSPENSION OR PROLONGATION OF THE PRESCRIPTIVE PERIOD

A. *Impossibility to sue by reason of external circumstances (force majeure)*

63. The Working Group considered whether the prescriptive period should be suspended or prolonged during various circumstances that make it impossible for the creditor to bring his claim to court. A majority of the Group agreed that provision should be made for suspension or prolongation during certain conditions where legal action is prevented by external circumstances, such as war, interruption of communication or moratoria. It was also agreed that the proposed rule on suspension should not extend to circumstances peculiar to the parties, such as death. It was further agreed that effect should be given only to events occurring towards the end of the prescriptive period by giving assurance of specified time for suit (like one year) following the end of the events preventing access to the courts.

64. The Working Group considered the provision on this problem contained in the Draft European Rules on Extinctive Prescription; Rule No. 7(1) provides:

"Where, due to circumstances which he could neither take into account nor avoid nor overcome, the creditor has been unable to interrupt prescription, and provided that he has taken all appropriate measures with a view to preserving his right, prescription shall not take effect before the expiry of a period of one year from the date on which the relevant circumstances ceased to exist."

65. Certain representatives expressed the view that this draft rule was acceptable. They noted, however, that this proposed rule did not appear to be limited to impossibility based on external factors of the sort mentioned above. Consideration was given to inserting a qualifying phrase such as "due to circumstances of external force majeure". It was noted, however, that the concept of *force majeure* was unknown in some legal systems and could not be readily translated or defined. One delegate considered the above-quoted Rule No. 7 to be unacceptably wide.

66. It was further suggested that the grounds for suspension should be put in specific terms, such as the closing of the courts, the closing of the frontier, or

circumstances preventing communication between the parties. In response it was noted that itemizing circumstances might overlook important causes for interruption. And one delegate noted that wide grounds for interruption should be provided to meet the problems of trade with remote regions. The Working Group agreed that further study would be necessary before it would be possible to draft an acceptable statutory provision on this problem.

B. *Fraud*

67. The Working Group examined problems presented by misconduct of the debtor preventing the creditor from exercising his rights.

68. The Working Group gave attention to a relevant provision of the Uniform Law on the International Sale of Goods (ULIS). The one-year prescriptive period prescribed in ULIS article 49-1 is subject to a general exception where the buyer "has been prevented from exercising his right because of fraud on the part of the seller". The Group was in doubt about the meaning of this language. In any event, the Group was agreed that the prescriptive period should not be subject to suspension on the basis of a claim by the buyer that the seller knew that the goods were defective; such claims may readily be made in doubtful cases and could undercut the prescriptive period (compare part III (B) of this report at paragraphs 29-33).

69. The Working Group also considered Rule No. 7 (2) of the Draft European Rules on Extinctive Prescription. This rule provides for suspension "where the creditor does not know of the existence of his right . . . or the debtor's identity . . .". The Group was of the view that this language was too vague and loose for a prescriptive period governing international sales.

70. The Working Group gave attention to the special problem where a debtor conceals his identity or address or his relationship to the transaction in such a way as to prevent suit by the creditor. A majority of the Group was of the view that this problem was sufficiently serious to justify an exception, and tentatively approved the following language:

"Where one party has been prevented from exercising his rights by the other party's intentional misrepresentation or concealment of his identity, [capacity] or address, prescription shall not in any case take effect earlier than one year after the other party knew or reasonably should have known the concealed fact."

The Group decided to place brackets about the word "capacity" in the above draft to indicate hesitation about the implications of this concept.

C. *Other possible bases for suspension*

71. The Working Group then examined the provisions on the effect of criminal proceedings contained in Rule No. 5 of the Draft European Rules on Extinctive Prescription and Rule No. 6 on dealings between a person under legal disability and his legal representative, between spouses, between parents and their children and between a corporate body and its managing staff. The

Group agreed that these provisions were not necessary for a convention limited to international sales of goods. The Working Group also considered Rule No. 7(3) prolonging the prescriptive period "when the parties are engaged in negotiations with a view to reaching a settlement". The Group was of the view that this provision could lead to too much uncertainty, and decided not to recommend such a rule. Reference should also be made to the decision on agreements to extend the period after breach or like event mentioned in paragraphs 105-107, *infra*.

D. *Proceedings that fail to reach decision on the merits*

72. The Working Group considered the clause of Rule No. 11(2) of the Council of Europe's draft providing that when judicial, administrative or arbitration proceedings "have not resulted in a final and conclusive judgement or an arbitral award establishing the creditor's right, prescription shall not be regarded as having been interrupted but shall not take effect before the expiry of a period of six months from the day on which the proceedings ended". It was observed that the expression "final and conclusive judgement" was open to different interpretations.

73. The Working Group considered the desirability of providing for suspension of the prescription while a claim is pending before a tribunal if the tribunal ultimately decides it was without jurisdiction to decide the merits of the claim. The prevailing view was that while in such circumstances a suspension would be warranted, care should be taken to avoid successive suspensions while a claim is brought before a series of incompetent tribunals. Accordingly, there was support for the view that in such and similar cases the prescriptive period should be suspended, but for not more than one additional year from the institution [conclusion] of the first proceeding. It was agreed, however, that the scope and formulation of such a rule called for further study.

VI. INTERRUPTION OF THE PERIOD

A. *Acknowledgement of the debt*

(i) *Effectiveness to interrupt the period*

74. Consideration was given to the effect of an acknowledgement by the debtor that he owed a debt or other obligation. It was agreed that, in general, such an acknowledgement would interrupt the period of prescription — i.e., the portion of the period that had run prior to the acknowledgement would be cancelled and the prescriptive period would commence to run afresh from the date of the acknowledgement.

(ii) *Definiteness and form*

75. The Working Group considered the definiteness and completeness that would be required of an acknowledgement that would interrupt the period of prescription. Thus, the Group considered whether giving effect to an "acknowledgement of the debt" was sufficiently definite, or whether a provision should be added requiring that the acknowledgement specify the amount agreed to be due (working paper, paragraph 14).

76. One delegate suggested that the convention require that the acknowledgement specify the amount, al-

though this amount could be ascertained by reference to other documents. Others thought that such a provision in the convention would involve unnecessary detail in drafting, and that sufficient definiteness would result from a provision giving effect to "acknowledgement of the obligation". It was assumed that under such language, the obligation in question must be definitely identified. The Group further concluded that the problems of definiteness could be solved at the drafting stage.

77. A majority of the Working Group was of the view that only acknowledgements in writing should be effective to interruption of the prescriptive period, and that telex and telegraphic communications should be deemed to be in writing for the purpose of this provision. One representative referred to Rule No. 9 (a) of the Draft European Rules on Extinctive Prescription. Under this Rule, interruption of the period results if the debtor acknowledges, expressly or impliedly, the right of the creditor; the rule states no requirement of a writing.

(iii) *Acknowledgements after the running of the period*

78. Some representatives supported the inclusion of a specific provision that an acknowledgement shall be effective regardless of whether the prescriptive period has expired at the time of the acknowledgement. Another representative suggested an analogy to article 96 of the CMFA General Conditions (annex III to A/CN.9/16) giving effect to payment after the running of the period; it was suggested that this supported the proposed provision with respect to an acknowledgement after the end of the period. Attention was also directed to section 94 (2) of the Czechoslovak International Trade Code, which also supports the effectiveness of a late acknowledgement.

79. Some representatives objected to allowing an acknowledgement to revive the old obligation after it was barred. On the other hand, another delegate expressed the view that acknowledgement ought to be the cause of interruption even if it does not involve novation of the claim. The observer from the Hague Conference noted that there was a relationship between the revival of barred claims and the question whether the issue was deemed one of substance or procedure, with bearing on private international law.

80. A majority seemed to favour giving effect to an acknowledgement that occurred after the expiration of the period of prescription. As a matter of drafting, however, there was doubt as to whether an acknowledgement after the expiration of the period could be deemed an "interruption". In any event, it was noted that any alternative formulation (such as one stating that the claim revived) should not affect domestic rules on the discharge of claims in bankruptcy or rules on incompetency.

(iv) *Part payment*

81. The Working Group was agreed that the convention should provide that part payment of the principal or payment of interest could serve as an acknowledgement. It was noted that a payment would not always constitute an acknowledgement that a balance was still

owing. The Group agreed that in drafting it should be provided, in substance, that an acknowledgement of a claim could be effected by a payment stated as a part payment of a larger obligation.

B. The legal action necessary to interrupt (or satisfy) the prescriptive period

82. The Working Group considered whether the convention should specify the stage a legal proceeding must reach in order to satisfy the prescriptive period. See the working paper (A/CN.9/WG.I/CRD.1) at paragraph 16.

83. There was support for the position that it would be impractical and unnecessary to define the stage of the proceedings under varying procedural systems: the question should be left to the law of the forum.

84. One delegate observed that it might be necessary to decide whether starting a legal proceeding merely suspends the running of the period — with final interruption only on a final decision. In response, it was noted that the answer to this question depends on the way the basic prescriptive rule is framed: whether the specified period of years must be satisfied by instituting a legal proceeding, or by securing a decision on the merits (subject to suspension during court proceedings). The Working Group decided that the question of terminology should be considered a problem of drafting.

85. The suggestion was made that consideration be given to the Draft European Rules on Extinctive Prescription, Rule No. 7, which provides that interruption of prescription may be effected "by the creditor pleading his right or invoking it as a defence before a judicial or administrative authority or in arbitration proceedings, for the purpose of obtaining satisfaction of the right".

86. There was general satisfaction with the concluding phrase "for the purpose of obtaining satisfaction of the right". It was suggested that the earlier part of the English text, however, in referring to "pleading" a right, might undermine the Working Group's decision to refer to local law the question of the matter of the necessary stage of the legal proceeding; it was thought preferable to refer to commencement of the action. It was noted that the French text also needed attention; reference was made to the possible use of the phrase "*intenter l'action*".

87. One delegate suggested the following text for future consideration:

"The period shall be interrupted by the creditor performing any action recognized, under the law of the jurisdiction where such performance takes place, as instituting legal proceedings for the purpose of obtaining satisfaction of the right."

88. There was also discussion of whether and at which point the prescriptive period should be interrupted in case of bankruptcy proceedings against the debtor, proceedings for corporate reorganization or other insolvency proceedings. One representative proposed that the prescriptive period should be interrupted "by the filing of a claim in the insolvency proceedings". Another representative proposed that the interruption would be brought about "by the commencement of in-

solveny proceedings in relation to the debtor". No decision was reached by the Working Group on this point.

89. The Working Group also considered whether a special provision was needed with respect to interruption of the period by an action in one country whose jurisdiction or judgements, etc., would not be recognized in a second country in which the claim is pressed [relied upon?]. It was agreed that this matter should be left for consideration at a later session.

C. Warning notices ("litis denunciatio") in successive sales, etc.

90. The Working Group considered the problem posed by this example: A sells to B and B sells to C; C sues B to recover for defects in the goods. If B gives notice to his supplier, A, that he should watch the suit, should this extend the prescriptive period for B *versus* A? One delegate reported that such provision was made in his legal system.

91. It was agreed that the effect of such a notice of warning should be left to the law of the forum of the first suit (i.e., C *versus* B) — as in the case of other problems as to the character of legal proceeding necessary to interrupt prescription.

D. Effects of interruption: applicability of convention to delay in enforcing judgements

92. The question arose as to whether the convention should prescribe the length of a prescriptive period after the initial prescriptive period has been interrupted. The Group recalled that it had agreed to provide for extension of the period for not more than one year if the initial proceeding does not lead to a decision on the merits (see part V (C), *supra*, at paragraphs 72-73). Thus, the problem essentially was whether a prescriptive period should be established following a decision on the merits. The Commission reaffirmed its earlier view that the law relating to actions to enforce judgements involved local procedural problems which lay outside the scope of the proposed convention (see part IV (C), *supra*, at paragraphs 60-62; as regards interruption by acknowledgement, see paragraph 74).

VII. GENERAL PROBLEMS

A. Modification of the period by agreement of the parties

(i) The general power to modify by agreement

93. The Working Group considered the question whether prescriptive periods may be modified by agreement of the parties (see working paper A/CN.9/WG.I/CRD.1 at paragraph 17).

94. One representative suggested that the parties should have the power to extend the period; but some specific outside limit should be set for extensions.

95. This representative noted that allowing for the shortening of the period was more questionable. Other representatives objected to agreements shortening the period, and mentioned the special needs of buyers in developing countries who might be subject to pressure to agree to unreasonably short periods. It was also sug-

gested that further study of the problem was necessary, especially in view of the use of printed forms; pending such a study, no decision should be reached.

96. Another representative supported a wide range of freedom of contract both to extend and shorten the period, with the possible provision for a lower limit such as one year. This delegate emphasized that agreements for arbitration often require that such proceedings be commenced within a short period. If the convention governs arbitration proceedings, the inability to shorten the period could raise serious problems.

97. It was suggested that attention be given to the relationship between the proposed convention on prescription and ULIS attached to the Hague Conventions of 1964. It was noted that article 49 of ULIS prescribes a one-year prescriptive period for certain types of claims by buyers and that ULIS does not limit the parties' freedom to modify this or other provisions of the Uniform Law.

98. Most delegates agreed that any modification to be effective must be in writing. Some delegates thought that if shortening should be permissible, an attempt to shorten the period for only one party should either (a) extend the same right to the other party, or (b) nullify the clause attempting to shorten the provision.

99. The question was raised as to whether the practices of organized commodity markets, in honouring oral agreements, might be disrupted by the requirement that provisions be in writing. In that connexion it was observed that the disciplinary powers of organized markets might hold the parties to their oral agreements.

100. In conclusion as to shortening, five delegates opposed the power to shorten the period of prescription by agreement (one of these reserved his position if the period is five years). One favoured the power to shorten. One delegate reserved his position pending further study.

101. Various means to regulate the power to shorten the period were mentioned. In addition to the above-mentioned possibilities — the setting of a lower limit, the requirement of a writing, and the restriction on unilateral clauses — it was suggested that courts should be empowered to invalidate unreasonable clauses.

102. As to the power to extend, one delegate developed reasons for the power to extend the period; these included the possibility of extended negotiations and of the late appearance of defects in the case of complex machinery. Another delegate suggested that in any case an outer limit on extension should be specified; he drew attention to the draft of Professor Trammer on the point (see article 4 of the Trammer draft in appendix II, A/CN.9/16).

103. In conclusion, four delegates were opposed to prolongation; doubt was expressed concerning the need for prolongation. One delegate noted that his view might be different if the period is three years.

104. Reference was made to the tentative decision that the period for claims with respect to defects in goods should run from the date of delivery without regard to the time when defects appear (see paragraph 32,

supra). It was suggested that difficulty might arise with respect to complex machinery unless the parties may agree to extend the period. It was noted, however, that if the contract includes an express guarantee as to the time for performance, our proposed draft would extend the prescriptive period (see paragraph 37, *supra*).

(ii) *Prolongation during negotiation*

105. Reference was made to Rule No. 17 (2) of the Draft European Rules on Extinctive Prescription which provides:

"For the purpose of negotiations in case of a dispute between them concerning the existence or extent of the creditor's right, the creditor and the debtor may agree upon a longer prescription period than that provided for by Rules Nos. 4 or 5, provided that the prescription period is not thereby prolonged by more than [three] years."

106. Attention was directed to the phrase "for the purpose of negotiations". It was suggested that this language would be difficult to apply, and that consideration should be given to other formulae on the situations in which such agreements would be allowed. Suggested alternative formulae included reference to the period (a) after breach or (b) after a claim has arisen or (c) after the prescriptive period has started to run.

107. The Working Group agreed that a provision dealing with this general problem would be useful. It was further agreed that such agreements extending the period should be in writing. Other aspects of a proposed rule on this matter were left for further study.

B. *Relation of the convention to conflict of laws*

108. The decision by UNCITRAL establishing the present Working Group requested the Group to consider, *inter alia*, "to what extent it would still be necessary to have regard to the rules of conflict of laws" under a convention on prescription.

109. As an aid in analysing the problem, reference was made to article 7 in the Trammer draft, which provides:

"1. The provisions of articles 1 to 6 of the present Convention shall replace, regarding the matters governed thereby, the municipal laws of the signatory States with respect to the limitation of actions (discharge of rights of action arising from contract by the lapse of time).

"2. In the territories of the signatory States, the provisions of articles 1 to 6 of the present Convention shall be applied by the tribunal (whether judicial or arbitral) before which the action is brought. This shall apply equally to cases in which in accordance with the private international law of the jurisdiction in which the action is brought, the law applicable to the contract of sale in question would be neither the municipal law of the forum nor the municipal law of any signatory State."

110. Some delegates supported the position of the Trammer draft. However, it was suggested that reservations be allowed along the lines of articles III and IV

of the Hague Conventions of 1964. It was agreed that the specific problems posed by these various provisions should be given further consideration.

C. Whether the prescriptive rules should have the effect of substance or procedure

111. The Commission's resolution asked the Working Group to consider "whether it would be necessary to state that the rules of the . . . convention would take effect as rules of substance or procedure".

112. Some representatives called attention to the approach of article 7 in Professor Trammer's draft, quoted above in paragraph 109.

113. It was suggested that the problem might be omitted from the draft. In support of this suggestion it was noted that there had been disagreement over the attempt to deal with this problem in the Uniform Law on the International Sale of Goods annexed to the 1964 Hague Conventions; the attempt to deal with this provision might impede accession to the convention on prescription.

114. In view of these suggestions, it was decided that further study should be given to whether the uniform rules should be applicable only to transactions among parties in States that agree to the convention, or whether the *fora* of such States should be directed to apply the rules to all international sales transactions.

D. Characterizing the effect of expiration of the period

115. The Working Group considered whether the convention should attempt to lay down a general rule on the effect of the running of the period — i.e., does prescription cancel the right. It was suggested that it would be unwise to attempt a general formula; what is needed is to set forth the specific consequences of prescription, such as the recovery of late payments, the opportunity to set off a barred claim in defence to an action, and the appropriation of payments belonging to a party against whom a claim is barred. On the consequences of prescription, and related matters, reference was made to Rule 13 (1) of the Draft European Rules on Extinctive Prescription and to section 76 (2) of the International Trade Code of Czechoslovakia. There was general agreement that the approach of these provisions would be useful in drafting the convention.

E. Recourse to barred claims by counter-claims or set-off

116. The Working Group considered this question: May a claim barred by prescription be used as the basis for a counter-claim — i.e., a cross-action by a defendant against the plaintiff. The Working Group agreed that the use of claims barred by prescription to establish affirmative recovery against the other party should not be permitted.

117. The Working Group was of the view that a different problem was posed by set-off — whereby claims by two parties against each other might be deemed to have cancelled each other or whereby the smaller claim might be deemed to have reduced the larger opposing claim.

118. It was agreed that there should be some opportunity for set-off, but that this opportunity should be limited. To this end, it was suggested that set-off might be available only if the opportunity to use a claim for set-off arose before that claim was barred by prescription. One delegate called attention to the Draft European Rules on Extinctive Prescription. Rule No. 14 provides:

"1. Notwithstanding that prescription has taken effect, the creditor may invoke his right as a defence for the purpose of set-off or counter-claim, provided that the right had not become time-barred when the claim brought against him became due.

"2. Any member State may by national legislation provide that paragraph 1:

"(a) Shall not apply to specified categories of rights;

"(b) Shall apply only on condition that the claim invoked as a defence arises out of the same legal relationship as the claim brought against the creditor;

"(c) Shall apply only on condition that the right which is invoked for the purpose of set-off or counter-claim had not become time-barred when the creditor acquired it."

It was agreed that Rule No. 14 should be given further attention in further work on this problem.

F. Voluntary payment (or other fulfilment) of barred claims

119. It was suggested that a payment (or other fulfilment) of a barred claim should not be subject to recovery on the ground that claim had been barred by prescription. Attention was drawn to the CMFA General Conditions (annex III to A/CN.9/16). Article 96 provides:

"If the debtor has fulfilled his obligation after the expiration of the time period of prescription, he shall not be entitled to claim back the performance, even if he knew at the date of his performance that the time period of prescription has elapsed."

120. One delegate thought it should be specifically provided that only voluntary payments should be subject to recovery. Another delegate thought that this provision would inject an unnecessary complication. To deal with this question, it was suggested that the draft might provide that a payment could not be recovered on the ground that the claim was barred at the time of payment. Under such a rule, municipal law would still be effective with respect to other grounds for recovering payment, such as the use of fraud to secure payment. It was suggested that this was the approach taken in Rule 13 (3) of the Draft European Rules on Extinctive Prescription, which provides:

"(3) A debtor who had performed an obligation after prescription has taken effect cannot invoke this prescription to justify an action for restitution."

121. The question was raised whether the convention should set forth a general characterization as to the nature of voluntary payment of barred claims as by stating that such payments constituted a gift. It was suggested that such a general rule might affect results

in bankruptcy, taxation and other municipal arrangements. Such a general characterization as this might create difficulties and, in any event, would not be necessary. Reference was made to the objection to the attempt to provide a general characterization of the effect of prescription (*supra* at paragraph 115) and the caution that describing the effect of an acknowledgement should not affect municipal rules on discharge in bankruptcy (*supra* at paragraph 80).

G. *Whether the issue of prescription should be raised by the court suo officio or only at the instance of the parties*

122. There was general agreement that prescription should be invoked by the party concerned (including a guarantor) and the court should not be authorized to raise it *suo officio* in the course of a judicial proceeding. One representative, however, expressed the view that in case of default proceedings, a court should be authorized to raise the issue of prescription on behalf of an absent defendant.

123. It was noted that in drafting a provision dealing with this problem attention might be given to Rule No. 16 of the Draft European Rules on Extinctive Prescription. This Rule provides:

"The debtor may, expressly or impliedly, refrain from invoking the prescription which has taken effect in his favour. Prescription may not be invoked by the court on its own initiative."

H. *Matters deferred for later attention*

124. The Working Group noted that among the problems it had not been able to consider at this session, and which should receive attention at a later date, were the following:

(a) Arbitration: It was noted that a convention on prescription would raise complex problems with respect to arbitration proceedings. It was agreed that the applicability of the convention to arbitration would be deferred to a later stage.

(b) The question posed by the Commission's decision at paragraph 3 (g): "Whether the preliminary draft convention should take the form of a uniform or model law".

(c) The effect of prescription of the principal obligation on the obligation to pay interest (see the Draft European Rules on Extinctive Prescription, Rule 13 (2)).

(d) The effect of the prescription of an obligation on liens or other security interests given to secure that obligation.

I. *Programme for completion of the work*

125. The Working Group noted the statement contained in the Commission's report (A/7618, paragraph 46 (4)) envisaging that "a preliminary draft of a convention can be completed in 1970 or 1971". However, in view of the short duration of this first meeting (five

days) and the technically complex nature of the subject, the Working Group did not at this stage attempt to formulate its conclusions in terms that would be suitable for inclusion in a preliminary draft convention. On many points the Working Group was not able to reach conclusions; even the conclusions reached should be regarded as provisional and incomplete, and will require further study.

126. Accordingly, in order to carry out the work within the time mentioned in the Commission's report, the Working Group recommends that after the Commission considers the present report at the third session in April 1970, the Commission should arrange for the preparation of a tentative draft; this tentative draft would take into account the present report and the comments thereon made at the third session of the Commission. It is also recommended that a second session of the Working Group be held in the second half of 1970 to consider the above-mentioned draft.

ANNEX I

List of participants

MEMBERS

Argentina

H. Gervasio Ramón Carlos COLOMBRES, Professeur à la Faculté de droit, Université de Buenos Aires.

Belgium

M. Jacques BOQUE, Conseiller-adjoint au Ministère des affaires étrangères.

Czechoslovakia

Mr. Ludvik KOPAC, Legal Adviser, Ministry of Foreign Trade, Prague;
Mr. Jiri BLETICHA, Second Secretary, Ministry of Foreign Affairs, Prague.

Japan

Mr. Shinichiro MICHIDA, Professor of Law, University of Kyoto.

Norway

Mr. Stein ROGNLIEN, Head of Department of Legislation, Ministry of Justice, Oslo.

United Arab Republic

Mr. Mohsen CHAFIK, Professor of Trade Law, Cairo University.

United Kingdom

Mr. Anthony Gordon GUEST, Professor of Law, King's College, London.

OBSERVERS

International Institute for the Unification of Private Law

Mr. Mario MATTEUCCI, Secretary-General.

Hague Conference on Private International Law

Mr. M. H. VAN HOOGBRATEN, Secretary-General.

SECRETARIAT

Mr. Paolo CONTINI, Secretary of the Working Group;

Mr. John HONNOLD, Consultant;

Miss J. HATFIELD and Miss T. REASON, Secretaries.

ANNEX II

List of documents and working papers
before the Working Group

A/CN.9/WG.1/1 A/CN.9/WG.1/2 and Add.1-4	Provisional agenda Working Group on time-limits and limitations (prescription) in the international sale of goods: draft report	A/CN.9/WG.1/CRD.1 A/CN.9/WG.1/ORD.2 and CRD.3 A/CN.9/WG.1/CRD.4 A/CN.9/WG.1/ORD.5 A/CN.9/WG.1/CRD.6 A/CN.9/WG.1/CRD.7	Working paper produced by special consultant to the secretariat Report of Drafting Group on the commencement of the period of prescription Second report of the Drafting Group Third report of the Drafting Group Proposal by Norway Recommendation by the Chairman for completion of the work
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E. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Replies and comments by States concerning the Hague Conventions of 1964: note by the Secretary-General	A/CN.9/11, Corr. 1, Add.1,2
Replies and comments by States concerning the Hague Convention of 1955 on the law applicable to international sale of goods: note by the Secretary-General	A/CN.9/12, Add.1,2,3
Incoterms and other trade terms: report of the Secretary-General	A/CN.9/14
Time-limits and limitations (prescription) in the field of international sale of goods: note by the Secretary-General	A/CN.9/16, Add.1,2
International sale of goods, the Hague Conventions of 1964: analysis of replies and studies received from governments: report of the Secretary-General	A/CN.9/17
General conditions of sale and standard contracts: proposal by the United States of America concerning the role of the United Nations Commission on International Trade Law (UNCITRAL) in furthering the use of general conditions, standard contracts, uniform trade terms or aids to uniformity	A/CN.9/L.8
The Hague Conventions of 1964: proposal by the delegation of the Union of Soviet Socialist Republics concerning the unification of rules of law regulating the international sale of goods	A/CN.9/L.9
Time-limits and limitations (prescription) in the field of international sale of goods: note by the Secretariat. (Suggestions concerning alternative approaches for consideration of the report of the Working Group)	A/CN.9/R.1
Uniform rules governing the international sale of goods: note by the Secretariat	A/CN.9/R.2

II. INTERNATIONAL LEGISLATION ON SHIPPING*

A. A survey of the work in the field of international legislation on shipping undertaken by various international organizations and co-ordination of future work in this field: report of the Secretary-General**

INTRODUCTION

1. The Commission at its second session adopted a resolution¹ that, *inter alia*, noted "the importance of the question of international shipping and of the desirability of close collaboration with the organs and organizations already working in this field".

The resolution also took account "in particular, of resolution 14 (II) adopted at the second session of the United Nations Conference on Trade and Development on 25 March 1968, by which the Conference requested its Committee on Shipping to create a working group on international shipping legislation, and resolution 46 (VII) adopted in this connexion on 21 September 1968 by the Trade and Development Board". In addition, the resolution confirmed "its wish to see close co-operation established between the Commission and UNCTAD" and considered "that a duplication of work should be avoided".

2. The resolution provided that the Commission:

"1. *Decides* to include international legislation on shipping among the priority items in its programme of work;

"2. *Requests* the Secretary General to prepare a study in depth giving *inter alia* a survey of work in the field of international legislation on shipping done or planned in the organs of the United Nations, or in intergovernmental or non-governmental organizations, and to submit it to the Commission at its third session;

"3. *Decides* to set up a Working Group consisting of representatives of Chile, Ghana, India, Italy, the United Arab Republic, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland, which may be convened by the Secretary-General, either on his own initiative or at the request of the Chairman, to meet some time before — and preferably shortly before — the commencement of the third session of the Commission to indicate the topics and method of work on the subject, taking into consideration the study prepared by the Secretary-General, if it is ready, and giving full regard to the recommendations of UNCTAD and any of its

organs, and to submit its report to the Commission at its third session;

"4. *Invites* the Chairman of its second session and, if he is unable to attend, his nominee from among the members of the Commission to attend the session of the UNCTAD Committee on Shipping to be held at Geneva in April 1969 and to inform that Committee of the course of the discussion in the Commission at its second session and the Commission's desire to strengthen the close co-operation and effective co-ordination between the Commission and UNCTAD.

"5. *Requests* the Secretary-General, should it be decided to convene the Working Group referred to in paragraph 3 above, to invite States members of the Commission and intergovernmental and non-governmental organizations active in the field to be present at the meeting of the Working Group, if they choose to do so."

3. To assist the Commission in its consideration of the subject this report provides information:

(a) On the third session of the UNCTAD Committee on Shipping (chapter I, *infra*);

(b) On the deliberations at the Sixth Committee and the resolution of the General Assembly (chapter II, *infra*);

(c) On the first session of the UNCTAD Working Group on International Shipping Legislation (chapter III, *infra*);

(d) On problem of co-ordination of current work to implement the decision of the Commission referred to in paragraphs 1 and 2 above (chapter IV, *infra*).

I. THIRD SESSION OF THE UNCTAD COMMITTEE ON SHIPPING

4. The UNCTAD Committee on Shipping at its third session, held from 9 to 25 April 1969 in Geneva, considered the question of creation of a Working Group on International Shipping Legislation.²

5. Pursuant to paragraph 4 of the Commission's decision (quoted in paragraph 2, *supra*) the Chairman of

¹ Report of the Commission on the work of its second session, (A/7618), para. 133.

* For action by the Commission with respect to this subject, see part two, section II, A, report of the Commission on the work of its second session (1969), paragraphs 114-133. See also part two, section III, A, report of the Commission on the work of its third session (1970), paragraphs 147-166.

** A/CN.9/41.

² UNCTAD, *Official Records of the Trade and Development Board, ninth session, Report of the Committee on Shipping on its third session* (TD/B/240) (herein cited as Report of the Committee on Shipping), chapter V, paras. 67-81.

the second session of UNCITRAL attended the meeting of the Committee and made a statement at the Committee's 44th meeting on 15 April 1969. In his statement the Chairman informed the Committee of the Commission's decision on international legislation on shipping at its second session and of the Commission's desire for close co-operation and effective co-ordination between UNCITRAL and UNCTAD.³

6. With respect to co-operation between UNCTAD and UNCITRAL it was stated by several developing countries at the meeting that the UNCTAD Working Group, if established, "should review existing legislation, identify areas which required legislation, send its directives and guidelines to UNCITRAL and request UNCITRAL to proceed on the basis of such suggestions and guidelines in the drafting of the requested legislation".⁴ Statements were also made by other representatives concerning the need for liaison and collaboration between UNCTAD and UNCITRAL and the advisability of avoiding duplication of work.⁵

7. At its 55th meeting on 25 April 1969 the Committee unanimously adopted resolution 7 (III) the Creation of a Working Group on International Shipping Legislation.⁶ According to the resolution the Working Group consists of representatives of thirty-three States,⁷ elected for a three-year term, and has the following terms of reference:

"(a) To review economic and commercial aspects of international legislation and practices in the field of shipping from the standpoint of their conformity with the needs of economic development, in particular of the developing countries, in order to identify areas where modifications are needed;

"(b) In the light of this review, to make recommendations and prepare the necessary documentation relating thereto to serve as a basis for further work Commission on International Trade Law for the drafting of new legislation or other appropriate action and, when necessary, to consider other measures to implement fully the provisions of paragraph 1 of resolution 14 (II);

"(c) To report its findings and recommendations to the Committee on Shipping."

8. In its resolution referred to in paragraph 7 above, the Committee on Shipping requested the Secretary-General to convene the UNCITRAL Working Group on International Legislation on Shipping immediately on receipt of the first report of the UNCTAD Working

Group and the recommendations of the Trade and Development Board thereon.⁸ It further requested the Secretary-General to schedule the meetings of the Working Group on International Shipping Legislation of the United Nations Commission on International Trade Law in such a way that the reports of the UNCTAD Working Group on International Shipping Legislation may be considered by the Committee on Shipping at its session following next upon that of the UNCTAD Working Group.⁹

9. At the first part of the ninth session of the UNCTAD Trade and Development Board, held in August to September 1969, the Board took note with satisfaction of the report of the Committee on Shipping on its third session and agreed, as an exceptional measure, in accordance with the wish expressed in paragraph 6 of resolution 7 (III) of the Committee on Shipping, to consider at its resumed ninth session in February 1970 the report of the UNCTAD Working Group on International Shipping Legislation on its first session and to forward this report to the Working Group on International Legislation on Shipping of the United Nations Commission on International Trade Law in time for its first session.¹⁰

II. THE TWENTY-FOURTH SESSION OF THE GENERAL ASSEMBLY

10. During the debate in the Sixth Committee of the General Assembly on the Commission's report on its second session, several speakers touched upon the question of international legislation on shipping. The report of the Sixth Committee stated:¹¹

"24. Most representatives who commented on the decision of UNCITRAL to include international legislation on shipping among the priority topics in its programme of work, recognized that UNCITRAL was competent to consider such legislation and to decide on topics and methods of work in that connexion. Many drew attention, however, to the need for UNCITRAL to take account of the work of other organizations in the field so as to avoid wasteful duplication or unnecessary expenditure. It was also observed that collaboration in this particular field had been helped by the creation of the Joint Shipping Legislation Unit of the United Nations Office of Legal Affairs and the UNCTAD secretariat.

"25. Some representatives, while accepting the competence of UNCITRAL in the field of international legislation on shipping, doubted the wisdom of UNCITRAL's decision to include the subject in its working programme at the present stage. These representatives took the view that it would be preferable

³ *Ibid.* The text of the Chairman's statement appears in annex IV to the Report of the Committee on Shipping.

⁴ *Ibid.*, para. 70.

⁵ *Ibid.*, paras. 72, 74 and 76.

⁶ *Ibid.* For the text of the resolution, see annex I, p. 26.

⁷ Algeria, Argentina, Belgium, Brazil, Bulgaria, Canada, Ceylon, Chile, Colombia, Czechoslovakia, Ethiopia, Federal Republic of Germany, France, Gabon, Ghana, Greece, India, Indonesia, Iran, Iraq, Ivory Coast, Japan, Mexico, Norway, Pakistan, Philippines, Poland, Spain, Sweden, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland and United States of America.

⁸ Resolution 7 (III) of the Committee on Shipping, para. 7. Report of the Committee on Shipping, annex I, p. 26.

⁹ *Ibid.*, para. 8.

¹⁰ TD/B/L.185/Add.1(E). Draft report of the Trade and Development Board on the first part of its ninth session, para. 103.

¹¹ Report of the Sixth Committee on agenda item 90: Report of the United Nations Commission on International Trade Law on the work of its second session (A/7747), paras. 24-27.

for UNCITRAL not to commence considering the substance of the question until the other international organizations concerned had considered its economic and other aspects. Under this view, the Commission should, for the time being, confine its task to that of co-ordination.

"26. Representatives of developing countries stressed that UNCITRAL's work in this field was of importance for the economy of these countries and expressed the hope that their countries would be equitably represented in the bodies responsible for drafting new legislation. These representatives stated that present-day legislation in the field reflected, in many respects, an earlier economic phase of society, as well as attitudes and practices which seemed unduly to favour ship-owners at the expense of shippers. They also observed that the developing countries were particularly interested in legislation on freight rates, charter parties, standard clauses in bills of lading, and the limitations on the ship-owner's liability resulting from exemption clauses. Some delegations expressed the opinion that international shipping legislation is a priority topic that provides UNCITRAL with the best opportunity of contributing to a change in the *status quo* and the creation of more just and equitable conditions for the developing nations in the field of international trade.

"27. One representative suggested that, in dealing with international legislation on shipping, UNCITRAL should take account of the Treaties of Montevideo of 1889, as revised in 1940 and 1944, which had greatly benefited private international law."

11. The General Assembly in resolution 2502 (XXIV), with reference to the present subject, stated that the Assembly:

"2. *Endorses* the inclusion by the United Nations Commission on International Trade Law, on the basis indicated in its report of International legislation on shipping among the priority topics in its programme of work;

...

"10. *Recommends* that the United Nations Commission on International Trade Law should:

"(a) Continue its work on the topics to which it decided to give priority, that is, the international sale of goods, international payments, international commercial arbitration and international legislation on shipping;

...

"(d) Give special consideration, in promoting the harmonization and unification of international trade law, to the interests of developing and land-locked countries;

"11. *Recommends further* that the United Nations Commission on International Trade Law should continue to collaborate fully with international organizations active in the field of international trade law;"

III. THE FIRST SESSION OF THE UNCTAD WORKING GROUP ON INTERNATIONAL SHIPPING LEGISLATION

12. The UNCTAD Working Group on International Shipping Legislation held its first meeting in Geneva from 1 to 12 December 1969. The report of the Working Group on its first meeting appears in document TD/B/289.

13. The Working Group adopted the following work programme:

1. Bills of lading.
2. Charter parties.
3. General average.
4. Marine insurance.
5. Economic and commercial aspects of international legislation and practices in the field of shipping not covered by items 1 to 4 above.
6. Consideration of other measures to implement fully the provisions of the last clause of paragraph 2 (b) of resolution 7 (III) of the Committee on Shipping.¹²

14. The Working Group decided that the topics in its programme of work would be taken up in the order stated.¹³ Accordingly, the first priority item to be dealt with is bills of lading. It was further agreed that the secretariat of UNCTAD should undertake a major study of that topic.¹⁴

15. The Working Group adopted the following list of topics for the programme of work on the first priority topic, bills of lading:

"The Working Group shall review the economic and commercial aspects of international legislation and practices in the field of bills of lading from the standpoint of their conformity with the needs of economic development in particular of the developing countries and would make appropriate recommendations as regards, *inter alia*, the following subjects:

"(a) Principles and rules governing bills of lading, including:

"(i) Applicable law and forum including arbitration,

"(ii) Conflict of laws between conventions and national legislation,

"(iii) Responsibilities and liabilities in respect of carriage of goods,

"(iv) Voyage deviation and delays;

"(b) Study of standard forms and documentation, including an analysis of common terms;

"(c) Trade customs and usages relating to bills of lading;

"(d) Third party interests at ports of call."¹⁵

16. A representative of the UNCITRAL secretariat, attending the session of the Working Group, informed the meeting of the decision of UNCITRAL with respect

¹² TD/B/289, para. 17. Foot-notes to the report are not reproduced herein.

¹³ *Ibid.*, para. 26.

¹⁴ *Ibid.*, para. 27.

¹⁵ *Ibid.*, para. 31.

to international legislation on shipping and of the desire of UNCITRAL to co-ordinate its work in this field with that of the UNCTAD Working Group.¹⁶

17. At this meeting of the UNCTAD Working Group, the need for co-operation between UNCTAD and UNCITRAL in the field of international shipping legislation was emphasized by many representatives. Thus, the report noted that the representatives of the socialist countries of Eastern Europe, supported by the representatives of the developing countries, expressed the hope that UNCITRAL would not act without first having received the recommendations and studies of the UNCTAD Working Group.¹⁷

18. The representative of the Secretary-General of UNCTAD suggested that it might be possible for the Committee on Shipping in the future to forward its comments on the report of the Working Group directly to UNCITRAL or its Working Group on International Legislation on Shipping. He further suggested since the Committee on Shipping was to meet in March/April 1971, that UNCITRAL might postpone its fourth session at least until May 1971.¹⁸

19. The Trade and Development Board, at its meeting on 9 February 1970, took note of the report of the UNCTAD Working Group and directed that this report be forwarded to UNCITRAL together with the comments made thereon by members of the Board.¹⁹ The Board further decided that the UNCTAD Working Group should hold its second session from 30 November to 11 December 1970 and, should that not be possible, that the Working Group should meet not later than early February 1971.

IV. CO-ORDINATION OF FURTHER WORK

20. At its second session, the Commission's resolution on international shipping legislation requested the Secretary-General "to prepare a study in depth giving *inter alia* a survey of work in the field of international legislation done or planned in the organs of the United Nations, or in intergovernmental or non-governmental organizations".²⁰ The Secretary-General was requested to submit this study to the Commission at its third session.

21. Information relevant to the work under way in the organs of the United Nations and in other organizations, as referred to in the above resolution, was requested in a questionnaire which was transmitted on 8 August 1969 to the organizations principally involved in this field. The replies so far received appear as annex II to the Report of the Secretary-General on the Register

of Organizations and Register of Texts (A/CN.9/40/Add.1). Examination of these replies shows that the current project directly relevant to the Commission's field of work is the Draft Convention on the International Combined Transport of Goods, the current status of which is discussed *infra* at paragraph 22. In addition, since the receipt of these replies, UNCTAD has instituted the programme of work with respect to international shipping legislation which has been described, *supra*, in paragraphs 4 to 9 and 12 to 19.

22. The Secretary-General also instituted a study of the substantive law of this field. When this study was instituted, no priorities were established within the general field of international shipping legislation. For this reason, the preliminary work towards a study in depth has dealt with the items embraced within resolution 14 (II) adopted by UNCTAD on 25 March 1968 to which the resolution of UNCITRAL had made reference.²¹ After the commencement of this work, the UNCTAD Working Group on Shipping in December 1969 established a programme of study in the field of international shipping legislation on the six subjects listed in paragraph 12, *supra* and decided that top priority should be given to bills of lading with special reference to the aspects of the subject listed in paragraph 15, *supra*. The resolution of the UNCTAD Working Group emphasized the study of the "economic and commercial aspects" of the rules governing bills of lading, but it appears that attention to the existing legal rules may be necessary in evaluating their economic and commercial effects.²² Should the Commission desire, an oral report on the development of the study requested by the UNCTAD Working Group could be presented during its third session.

23. In view of the above decision by UNCTAD to give top priority to bills of lading, it may be relevant to note certain other recent developments in this field. In January 1970 a revised draft was released of a Draft Convention on the International Combined Transport of Goods (TCM); this draft resulted from the work of the second session of the Round Table on the Legal Aspects of Combined Transport Operation (Institut International pour l'unification du droit privé (UDP), 1970 — Etudes: XLII Transport combiné — Doc. 39). This Draft Convention proposes revised rules of carrier responsibility where a contract for international carriage by two different modes of transport bears the heading "Combined Transport Document governed by the TCM Convention". This proposed convention is still in the course of formulation, but preliminary examination of this draft

¹⁶ *Ibid.*, annex III.

¹⁷ *Ibid.*, para. 36.

¹⁸ *Ibid.*, para. 54. Current plans call for the UNCTAD Committee on Shipping to meet 22 March to 2 April 1971. It is estimated that the Committee's recommendations can be transmitted to UNCITRAL within two weeks of the end of the session.

¹⁹ See document TD/B/299.

²⁰ UNCITRAL, Report on the Second Session (1969), para. 133, sub-para. 2.

²¹ The specific subjects mentioned in paragraph 1 (b) of Resolution 14 (II) of the second UNCTAD conference were: "(i) charter parties; (ii) marine insurance, and (iii) amendments to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924."

²² See the itemization of topics for the programme of work on bills of lading at paragraph 15, *supra*. See also the Working Paper on International Shipping Legislation submitted by the UNCTAD secretariat to the UNCTAD Working Group (TD/B/C.4/ISL/2). This document, as well as the report of the UNCTAD Working Group on International Shipping Legislation (TD/B/C.4/ISL/4), will be available at the third session of UNCITRAL.

indicates that certain of its provisions may call for attention under the above resolutions of the Commission.²³

24. The wide scope that was initially envisaged for the study in depth of international shipping legislation has made it impossible to complete a general study prior to the third session of UNCITRAL. In addition, for reasons that will be suggested below (para. 25), when priorities for work were established by the UNCTAD bodies and plans were developed for an intensive study in the field of bills of lading, questions arose with respect to the appropriate co-ordination of the work of UNCITRAL and UNCTAD. In view of these developments since the last session of the Commission, it has been thought appropriate to refer to the Commission the question of what work should be carried forward by the UNCITRAL secretariat in view of the work now in process by UNCTAD and other organizations engaged in work in this field.

25. In this connexion, the Commission may wish to consider the following alternatives:

(a) One alternative would involve continuation of the study of various aspects of the law of international shipping legislation that was commenced before the UNCTAD Working Group decided to establish a programme of work with top priority for bills of lading. In examining this alternative, the Commission may wish to consider the following problems: (i) On the one hand, a general study not directed to the analysis and solution of specific legal problems tends to duplicate the work of substantial dimension that has been produced in existing treaties and other scholarly writing.²⁴ In addition, such general studies embrace such a wide field that the completion of satisfactory work necessarily requires a substantial period of time. As a consequence, such a general study may not be completed by the time specific recommendations are presented by UNCTAD and may not be addressed to the specific issues on which recommendations for legislative change will be offered. (ii) On the other hand, if a study addresses itself more narrowly to points on which the present legal rules have been the subject of criticism, the study might duplicate the work under way as a result of the work programme developed by the UNCTAD Working Group. Problems of co-ordination might also arise, since such a study might present issues to UNCITRAL for decision

at the same time these issues are presented to the UNCTAD organs for decision.

(b) A second alternative would be for the UNCITRAL secretariat to collect and analyse the legal materials that are relevant to the economic and commercial issues as they emerge from the UNCTAD study. In examining such a co-ordinated programme, the Commission may wish to give attention to the following considerations: On the one hand, the development and issuance of separate studies and reports by UNCITRAL and UNCTAD on the same or similar issues may be difficult to reconcile with the declared goals of co-ordination and avoidance of duplication. On the other hand, for UNCITRAL to institute its studies after the receipt of recommendations from UNCTAD would involve delay. The Commission may wish to consider whether this dilemma, to some degree, may be avoided by an approach involving close attention by the UNCITRAL secretariat to the work in process in UNCTAD, and the development of preliminary studies which would make it more feasible for the UNCITRAL secretariat to present studies of the relevant legal issues within a reasonably short time after the receipt of the UNCTAD studies and recommendations.

26. As was provided in the decision quoted in paragraph 2 above, the Commission at its second session authorized "the Secretary-General, either on his own initiative or at the request of the Chairman" to convene the Working Group on International Legislation on Shipping prior to the commencement of the third session of the Commission.

27. The Chairman of the second session of the Commission did not request the convening of the Working Group. On behalf of the Secretary-General, the Legal Counsel of the United Nations addressed an inquiry to the States members of the Working Group seeking their advice with respect to the convening of the Working Group. In his inquiry the Legal Counsel drew attention to the report of the UNCTAD Working Group on Shipping Legislation and especially to paragraph 36 of the report that indicated strong support for the view "that UNCITRAL would not act in this field without having first received the recommendations and studies of the UNCTAD Working Group". It was indicated in the inquiry that the Secretary-General would convene the Working Group if the majority of the members of the Working Group should desire a meeting.

28. Three members, Italy, the United Kingdom and the USSR, replied to the inquiry of the Legal Counsel. None of their replies requested the convening of a meeting of the Working Group. The Secretary-General, therefore, decided not to convene the meeting before the commencement of the third session of the Commission.

29. In the light of any decisions the Commission reaches with respect to the co-ordination of the work of UNCITRAL and UNCTAD (see paragraph 25, *supra*), the Commission may wish to consider the question of a meeting and terms of reference of the UNCITRAL Working Group.

²³ See TCM art. 11(b)(ii), on applicability of the 1924 International Convention for the Unification of Certain Rules relating to Ocean Bills of Lading (the Hague Rules) with respect to goods carried on deck; *contrast* art. I(c) of the Hague Rules. *Compare* TCM art. 9(1) on period of carrier responsibility (e.g. while in possession prior to loading or after discharge from ship) with Hague Rules art. I(c); *compare* TCM art. 9 on scope of responsibility for acts of agents with Hague Rules art. IV(2) (a); *compare* TCM art. X-3 on computation of limits of liability with Hague Rules art. IV(5) as amended by art. 2 of the 1968 Protocol. *See also* TCM arts. 14 and 15 on choice of forum and arbitration tribunal.

²⁴ The existing general studies include, *inter alia*, the report prepared by Dr. Thommen for UNCTAD (TD/32/Rev.1), surveying the history and subject areas of international shipping legislation and setting out the work being done in the various international and intergovernmental organizations, which will be available to members of the Commission.

B. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Consideration of inclusion of international legislation on shipping among the priority topics in the work programme: note by the Secretary-General	A/CN.9/23

III. INTERNATIONAL PAYMENTS*

A. Negotiable instruments

1. *Unification of the law of bills of exchange and cheques: note by the Secretary-General and preliminary report by the International Institute for the Unification of Private Law (UNIDROIT)***

1. The United Nations Commission on International Trade Law (UNCITRAL), at its first session, decided to include in its work programme, as a priority topic, the law of international payments. The Commission selected, as one of the items falling within the scope of international payments, the harmonization and unification of law relating to negotiable instruments.¹ In view of the work done by the International Institute for the Unification of Private Law (UNIDROIT) on this subject, the Commission considered it appropriate to request the Secretary-General to consult with UNIDROIT as to whether that Organization would be prepared to make a study of the measures that could be adopted in order to promote the harmonization and unification of the law relating to negotiable instruments, in so far as transactions involving different countries are concerned. The Commission especially requested:

(a) Examination of the question of the convenience of promoting a wider acceptance of the following Geneva Convention on negotiable instruments: (i) Convention providing a Uniform Law for Bills of Exchange and Promissory Notes of 1930; (ii) Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes of 1930; (iii) Convention providing a Uniform Law for Cheques of 1931; and (iv) Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques of 1931.

(b) A study of the possible means of giving reciprocal international recognition and protection to negotiable instruments under the Common Law and to the instruments recognized under the Geneva Conventions; and

(c) Consideration of the creation of a new international negotiable instrument for international payments.²

2. In accordance with the Commission's request, the Secretary-General consulted with UNIDROIT as to whether it would be prepared to carry out a study along the lines indicated by the Commission. UNIDROIT agreed to prepare such a study, and submitted a "Preliminary report on the possibilities of extending the uni-

fication of the law of bills of exchange and cheques", which is reproduced in the annex below.

ANNEX

The possibilities of extending the unification of the law of bills of exchange and cheques

REPORT SUBMITTED TO THE UNITED NATIONS BY THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

I. This report does not, of course, profess to give a definitive answer on this subject, but merely formulates suggestions concerning the course to be followed, and in particular the methods of work that will in any case have to be adopted before a definitive view is expressed. As will be seen, the report refers particularly to the points mentioned under (a) and (c) above, since the problem of reciprocal recognition of negotiable instruments under the common law and under the Geneva Conventions should be taken up after a decision has been reached on whether to promote a wider acceptance of the Geneva Conventions or to create a new negotiable instrument applicable only to international payments. In addition, the term "negotiable instruments under the common law" calls for further clarification; for after all, as will be seen below, in the common-law countries, as elsewhere, negotiable instruments are regulated by written laws (statutes) which may differ, sometimes quite considerably. Hence, the problem of reciprocal recognition of negotiable instruments will have to be assessed in relation to each of the statutes in force in each common-law country.

II. *Methodological criteria to be applied to a study aimed at promoting unification and/or harmonization in respect of negotiable instruments*

Any study attempting to assess either the possibility of subsequent unifications of laws relating to negotiable instruments or the desirability of creating a special negotiable instrument to be used in international commercial transactions involves considerable difficulties, and it should therefore be envisaged that it will take quite a long time.

There are a number of reasons for this, which may be summarized as follows:

A. Before any research of a strictly legal nature is undertaken, a careful survey must be carried out in those circles which would be affected by a change in the existing state of the law, namely, governmental banking and commercial circles, at both the national and the international level.

¹ Report of the Commission on the work of its first session, para. 25.

² *Ibid.*, para. 26.

* For action by the Commission with respect to this subject, see part two, section II, A, report of the Commission on the work of its second session (1969), para. 63-100. See also part two, section III, A, report of the Commission on the work of its third session (1970) para. 103-145.

** A/CN. 9/19.

Rigorously scientific methods should be used in the survey, which should be carried out through interviews, questionnaires and exhaustive consultation with associations, organs, institutes and bodies representing the circles mentioned above.

The survey, which would lead to the preparation of a substantial body of documentation, should cover the following questions:

(1) Is there or is there not a continuing need to amend the existing rules of law relating to bills of exchange, especially with regard to the problem of international payments?

(2) Is there a feeling that the uniform legislation now existing could be amended, particularly in view of the parallel unification process which has taken place in the civil-law countries on the one hand (the Geneva Conventions) and in the common-law countries on the other (the Negotiable Instruments Act and Uniform Commercial Code in the United States, and the Bills of Exchange Act in England)? In other words, can one envisage at the outset any possibility of success for an effort aimed at extending the Geneva Conventions to the common-law countries by reopening discussion on a number of rules of law which those countries might find it very hard to accept in present circumstances?

It would also be necessary, as a preliminary step, to analyse the extent of uniformity really achieved in the United States through the aforementioned Act; for, in the common-law countries, statutes must always be interpreted in the light of the pre-existing common law, so that the interpretation of so-called uniform laws often differs quite widely in areas falling within the jurisdiction of the individual states.

In England, too, the judges have more than once imposed limits on the uniformity introduced by a written law by using the wide discretionary powers characteristic of this legal system, which allows them to invoke a body of law consisting of the precedents established by the courts.

However, these problems can only be touched upon in a preliminary report. Furthermore, the interpretation of the Geneva Uniform Laws in the countries which have accepted them has not been free from differences.¹

Generally speaking, the differences of interpretation which have occurred, even with regard to the Geneva Uniform Laws, may be attributed to the fact that the nucleus of the legal codes relating to bills of exchange in force in the countries of continental Europe is the French and Germanic systems, which in turn influenced all the other systems to a greater or lesser degree and which show differences that are often very substantial.

In the Germanic system the bill of exchange is a formal, abstract instrument, the validity of which depends primarily on its form. Furthermore, the obligation arising out of the instrument is entirely independent of the basic or underlying juridical relationship on which the issuance or negotiation of the instrument itself is based.

In the French system, on the other hand, the conditions relating to form are less strict. The bill of exchange is the means by which the drawer disposes of the consideration, (*provision*)—that is, his own claim on the drawee—in order to satisfy, through the drawee, the payee's claim on him (the drawer).

The rules peculiar to the French and Germanic systems are based on these fundamental criteria. However, although the differences between these two systems cannot be analysed here in greater detail, it should be noted that they affect a limited number of cases, particularly those connected with the *provision*

system. Nevertheless, it was necessary to mention those differences in order to permit a realistic evaluation of the legislative uniformity which already exists.

Clearly, however, the basic problem in the present context is still that of unification encompassing the two main groups of laws, belonging to the spheres of influence of the common law and the civil law respectively.

(3) Would it not be preferable merely to draw up a new uniform law to regulate a special negotiable instrument, which will be used in international trade transactions? This instrument should be such that it could be used either as a bill of exchange or as a bank cheque. The rules relating to the new international negotiable instrument should be optional, in the sense that the parties concerned could choose freely between the new instrument and the instruments now in use, which would continue to be regulated by the applicable municipal law.

(b) Certain statistical data, not all of which are available in existing publications, are essential before a view can be expressed on the extremely delicate and controversial problems which exist with respect to bills of exchange. These include, for example, the problem of forgery of the drawer's signature, the fictitious payee situation, and successive forged endorsements.

The problem usually referred to in very general terms as "forged endorsement" very often includes situations which could more accurately be placed in more specific categories, such as those mentioned above.

It should be noted that the question is not purely theoretical, since the practical solutions, provided especially by Anglo-American juridical practice, vary radically, according as the case involves the forging of the drawer's signature (cf. *Price v. Neal*), the fictitious payee situation, or an actual forged endorsement.

These difficulties should be most carefully borne in mind when undertaking, with a view to unification, an analysis of the various rules relating to bills of exchange, with particular reference to the Geneva Uniform Laws and the Anglo-American statutes. It will not be sufficient to consider the solutions indicated in the various articles of the laws (comparing them by what could be described as "parallel tables"); it will be essential to consider the substance of the real problem—in other words, to determine whether the articles considered *a priori* to be analogous do in fact regulate analogous cases.

Before expressing a general view concerning the difference or similarity of the various laws relating to bills of exchange, it will therefore be necessary to determine what kinds of forged signatures occur most often in practice on bills of exchange. This research work will be very arduous but very necessary.

The assertion that there are modest possibilities of unifying the laws of the civil-law countries and of the common-law countries relating to bills of exchange should in any case be qualified when considering specific cases (forgery of the drawer's signature, the fictitious payee situation), which are dealt with in a substantially similar manner in the judicial practice of the civil-law and common-law countries, despite a fairly marked contrast between the basic principles embodied in the legislation relating to forged endorsements.²

A limited comparison of the texts of the laws will be meaningless and may be completely misleading if no attempt is made to carry out what has been referred to as a "statistical study" of the various kinds of forgery of bills of exchange, as the basis for subsequent qualification of the various hypotheses in the light of the criteria established by judicial practice,

¹ These differences of interpretation are clearly indicated in the Uniform Law Cases published by UNIDROIT.

² On this problem see Bernini, *The Acceptance of the Bill of Exchange and the Theory of Negotiability in Civil Law and Common Law Countries*, Milan, 1961, pp. 61 et seq.

which may deviate, sometimes quite radically, from the general principles laid down in the texts themselves.

In this connexion, it is also very useful to stress the need for a study of the criteria established by judicial practice concerning the diligence to be exercised by the drawee in verifying that the instrument is properly drawn and in making payment. Differences in the evaluation of such diligence under the various systems may lead to the curious conclusion that, although the two systems apply different principles to bills of exchange, they actually resolve specific cases in the same way.

III. The observations made thus far suffice to indicate the only type of study which can serve as the basis for a serious effort to achieve wider unification of the laws relating to negotiable instruments.

Once the survey envisaged in section II A above has been completed, the strictly juridical analysis should be undertaken, with the following precautions:

(a) Special attention should be paid to commercial custom, banking practice and judicial precedents, an attempt being made to define the substance of "law action" in relation to the codified rules and the theoretical speculations of legal writers.

(b) It should be remembered that the law relating to bills of exchange does not lend itself to a study which ignores the law of contracts of which it is the expression. It follows that the specific solutions adopted in respect of bills of exchange must be evaluated as the expression of a given system of private law in force in the various countries.

(c) A comparison of the laws relating to bills of exchange in force in the civil-law and common-law systems respectively is particularly difficult, owing to the basic differences between the two systems. In considering common-law systems, constant and careful reference must be made to judicial practice.

Although these observations have been somewhat brief, they clearly lead to the conclusion already mentioned at the beginning of this report.

A study of the law of bills of exchange with a view to subsequent unification requires, as a first step, a good deal of organizational machinery for the collection and critical evaluation of essential information. The statistical research envisaged in section II will be equally arduous and will involve not only the examination of many judgements but also contacts with banking circles.

Consequently, in order to carry out a study which conforms to the aforementioned criteria, provision must be made for adequate funds, the formation of a work team and a working period of certainly not less than two years.

IV. *Opinion already expressed in UNIDROIT regarding the possibility of subsequent unification of the law relating to negotiable instruments. Desirability of proposing the creation of a new negotiable instrument for international transactions*

Subject to the considerations mentioned in the preceding paragraph with regard to the desirability of consulting the circles concerned before making a final choice, it would seem desirable to mention an opinion which was expressed in the course of the work carried out in UNIDROIT.

This work was done by a Sub-Commission appointed by the Governing Council at its thirty-third session (Nice, April 1953), on the proposal of Professor E. Yntema, whose specific task was to study means of expanding the international unification which already existed with regard to bills of exchange and cheques.

In taking this decision, the Governing Council was seeking to implement a wish expressed by the International Congress on Private Law, convened by the Institute at Rome in July 1950, after having taken note of an outstanding report by the late

Professor Ascarelli and of the fruitful discussions on that report.³

The second session of the Sub-Commission (Rome, 14-15 April 1955) was attended by Professor Hamel, Professor Yntema, Professor Ascarelli and Lord Chorley (members) and Professor Tito Ravà (representative of the Institute).

The Sub-Commission's conclusions were summarized as follows in a final report adopted at the end of the discussion:

"1. It is very difficult to draw up a uniform law which would be applied as municipal law in the common-law countries.

"2. It is very difficult, in international transactions, to persuade the common-law countries to accept the full text of the Geneva law.

"3. An effort must therefore be made to establish a body of rules aimed at solving the most urgent problems in the field of international negotiable instruments.

"4. These rules would be less numerous than those of the laws now in force. They would regulate a strictly international negotiable instrument which might serve at the same time as a bill of exchange and as a cheque, the regulation of promissory notes being set aside for the present.

"5. The rules thus established would be purely optional, the parties concerned being free to adopt the new international instrument or the instruments now in use, which would continue to be regulated by the applicable municipal law."

The foregoing conclusions, and in particular the way in which the Sub-Commission arrived at them, deserve more detailed comment.

The problem of international unification with respect to negotiable instruments was approached in a very realistic manner at the Sub-Commission's meetings.

Any hope of persuading the common-law countries to adopt the Geneva Uniform Law, even as an optional law applicable only to international instruments, was set aside. That was a foregone conclusion, in view of all the past experience in connexion with unification in that field.

In point of fact, the international unification in question raised not only a legal problem but also a very delicate political problem, both internationally and domestically, firstly, because every State is always somewhat reluctant to sign agreements which may limit the sphere of validity of its national laws, and, secondly, because the reaction of the circles concerned (banks, merchants, industrialists) exercises a very strong influence for or against movements towards international unification, especially in the case of a subject such as bills of exchange. It is a widely recognized fact that the Anglo-American circles concerned have never been particularly sympathetic towards the Geneva Uniform Law, for they consider it too detailed and complicated, as Professor Yntema and Lord Chorley observed during the debate in the Sub-Commission. On the other hand, the countries which have adopted the Geneva Uniform Laws cannot be expected to favour any amendment of them, which

³ Tullio Ascarelli, "L'unification de la loi uniforme de Genève sur la lettre de change et le billet à ordre et du système américain", in *Actes du Congrès international de droit privé, L'unification du droit*, vol. II, UNIDROIT, Rome, 1951.

The wish was expressed in the following terms: "The Congress, convinced of the desirability and feasibility of international unification of the rules relating to bills of exchange, especially in international transactions, expresses the wish that the International Institute for the Unification of Private Law should undertake, as soon as possible, in collaboration with other qualified organizations, preparatory studies concerning the unification of international bills of exchange and promissory notes and international bank cheques."

would inevitably have repercussions on banking and commercial practice.

Consequently, as all the members of the Sub-Commission observed, the problem of unification consists essentially of defining the limits of unification with regard to the content of the uniform law to be drawn up. As stated in the Sub-Commission's final report, this law should be simple and contain as few rules as possible.

The more specifically technical and juridical problem of the practical solutions to be adopted in each case does not seem to be insoluble. In that connexion, primarily for purposes of demonstration, the Sub-Commission examined four laws relating to negotiable instruments — the English Bills of Exchange Act, the United States Negotiable Instruments Act, the United States Uniform Commercial Code, and the Geneva Uniform Law. This examination, although somewhat superficial, showed that the really essential differences came down to two specific points: the regulation of protest, and forged endorsement.

In the case of protest, however, the opposite tendencies do not really seem irreconcilable; for, although under the English and American laws protest is generally not necessary for recourse, it is necessary in the case of foreign bills of exchange (cf., Bills of Exchange Act, sect. 51, and Negotiable Instruments Act, sect. 152). Since the instrument the creation of which is proposed would by definition be international, it may be hoped that this difference could easily be resolved.

The contrast between the common-law and civil-law systems is more marked in the case of the problem of forged endorsements. Both the Bills of Exchange Act (sect. 24) and the Negotiable Instruments Act (sect. 23) provide that a forged endorsement is inoperative, and that consequently no rights can be acquired through or under that endorsement. The Geneva Uniform Law, on the other hand, accepts the opposite principle (article 16).

However, section 60 of the Bills of Exchange Act, relating to cheques, provides for an exception to the general principle adopted in section 24 and adopts the same solution as the Geneva law.

Consequently, the members of the Sub-Commission proposed that the exception provided for in the aforementioned section 60 should be adopted as the general rule.

The results of the examination carried out by the Sub-Commission acquire special value when one considers the very nature of the laws examined, which exemplify the tendencies expressed in the principal legislations of the world relating to negotiable instruments. It may be recalled that the Bills of Exchange Act of 1882 has been adopted without major changes throughout the British Commonwealth; that the Negotiable Instruments Act of 1896 has been adopted not only in all the states of the American Union, but also in Colombia and Panama; that the Uniform Commercial Code has also been adopted in nearly all the states of the American Union; that the Uniform Commercial Code represents an extremely important effort by the American Law Institute to codify the whole body of commercial law in a uniform manner for all the states of the American Union; and that the Geneva Uniform Law, despite the amendments incorporated in it by the national legislators on the basis of authorized reservations, has undoubtedly made a powerful contribution to the unification of the law of negotiable instruments in the countries which follow the tradition of Roman law.

The Sub-Commission took pains to state very clearly in its final report that "this first formal examination showed that solutions satisfactory to all the interests involved could probably be found". In this connexion, attention should be drawn to a question mentioned in section II above: in the sphere of the law of negotiable instruments, differences relating to concepts and even methods have been created which have helped to

widen the gap between the systems by relegating to the background which should have constituted the real criterion in the matter, namely, the practical solution of the various problems, which in many cases is not so radically different.

The existence of such differences which may be termed prejudicial and which are quite other than and independent of those relating to the solution of specific problems, was clearly seen in the course of the Sub-Commission's work, and the members of the Sub-Commission quite rightly drew attention to it. In seeking to overcome the obstacles created by these differences, useful guidance might be derived from the decision taken at that time, namely, to look towards the creation of an international instrument which could be used both as a bill of exchange and as a cheque and the uniform regulation of which would be guaranteed by a series of simple rules acceptable both in the countries now governed by the Geneva laws and in those where the subject is regulated on the basis of the common law.

Clearly, the uniform interpretation and application by courts in the various countries of a series of rules of the kind outlined above would give rise to less serious difficulties than might be encountered in the case of a comprehensive and would-be systematic law — a law which, as such, it would be much more difficult to divorce from the juridical environment and traditions in which it originated.

There are, however, other aspects from which the solution proposed by the Sub-Commission seems to offer more certain guarantees of future success.

In the first place, the optional character of the uniform regulation which is envisaged, while permitting the parties concerned to continue applying their own municipal law with regard to the instruments already in use, would leave them a wide sphere of action even where the new international instrument was concerned, on points not covered by the uniform rules, which would merely regulate the really basic questions. It cannot be denied that this optional character, and the correlative fact that the proposed uniform law would in no way purport to be comprehensive and, indeed, would deliberately avoid being so, might help to alleviate the difficulties mentioned previously with regard to what may be termed the political problem inherent in any attempt at international unification.

Furthermore, the fact that the proposed international instrument could be used both as a bill of exchange and as a cheque would dispose of another question which confronted the Sub-Commission from the beginning of its work, namely, whether the best point of departure for unification would be the concept of the bill of exchange or concept of the cheque.

At the Sub-Commission's first meeting it was noted — and a consensus was reached on this point — that nowadays not all international commercial transactions are effected by means of bills of exchange. It was for that reason that Professor Ascarelli and Professor Hamel clearly expressed their conviction that the cheque should be the point of departure, even before the other members of the Sub-Commission had stated that they favoured the creation of an instrument which could be used both as a bill of exchange and as a cheque. Lord Chorley, too, observed that nowadays bills of exchange are used in only about half the cases (of international transactions).

It may also be useful to recall that, at the same session, Lord Chorley also drew the Sub-Commission's attention to the desirability of carrying out a study on documentary credits. This idea is mentioned here in case it should be decided to include it in whatever plan of work is drawn up.

In conclusion, it is felt that the course indicated by the Sub-Commission in question deserves to be followed today, with good prospects of success, as part of the efforts to unify international trade law now envisaged by the United Nations, which has inherited from the League of Nations the Conventions drawn up under the latter's auspices, providing Uniform Laws for bills of exchange and for cheques.

2. Analysis of replies and comments by governments and banking and trade institutions to the questionnaire on negotiable instruments used for making international payments: report of the Secretary-General*

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1-12
I. PRESENT METHODS AND PRACTICE FOR MAKING AND RECEIVING INTERNATIONAL PAYMENTS	13-38
A. Methods used for making international payments	16-17
B. The extent to which each method is used	18-23
C. Present trends in the use of payment methods	24-26
D. Influence of trade practices on choice of method	27-28
E. Influence of exchange control regulations on choice of method	29-30
F. Negotiable instruments drawn on, or made payable at, a bank	31-34
G. Guarantees of payment (including the <i>aval</i>)	35-37
H. Negotiable instruments drawn in sets	38
II. PROBLEMS ENCOUNTERED IN SETTLING INTERNATIONAL TRANSACTIONS BY MEANS OF NEGOTIABLE INSTRUMENTS	39-62
A. General	41-42
B. Form and content	43-44
C. Specific problems of rights and liabilities of the parties	45-49
D. "Consideration" or "Value", "Provision" and "Abstraction"	50
E. Forgery and alterations	51-52
F. Lost instruments	53-54
G. Protest and notice of dishonour	55-62
III. COMMENTS IN REPLIES CONCERNING THE SUBSTANCE OF POSSIBLE NEW UNIFORM RULES	63-67
IV. CONCLUSIONS	68-76
A. The question of continuation of work in respect of the law of negotiable instruments	68-72
B. Possible steps for further action	73-76

INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL), at its second session held in Geneva from 3-31 March 1969, considered certain problems in international payment transactions arising out of the existence of different systems of law on negotiable instruments.¹ The Commission concluded that a solution might lie in the creation of a new negotiable instrument to be used in international transactions only, and decided to make a further study of the possibility of creating such an instrument, based upon an inquiry aimed at securing the views and suggestions of Governments and banking and trade institutions.²

2. To that end the Commission requested the Secretary-General:

"(a) To draw up a questionnaire in consultation with the International Monetary Fund, UNIDROIT, the International Chamber of Commerce and, as appropriate, with other international organizations con-

cerned, taking into consideration the views expressed in the Commission;

"(b) To address such a questionnaire to Governments and/or banking and trade institutions as appropriate;

"(c) To make the replies to the questionnaire available to the Commission at its third session, together with an analysis thereof, prepared by the Secretary-General in consultation with the organizations mentioned in sub-paragraph (a) above."³

3. In compliance with this request, the Secretariat convened two meetings at UNESCO in Paris at which it consulted international organizations having a special interest in the matter. The first meeting was held from 30 June-4 July 1969 and devoted to preparing a questionnaire. The second meeting was held from 19-23 January 1970 and devoted to the consideration of the replies received from Governments and banking and trade institutions and to assistance in the preparation of an analysis thereof.⁴

¹ *Ibid.*, para. 87.

² The following took part in the meetings:

Mr. Robert Effros (Counsellor for Legislation, International Monetary Fund);

¹ A summary of the Commission's discussions is set out in paragraphs 64-81 of the report on the work of its second session.

² *Ibid.*, para. 79, and paras. 86 and 87.

* A/CN.9/38.

The questionnaire

4. One part of the questionnaire was designed to obtain factual information on present methods and practices from banking and other institutions with respect to international payments. A second part of the questionnaire was designed to identify the nature and cause of any problems encountered in settling international transactions by means of negotiable instruments.

5. In addition, an annex to the questionnaire contained a number of questions directed to the main points of difference between the Common Law and Civil Law systems; these questions were designed to secure information that might be useful in harmonizing those differences or in choosing between divergent rules in the event that the Commission should decide to propose measures to deal with the problems encountered in this area.

6. The Commission, at its second session, discussed the feasibility of measures to harmonize the basic differences among the prevailing rules governing negotiable instruments, such as the Geneva Conventions and the rules of the various common law systems. The Commission concluded that an attempt to unify or harmonize the rules applicable to both domestic and international transactions would face serious difficulties, and decided to study further the possibility of creating a new negotiable instrument to be used in international transactions only. The phrase "new negotiable instrument", in the context of the Commission's deliberations, reflected the decision to concentrate on the rules applicable to instruments used in international transactions, and also to envisage the possibility that those rules might be made applicable on an optional basis. For these reasons, this report will describe the current proposals as relating to the possibility of unified rules for instruments used for international payments and the further possibility that such rules may be made applicable only if the parties so choose.

7. The text of the questionnaire and its annex is as follows:

Mr. Roland Tenconi (Adviser, Central Banking Service, International Monetary Fund);

Professor Jorge Aja Espil (Rapporteur on Negotiable Instruments of the Inter-American Juridical Committee, representing the Organization of American States);

Professor Michel Vasseur (Professor at the Faculty of Law of the University of Paris, representing UNIDROIT);

Mr. Henri Guisan (Legal Adviser, Bank for International Settlements);

Mr. B. S. Wheble (Chairman, Commission on Banking Technique and Practice of the International Chamber of Commerce);

Mr. Frederic Eisemann (Legal Adviser, International Chamber of Commerce);

Professor Schinnerer (Professor at the Economic University of Vienna, Rapporteur of the Special Working Party on Negotiable Instruments of the International Chamber of Commerce);

Mr. John I. Clarke (Special Legal Adviser, Federal Reserve Bank of New York, acting as consultant);

Mr. J. Milnes Holden (Legal Adviser, Inter-Bank Research Organization (United Kingdom), acting as consultant).

The Secretariat acknowledges gratefully the co-operation and assistance received from the above organizations and experts.

QUESTIONNAIRE

A. Present methods and practice for making and receiving international payments

1. What methods are currently used for making international payments, for example:
 - (a) Negotiable instruments, such as cheques, bills of exchange (whether or not drawn under a documentary credit), promissory notes and similar instruments?
 - (b) Other methods of making international payments, such as payments made under a documentary credit (where no bill of exchange is employed), and inter-bank and intra-bank transfers (e.g. international payment orders, telegraphic transfers and *giro*)?
2. To what extent is each method used?
3. To what extent, if at all, has any one method tended to be replaced by another in the past decade?
4. To what extent, and in what manner, have established trade practices influenced the use of a particular method?
5. To what extent are the instruments referred to in 1(a) above:
 - (a) Drawn on a bank or a non-bank drawee?
 - (b) Made payable at a bank when drawn on a non-bank drawee?
6. To what extent do exchange control regulations influence the choice of method?
7. To what extent is use made of *aval* or other guarantee, and what form does such *aval* or guarantee take, e.g. by writing on the negotiable instrument or on a separate document?
8. To what extent are negotiable instruments used in international transactions drawn in sets?

B. Problems encountered in settling international transactions by means of negotiable instruments

1. In the use of negotiable instruments, what types of problems have arisen which are predominantly of a practical nature? (Please illustrate with concrete examples).
2. In the use of negotiable instruments, what types of problems have arisen which are predominantly of a legal nature? (Please illustrate with concrete examples). In particular, have there been problems, arising from differences between legal systems, in respect of the following:
 - (a) The forms and contents of instruments?
 - (b) The rights and liabilities of parties to an instrument?
 - (c) "Consideration" or "value", "provision", and "abstraction"?
 - (d) Forged signatures and endorsements?
 - (e) Lost instruments?
 - (f) The forms of protest, and the giving of notice of dishonour?
 - (g) The liabilities of agents and purported agents signing the instrument?
3. In what manner have the problems referred to in 1 and 2 above been mitigated or resolved in practice?

ANNEX TO THE QUESTIONNAIRE

A. Form and contents

1. Should the rules relating to a new negotiable instrument specify requirements as to its form and, if so, what should be the essential requirements?

2. Should the rules permit the instrument to stipulate that:
 - (a) The principal amount will bear interest?
 - (b) The principal amount may be payable in instalments?
 - (c) The holder may demand payment in a specified currency which is not that of the place of payment?
3. Should the rules specify the form of "signature", e.g. written, facsimile, perforated, by symbols, or otherwise?

B. *Rights and liabilities of parties*

1. Should the rules specify the circumstances under which the holder of an instrument may acquire it free from:
 - (a) Claims by prior parties or holders, and
 - (b) Defences which would have been available to the defendant if the defendant had been sued by a prior party?
 If so, what should be these circumstances?
2. Should the rules specify permissible types of endorsement and, if so, what types?
3. Should the rules provide that the holder be obliged to accept partial acceptance?
4. Should the rules provide that the holder be obliged to accept partial payment?
5. Should the rules provide that the drawer shall have a right to restrict his liability to the holder?

C. *Presentment and dishonour*

1. Should the rules permit alternatives as to the place of presentment?
2. Should the rules permit that the instrument be payable only by, at, or through a bank?
3. Should the rules provide that protest on dishonour be essential, or that a less formal kind of evidence is sufficient?
4. If protest is considered essential:
 - (a) For what reason is it considered essential?
 - (b) Could present practice be simplified?
5. In respect of notice of dishonour, what should the rules provide with reference to:
 - (a) Its form?
 - (b) The persons by and to whom it should be given?
 - (c) The effects of failure to give notice within a specified time-limit?
6. In what circumstances should delay in presentment, protest, or giving notice of dishonour be:
 - (a) Excused by the rules?
 - (b) Dispensed with altogether by the rules?

D. *Other matters*

1. Should the rules permit the debtor to make payment into court (or to another competent authority) in the event of an instrument not being presented for payment at maturity?
2. Should the rules contain a provision regarding damages to be recovered by the holder and by prior parties liable to the holder in the event of the instrument being dishonoured by non-acceptance and/or non-payment?
3. What period of limitation regarding the taking of legal action should the rules prescribe:
 - (a) Against the acceptor?
 - (b) Against the drawer and/or endorser(s)?
 - (c) By one endorser against a prior endorser?

8. The questionnaire was addressed to the States Members of the United Nations and of its specialized agencies, and to the Central Banks and Bank Associations in those countries. In addition, the International Chamber of Commerce addressed the questionnaire to its National Committees.

9. As of 5 February 1970, replies had been received from the following:⁵

1. Argentina (Q/A)	Government (Ministry of Justice)
2. Australia (Q/A)	Australian Bankers' Association
3. Austria (A)	Government (Federal Ministry of Justice)
4. Austria (Q/A)	Austrian National Bank
5. Austria (Q/A)	Association of Austrian Banks and Bankers
6. Austria (Q/A)	Oesterreichische Landesbank
7. Barbados (Q/A)	Government
8. Barbados (Q/A)	East Caribbean Currency Authority
9. Belgium (Q/A)	Government
10. Belgium (Q/A)	National Bank of Belgium
11. Cambodia (Q/A)	Government
12. China (Q/A)	Central Bank of China
13. Cyprus (Q/A)	Central Bank of Cyprus
14. Czechoslovakia (Q/A)	Government
15. Czechoslovakia (Q/A)	Czechoslovak National Bank
16. Denmark (Q/A)	Federation of Danish Banks
17. Dominican Republic (Q/A)	Central Bank of the Dominican Republic
18. Ecuador	Central Bank of Ecuador
19. El Salvador (Q)	Central Reserve Bank of El Salvador
20. Ethiopia (Q/A)	Commercial Bank of Ethiopia
21. Federal Republic of Germany (Q/A)	Government (Ministry of Justice)
22. Federal Republic of Germany (Q/A)	German Federal Bank
23. Federal Republic of Germany (Q/A)	German National Committee of the I.C.C.
24. Federal Republic of Germany (Q)	Federal Association of German Banks
25. Finland (Q/A)	Finnish Bankers' Association
26. France (Q/A)	Bankers' Association
27. France (Q/A)	Banque de France
28. Greece (Q/A)	Bank of Greece
29. Greece (Q/A)	Greek National Committee of the I.C.C.
30. Guatemala (Q)	Bank of Guatemala
31. Hungary (Q/A)	National Bank of Hungary
32. Iceland (Q/A)	Central Bank of Iceland
33. India (Q/A)	Foreign Exchange Dealers' Association
34. Iraq (Q/A)	Government (transmitting reply of the State Organization for Banks)

⁵ The letters "Q", "A" or "Q/A" following the name of a country indicate that the reply covers the Questionnaire, the Annex, or the Questionnaire and the Annex. The absence of any of these letters indicates that the reply was of a general nature only.

35. Iraq (Q)	Central Bank of Iraq	72. United Kingdom (Q/A)	Association of British Chambers of Commerce
36. Ireland (Q/A)	Central Bank of Ireland	73. United Kingdom (Q/A)	British Bankers' Association ⁷
37. Italy (Q/A)	Italian National Committee of the I.C.C.	74. Venezuela (Q/A)	Government (transmitting reply of the Central Bank of Venezuela)
38. Japan (Q/A)	Federation of Bankers' Associations of Japan	75. Bank for International Settlements (Basel, Switzerland) (Q/A)	
39. Jordan (Q/A)	Central Bank of Jordan	76. Inter-American Development Bank (Q/A)	
40. Republic of Korea (Q/A)	Government	77. International Bank for Economic Co-operation (Moscow, USSR) (Q)	
41. Republic of Korea (Q/A)	Bank of Korea	78. International Bank for Reconstruction and Development (Washington, D.C., United States) (Q)	
42. Kuwait (Q/A)	Government (transmitting reply of the Central Bank of Kuwait)		
43. Malawi (Q/A)	Government		
44. Malawi (Q/A)	Reserve Bank of Malawi		
45. Malaysia (Q/A)	Government		
46. Malta (Q)	Central Bank of Malta		
47. Mauritius (Q)	Bank of Mauritius		
48. Mexico (Q/A)	Government		
49. Mexico (Q/A)	Bank of Mexico		
50. Morocco (Q/A)	Government (Ministry of Finance)		
51. Netherlands	Netherlands National Committee of the I.C.C.		
52. Norway (Q)	Government (Ministry of Justice)		
53. Philippines (Q)	Central Bank of the Philippines		
54. Poland (Q/A)	Government		
55. Portugal (Q)	Portuguese National Committee of the I.C.C.		
56. Sierra Leone (Q/A)	Bank of Sierra Leone		
57. Singapore (Q/A)	Government (transmitting reply of the Development Bank of Singapore)		
58. Singapore (Q/A)	Association of Banks in Malaysia-Singapore		
59. Somalia (Q)	Somali National Bank		
60. South Africa (Q/A)	South African Reserve Bank		
61. Sweden	Government ⁶		
62. Sweden (Q/A)	Swedish Bankers' Association ⁶		
63. Sweden (Q/A)	Post Office Bank		
64. Sweden (Q/A)	General Export Association of Sweden; Federation of Swedish Wholesale Merchants and Importers (joint reply)		
65. Switzerland	Swiss National Committee of the I.C.C.		
66. Thailand (Q/A)	Bank of Thailand		
67. Trinidad and Tobago (Q/A)	Central Bank of Trinidad and Tobago		
68. United States	Government		
69. United States (Q/A)	Federal Reserve System		
70. Union of Soviet Socialist Republics (Q/A)	Government		
71. United Kingdom (Q/A)	Accepting Houses Committee		

⁶ The Swedish Government states that the competent authorities fully concur in the replies given by the Swedish Bankers' Association, the Post Office Bank, the General Export Association of Sweden, and the Federation of Swedish Wholesale Merchants and Importers.

10. The analysis set out hereafter follows closely the layout of the questionnaire and its annex. Part I (covering questions 1 to 7 of part A of the questionnaire) deals with present methods and practice for making and receiving international payments. Part II (covering questions 1 to 3 of part B of the questionnaire) reports on the problems encountered in settling international transactions by means of negotiable instruments. Part III relates to the views expressed on what uniform rules should govern a negotiable instrument used in international transactions. Part IV sets out tentative conclusions and suggestions which the Commission may wish to consider in deciding upon its further course of action.

11. It was not deemed advisable, at this stage, to reproduce and translate the replies received to the questionnaire as documents of the Commission. As of 5 February 1970, the volume of replies amounted to 550 pages; it did not appear feasible, at this stage, to reproduce all these documents.⁸ Photostats of the replies will, however, be available at the third session for consultation by members of the Commission.

12. The following abbreviations are used in the report:

- BEA: Bills of Exchange Act, 1882 (United Kingdom)
- UCC: Uniform Commercial Code (United States)
- ULB: Geneva Uniform Law on Bills of Exchange and Promissory Notes
- ULC: Geneva Uniform Law on Cheques.

I. PRESENT METHODS AND PRACTICE FOR MAKING AND RECEIVING INTERNATIONAL PAYMENTS

13. In deciding to study further the possibility of establishing uniform rules for negotiable instruments used for international payments, the Commission recognized the need to seek information on present practices for making and receiving international payments. Consistent with that objective, part A of the Questionnaire sets

⁷ The reply of the British Bankers' Association also incorporates the views of the Committee of Scottish Bank General Managers.

⁸ A compilation of the replies to part A of the questionnaire and to the questions set out in the annex was prepared by the Secretariat as a working paper for the meetings held in Paris from 19-23 January 1970 (referred to in para. 3 above). Copies of that working paper (in English only) were available for examination in conjunction with the original text of the replies.

out a number of questions designed to obtain such information.

14. It was felt that the Commission would wish to ascertain what types of negotiable instruments, as compared with other methods of payment, are at present used in settling international transactions, the extent of their use, what trends are discernible in this respect, and to what extent outside factors, such as trade practices and control exchange regulations, bear upon the use of a particular method of payment. Questions 1, 2, 3, 4 and 6 were designed to elicit factual information on these points. In addition, questions 5, 7 and 8 seek to determine certain other aspects of banking and payment practices.

15. The replies to each of these questions are analysed below under separate headings.

A. *Methods used for making international payments*

16. Question 1 asked: "What methods are currently used for making international payments", and directed the inquiry to the following examples:

(a) *Negotiable instruments*, such as cheques, bills of exchange (whether or not drawn under a documentary credit), promissory notes and similar instruments;

(b) *Other methods*, such as payments where no bill of exchange is employed, with special reference to inter-bank and intra-bank transfers (e.g. international payment orders, telegraphic transfers and *giro*).

17. The replies reveal the use of a wide range of payment methods. Both negotiable instruments and inter-bank transfers are universally used. The replies also show the virtually universal use of payments made under documentary credits. The replies give less attention to intra-bank transfers (as contrasted to inter-bank transfers). Some replies specifically note the absence of the use of *giro* for the making of international payments,⁹ while this method is stressed by others.¹⁰ Travellers cheques and travellers letters of credit receive special mention in some replies.¹¹

B. *The extent to which each method is used*

18. In some major trading and financial countries, inter-bank transfers predominate; these may include wire transfers, mail transfers and payment orders.¹² A great many replies emphasize the importance of payments made through bills of exchange and cheques.¹³

No clear pattern appears; cheques are said to be used extensively in some countries for international payments,¹⁴ but are seldom or rarely used in others.¹⁵ Again, while bills of exchange appear to be the primary means of effecting international payments in some countries,¹⁶ their use is limited in the practice of others.¹⁷ Promissory notes seem not to be used extensively in the practice of various respondents,¹⁸ but widely in that of others.¹⁹

19. *Giro* is not used at all for making international payments in respect of some countries,²⁰ but is becoming significant in the practice of others.²¹

20. Some replies emphasize the relative significance of documentary credits among the various payment methods;²² other replies indicate that a small proportion only of international payments is made by such means,²³ or are mainly used in transactions with certain groups of countries.²⁴

21. Some replies note that payments for imports and exports of goods are characterized by documentary credits and bills of exchange, whereas other types of payments are characterized by bank transfers or cheques.²⁵

22. A further factor affecting the payment pattern is the extension of credit in the underlying transaction; in this event, bills of exchange and promissory notes are said to prevail.²⁶

23. Some replies note that payment methods vary among different regions. The reply by Czechoslovakia notes that payments involved in trade with the United Kingdom, the Commonwealth countries and the United States are effected almost exclusively by bills of exchange in the context of documentary collections or credits. The reply of the Central Bank of Iceland mentions the use of promissory notes with special reference to trade with the United States. Replies from Central American sources stress the importance of cheques in payments between the countries participating in the Central American Clearing House. The reply of the Union of Soviet Socialist Republics distinguishes between foreign trade payments involving other socialist countries, and payments involving capitalist or developing countries. Payments involving other socialist countries are effected primarily by the collection (*inkasso*) method with post-acceptance, although there is also use

⁹ E.g., 8, 32 and 60. The numbers in this and other footnotes refer to the respondents listed in paragraph 9, above.

¹⁰ E.g., 51, 53 and 63.

¹¹ E.g., 58, 69 and 73.

¹² E.g., 4, 6, 21, 22, 25, 48, 60, 69 and 71. By way of example, the United States Federal Reserve System estimates that about 90 per cent of the dollar volume of payments arising from international transactions and originating or terminating in that country are effected by means of inter-bank and intra-bank transfers. In the Federal Republic of Germany and Finland 75 per cent of the volume of international payments are made through payment orders, and in South Africa approximately 80 per cent.

It should be noted that a certain percentage of bank transfers represent final settlements incident to other payment mechanisms.

¹³ E.g., 2, 7, 8, 19, 20, 27, 30, 31, 34, 36, 37, 38, 47, 53, 57, 66 and 67.

¹⁴ E.g., 19, 22, 23 and 69.

¹⁵ E.g., 2, 13, 20, 31, 57 and 70.

¹⁶ See foot-note 9.

¹⁷ E.g., 23, 25 and 41.

¹⁸ E.g., 25, 34, 40, 56, 57 and 69.

¹⁹ E.g., 70 and 73.

²⁰ E.g., 7, 32 and 60.

²¹ E.g., 51 and 63.

²² E.g., 2, 8, 11, 17, 35 and 39.

²³ E.g., 23, 25, 27, 40 and 57.

²⁴ E.g., 16 (in Far East trade and trade with developing countries), 27 (in transactions with countries of Eastern Europe and with those of the Third World).

²⁵ E.g., 1, 11, 13, 17, 30, 33 and 35.

²⁶ E.g., 30 (promissory notes); 31, 37 and 51 (bills of exchange); 54 (bills of exchange and promissory notes).

of the collection method with pre-acceptance, and also letters of credit and bank transfers. In transactions outside the socialist area, the most commonly used method is the letter of credit, with lesser use of the collection (*inkasso*) and transfer methods. Although cheques are less frequently used for payments for Soviet exports, bills of exchange and promissory notes are said to be widely used where credit is granted.

C. *Present trends in the use of payment methods*

24. The replies of a number of countries,²⁷ indicate a trend towards increasing use of the cable or telegraphic transfer. Where the transfer methods are feasible, they are widely preferred because of speed and safety and because, as one respondent observes, payors hold on to their funds as long as possible under present tight money market conditions.²⁸ In the United States, for example, it is estimated that 90 per cent of the dollar amount of international payments originating or terminating in that country are made by this means.

25. An almost equal number of respondents indicate a trend toward the increasing use of bills of exchange not involving documentary credits.²⁹ There remains, however, a substantial number of replies that indicate no general trend or tendency. In some, the choice of a particular method or methods can be traced to certain local conditions, such as conditions that in some instances favour the use of cheques³⁰ and in others have the opposite effect.³¹ There have been no discernible trends towards or away from the use of promissory notes.³²

26. The reply of one respondent suggests that the trend toward cable or telegraph transfers will intensify and spread in international trade transactions as technological changes in wider parts of the world make it possible to use these modern methods.³³ There is, however, no indication that cable or telegraphic transfers will be widely used in all parts of the world in the immediate future or that in any part of the world such transfers will supplant the use of the more traditional payment devices.

D. *Influence of trade practices on choice of method*

27. With a view to ascertaining the commercial patterns that are relevant to banking practice and that need to be considered in formulating new rules, one question inquired concerning the extent to which established trade practices have influenced the use of a particular payment method.

28. Many of the replies state that trade practices exercise no, or no appreciable, influence upon the method of payment used. Others attribute a choice of method to the existence of other factors, such as banking

practices,³⁴ the bargain of the parties³⁵ and their financial situation,³⁶ regional influences (the existence of a clearing house),³⁷ exchange controls,³⁸ technological changes,³⁹ and the like. Where commercial or trade practices might have exercised a decisive influence in normal situations,⁴⁰ this influence is found by at least one respondent to be offset or suppressed by rules of national policy in one or both of the countries concerned in a bilateral transaction.⁴¹

E. *Influence of exchange control regulations on choice of method*

29. While a number of replies indicate that exchange control regulations have no, or no appreciable, influence on the choice of method of payment,⁴² the greater number find that they do have an influence. The replies show that regulatory measures vary widely; their effect upon the choice of method of payment and even the form of the instrument is, consequently, equally varied. A free choice among methods of payment is not possible in many parts of the world, with various consequences: e.g., the use of cheques has been inhibited.⁴³ Other replies note reliance on banks as conduits of payment.⁴⁴

30. Some replies refer to specific provisions of exchange control regulations: restrictions on payment for imports in advance of receipt of the goods,⁴⁵ restrictions on the time for payment for certain imports,⁴⁶ and requirements of antecedent authorization for the acceptance or payment of a bill.⁴⁷

F. *Negotiable instruments drawn on, or made payable at, a bank*

31. In order to ascertain the role of banks and similar institutions in the use of negotiable instruments, information was sought on the extent to which these instruments are

- (a) Drawn on a bank or a non-bank drawee, and
- (b) Made payable at a bank when drawn on a non-bank drawee.

(a) *Drawn on a bank*

32. Under Anglo-American usage, the term "cheques" refers to bills of exchange (or drafts) that are drawn on a bank and payable on demand. Under the Geneva system cheques are distinguished from bills of exchange. The difference in usage makes it difficult to interpret some of the replies. In any event, the replies

²⁷ E.g., 4, 21, 22, 35, 36, 38, 48, 49, 53, 63, 64, 70, 71, 74, 75 and 76.

²⁸ See 49.

²⁹ E.g., 2, 15, 20, 29, 33, 43, 48, 49, 53 and 70.

³⁰ E.g., 4, 6, 19, 30 and 36.

³¹ E.g., 31, 35, 43, 44, 64 and 76.

³² E.g., 11, 29, 32 and 62.

³³ See 69.

³⁴ E.g., 7, 15, 36, 39 and 60.

³⁵ E.g., 8, 13 and 74.

³⁶ E.g., 14.

³⁷ E.g., 19 and 30.

³⁸ E.g., 14, 35, 53, 58 and 63.

³⁹ E.g., 75.

⁴⁰ E.g., 1, 11, 20, 26, 27 and 43.

⁴¹ See 26.

⁴² E.g., 10, 12, 15, 20, 26, 27, 30, 31, 36, 37, 40, 42, 43, 44, 47, 50, 54, 56, 58, 70, 76 and 78.

⁴³ E.g., 4, 5, 6, 34, 35 and 60. But cf. 19.

⁴⁴ E.g., 32, 35, 45, 48, 62, and 78.

⁴⁵ E.g., 13, 25, 39 and 59.

⁴⁶ E.g., 13 and 28.

⁴⁷ E.g., 11.

show that large numbers of bills of exchange are drawn on non-banks, such as the buyers of goods. For instance, an estimated 99 per cent of all bills of exchange in the Federal Republic of Germany are drawn on non-bank drawees.⁴⁸

33. The replies concur in bringing out the fact that in most cases, if not regularly, bills of exchange are drawn on a bank when issued under a documentary credit, or in connexion with commercial letters of credit, or when a bank intervenes directly in the financing of a transaction.⁴⁹

(b) *Payable at a bank*

34. The prevailing practice appears to be that bills of exchange are usually payable ("domiciled") at a bank,⁵⁰ although a number of replies are to the contrary.⁵¹ No reasons are stated for this difference in practice.

G. *Guarantees of payment (including the aval)*

35. In this area, different terms are used for similar undertakings. Under the Geneva Uniform Laws (ULB, articles 30-31; ULC, articles 25-26), an *aval* is a guarantee of payment executed by a signature and words such as "good as *aval*" (*bon pour aval*), either in the instrument or on an "allonge". Other guarantees may be given by a separate instrument. As some replies note, in practice, an endorsement of a bill by the guarantor produces the same effect as an *aval*.⁵²

36. There is strong evidence in the replies that the guaranteeing of bills of exchange or promissory notes by an *aval* or by a separate document is a practice that is not frequently resorted to in international transactions.⁵³ There are, however, a few notable exceptions. Thus, several replies state that guarantee or *aval* is customarily used in connexion with medium-term or long-term transactions,⁵⁴ or in transactions with certain groups of countries.⁵⁵ In at least one country the obligations of importers under bills of exchange drawn on them are secured by the local bank or by foreign banks acting for it.⁵⁶

37. Little or no mention is made of the practice of guaranteeing promissory notes.⁵⁷

H. *Negotiable instruments drawn in sets*

38. Several replies indicate the existence of a fairly constant practice to draw bills of exchange in sets, either

by tradition or in order that a second copy may be issued in the event of the first's going astray; however, the greater number report that this practice tends to diminish or has become rare. On the other hand, it seems that a substantial proportion of documentary credits call for the presentation of documents in sets.

II. PROBLEMS ENCOUNTERED IN SETTLING INTERNATIONAL TRANSACTIONS BY MEANS OF NEGOTIABLE INSTRUMENTS

39. The second part of the questionnaire was designed to identify the various types of problems that arise in the use of negotiable instruments in international transactions. The first question inquired about problems that are predominantly of a practical nature; the second question asked about problems that are primarily of a legal nature. On analysing the replies, it does not seem helpful, for present purposes, to emphasize this distinction between "practical" and "legal" problems; instead, emphasis will be placed on reported problems that stem from the divergencies between the rules of the Geneva and Anglo-American systems. Similarly, it does not seem helpful, for present purposes, to emphasize those problems or difficulties which do not arise from the nature of negotiable instruments or the rules applicable thereto. Examples of this character include: problems relating to the physical work required in the handling of an ever-increasing volume of paper; the introduction of computers; the lack of uniformity in the format or languages; and errors in drawing instruments where there is no indication that these errors resulted from lack of uniformity in the law.

40. This part of the report contains, by way of comment, explanatory notes on the relevant provisions of the Geneva Uniform Laws and of the Anglo-American law. It is realized that a comparison between the two systems does not necessarily expose the full range of divergencies in the law. Many of the countries that have adhered to the Geneva Conventions have done so with important reservations. Other countries that have used the Geneva texts as models have made important modifications. There are, in addition, important differences among the laws of countries with common law tradition. These major systems, however, have served as the cores around which countries have structured their negotiable instruments law and therefore constitute significant reference points.

A. *General*

41. A number of replies state that the use of negotiable instruments in international transactions has not given rise to any significant problems or difficulties or that, where problems do arise, they occur only in exceptional cases.⁵⁸ Some of these replies explain the absence or rareness of problems by the following:

(a) The existing laws operate satisfactorily and the divergencies between the civil law and common law systems are mainly of academic importance and, at any

⁴⁸ See 22. On the other hand, it is estimated that 75 per cent of all bills of exchange originating abroad and payable in the Member States are drawn on banks (cf. 69). It is, however, not clear whether this percentage also includes "cheques" in the sense of the Geneva Uniform Law.

⁴⁹ E.g., 13, 16, 20, 26, 50, 57, 71 and 73.

⁵⁰ E.g., 2, 7, 8, 11, 12, 22, 26, 29, 30, 32, 35, 36, 39, 43, 44, 50, 53, 57, 60, 62, 64, 66, 70, 71 and 72.

⁵¹ E.g., 10, 13, 19, 20, 32, 40, 41, 54 and 56.

⁵² E.g., 16, 22, 37, 45 and 57.

⁵³ E.g., 2, 4, 5, 7, 8, 12, 14, 20, 22, 23, 26, 43, 44, 45, 47, 53, 59, 60, 67 and 69.

⁵⁴ E.g., 48, 49, 57, 58 and 62.

⁵⁵ E.g., 5 and 71.

⁵⁶ See 70.

⁵⁷ E.g., 40, 41 and 71.

⁵⁸ E.g., 8, 12, 13, 32, 35, 42, 43, 44, 45, 47, 48, 49, 50, 56, 57, 58, 59, 60, 66, 67, 74, 76.

event, are not a serious impediment to international payments by means of negotiable instruments;

(b) The problems and difficulties that are from time to time encountered are removed or minimized by the Uniform Rules for the Collection of Commercial Paper and the Uniform Customs and Practice for Documentary Credits, drawn up by the International Chamber of Commerce, and by procedures that the banking institutions have developed for the solving of problems on an *ad hoc* basis;

(c) The majority of foreign trade transactions takes place with countries whose laws are based on the same principles as those in the country of the respondent;

(d) In the majority of foreign trade transactions bills of exchange are not negotiated or transferred, the only parties involved being the drawer (exporter) and the drawee or acceptor (importer).

42. The majority of replies, however, report that problems are encountered in the use of negotiable instruments in international transactions. These problems are set out below under separate headings.

B. Form and content

43. A large number of replies draw attention to problems that can be traced to divergencies in the rules in respect of the form and content of negotiable instruments. Although the Geneva Uniform Laws and the Anglo-American law unite on several requirements as to the form and content of instruments, there are significant differences.⁶⁰ Some of the replies merely state that problems of this general character occur,⁶¹ while others point to difficulties that have arisen where instruments are drawn in accordance with the provisions of the law of the issuing country but where their form and content do not conform to the provisions of the law of the country of payment.⁶²

44. More specifically, problems are said to have arisen in the following contexts;

(a) *The effect of statements in the instrument, such as references to an underlying contract.*⁶³

(b) *The effect of "not negotiable" written on the instrument.*⁶³

⁶⁰ The common grounds shared by the Geneva Uniform Laws and the Anglo-American law are the requirements that the instrument contain (i) the drawer's or maker's signature, (ii) an unconditional promise or order; (iii) payment of a determinable sum of money, and (iv) payment to be made on demand or at a fixed or determinable future time.

There are, however, significant differences between the two systems. First, the Geneva Uniform Laws require that the name of the type of instrument appear on the instrument to establish its negotiability (ULB, article 1 (1)). Second, the Geneva Uniform Laws require that the date and place of issue and the place of payment be set out in the instrument (ULB, article 1 (5) and (7)). Third, the Geneva Uniform Laws require that the name of the payee appear on the face of the instrument (ULB, article 1 (6)).

⁶¹ E.g., 1, 5, 28, 30, 31, 37, 51, 53, 64.

⁶² E.g., 2, 6, 11, 14, 15, 26, 37, 71, 73.

⁶³ E.g., 20.

⁶⁴ E.g., 26.

(c) *Deviations from the traditional handwritten signature in drawing, accepting or endorsing an instrument.*⁶⁴

(d) *Bills of exchange payable by instalments.*⁶⁵ One respondent comments that the rule (under the Geneva system) against instruments payable in instalments often runs counter to practical requirements, particularly in cases where the contract provides for payment in instalments after delivery.⁶⁶

(e) *Failure to insert the term "bill of exchange" in the body of the instrument.* On this point there is an important difference between the rules of the two principal systems.⁶⁷ Some replies note that the absence of the term "bill of exchange" on the instrument often necessitates a confirmation by the drawer that the instrument represents a bill of exchange according to the law of the country of payment.⁶⁸ It is also noted that divergent formal requirements often make it difficult to determine whether an instrument is a bill or a cheque.⁶⁹ One respondent comments that difficulties in this respect are said to arise where banking institutions of countries belonging to the Geneva system do not accept terms like "First of exchange" or "Sole of exchange", appearing on a bill, as substitutes for the term "Bill of exchange".⁷⁰

(f) *Stipulation of interest.* The Geneva rules set forth restrictions on provision for interest that are not found in Anglo-American law. The replies note that these differences have produced difficulties;⁷¹ they include the suggestion that there should be a uniform rule under which bills of exchange could cover interest as well as principal. One respondent observes that, in foreign trade transactions, the restrictions imposed by the law in regard to interest often make it difficult to draw bills

⁶⁴ *Ibid.* The Geneva Uniform Laws merely speak of "signature" without defining the term. Under Section 2 BEA "'written' includes printed, and 'writing' includes print". Under section 1-201 (39 and 46) UCC "'signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing". UCC section 3-401 (2) states that "a signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature".

⁶⁵ E.g., 14, 15, 26, 38 and 70. Bills and notes payable in instalments are deemed null and void under the Geneva system (art. 33 ULB). Anglo-American law, however, specifically allows for bills required to be paid by stated instalments. (Section 9 (1) BEA; section 3-106 (1) UCC.)

⁶⁶ See 70.

⁶⁷ The Geneva Uniform Laws require that the term "bill of exchange" ("cheque") be inserted in the body of the instrument (art. 1 ULB and ULC), whereas no such requirement is found in Anglo-American law.

⁶⁸ E.g., 14, 15, 21, 22.

⁶⁹ E.g., 31. See the discussion of differences in terminology in paragraph 32 above.

⁷⁰ E.g., 6, 31 and 62.

⁷¹ The Geneva uniform laws contain strict rules on interest. Article 5 ULB allows a stipulation for interest in the case of bills payable at sight or at a fixed period after sight, but such a stipulation is deemed not to be written in the case of any other bill of exchange (i.e. bills payable on or after a fixed period after date). Article 7 ULC does not allow any stipulation in the case of cheques. On the other hand, Anglo-American law (section 9 (1) BEA and section 3-106 (1) (a) UCC) permits the stipulation of interest on any draft or note.

of exchange on purchasers for the price of the goods. For example, it is noted that in cases where the contract provides that the interest and the principal must be separately stated, the interest cannot be included in the total amount of the bill.⁷²

C. Specific problems of rights and liabilities of the parties

45. The more specific problems or difficulties referred to in the replies may conveniently be summarized under the following sub-headings:

- (a) Claims and defences of parties;
 - (b) Stipulation of non-liability;
 - (c) Conditional acceptance and conditional endorsement;
 - (d) Liability of third persons signing.
- (a) *Claims and defences of parties*⁷³

46. Some replies call attention to lack of uniformity with respect to the protection afforded to a holder of a negotiable instrument against defences of the debtor.⁷⁴

(b) *Stipulation of non-liability*⁷⁵

47. One reply calls attention to the provision of the Geneva Uniform Law on bills of exchange prohibiting the drawer from including in the bill any stipulation limiting or excluding his liability for payment.⁷⁶ The reply observes that this prohibition conflicts with the relationships between parties using bills of exchange for the settlement of international trade transactions, particularly in cases where there is a documentary credit and the terms of the credit provide for the negotiation of drafts by a bank. It is further noted that this prohibition is inconsistent with provisions of the ICC Uniform Customs and Practice for Documentary Credits on the drawing of drafts without recourse against the drawer.⁷⁷

⁷² See 70.

⁷³ It is in connexion with the circumstances and conditions under which a person may acquire an instrument free of claims and defences of other parties that the Geneva and Anglo-American systems differ considerably. Generally speaking, under the Geneva system (ULB articles 16 and 17 and ULC articles 19, 21 and 22) the possessor of a bill (or endorsable cheque) is deemed to be the lawful holder if he establishes his title through an uninterrupted series of endorsements, good faith, and the absence of gross negligence. Under the UCC (sections 3-302, 3-305 and 3-306), a person obtains preferred status if he is a holder (merely showing an uninterrupted series of signatures that appear to be endorsements does not establish the status of holder) and takes the instrument for value, in good faith, and without notice of certain facts and conditions. See also *infra*, at para. 50 and foot-note ⁸⁶. In addition to these differences in conditions, there is also a difference in the degree of protection afforded to the lawful holder.

⁷⁴ E.g., 5, 26, 27, 28, 37 and 64.

⁷⁵ Article 9 ULB treats any stipulation by which the drawer releases himself from the guarantee of payment as null and void (*idem* article 12 ULC). In contrast with the Geneva uniform laws, both the BEA (section 16 (1)) and the UCC (section 3-413 (2)) permit the drawer to insert an express stipulation negating or limiting his own liability to the holder of a bill.

⁷⁶ See 70.

⁷⁷ See also 54 and 62.

(c) *Conditional acceptance or conditional endorsement*⁷⁸

48. It is stated that questions arise in connexion with undated acceptances; in common law countries, where the acceptance is undated, the holder may enter the appropriate date on the bill, while under the Geneva system the holder must, in such a case, protest the undated acceptance.⁷⁹ Problems appear to have arisen also because of uncertainties as to the effect, under the laws of various jurisdictions, of certain forms of endorsements.⁸⁰

(d) *Liability of third persons who sign an instrument*⁸¹

49. Reference is made to problems arising from the fact that the liability of the co-signatories (or co-acceptors) is not uniform under the legislation of the various countries. It is noted that in this respect the Geneva system adopts the institution of *aval*.⁸² Problems may also arise from the failure to specify for whom an *aval* is given, and one reply points out the inconvenience of the Geneva rule whereby, in the absence of a precise indication, the *aval* is deemed to have been given in favour of the drawer.⁸³

Problems connected with the form of *aval*, the tenor of the operative clause and the place on the bill where it should be indicated are also mentioned in other replies.⁸⁴

⁷⁸ Under article 26 ULB the acceptance must be unconditional, but the drawee may restrict it to part of the sum payable. Every other modification introduced by an acceptance into the tenor of a bill operates as a refusal to accept, but the acceptor is nevertheless bound according to the terms of his acceptance. By section 44 (1) BEA, the holder may refuse to take a qualified acceptance and, if he does not obtain an unqualified acceptance, may treat the bill as dishonoured by non-acceptance. Similarly, under section 3-412 (1) UCC any drawer or endorser who does not assent is discharged from his liability on the bill.

As to conditional endorsements, under the ULB (article 12) any condition to which an endorsement is made subject is deemed not to be written. Under the BEA (section 33) conditional endorsements have the same effect as an unrestricted endorsement.

⁷⁹ See 70.

⁸⁰ E.g., 69.

⁸¹ By articles 30 and 31 ULB, payment of a bill may be guaranteed by the signature of a third person appearing on the bill (*aval*) and, under article 32 ULB, the person who so signs assumes the same liability as the person for whom he has become guarantor. If the *aval* does not specify for whom it is given, it is deemed to have been given for the drawer (article 31 ULB). The nature of the presumption established by article 31 ULB is, however, controversial. Some countries (e.g. Switzerland, *Bundesgericht*, 19 June 1951) consider that the presumption can be rebutted, others (e.g. Germany, *Oberlandesgericht Stuttgart*, 13 November 1936) that it may not be rebutted. In still others (e.g. France) case law shows both tendencies.

Under the BEA (section 56), where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an endorser to a holder in due course (unless he excludes his liability, cf. section 16 (1)). The UCC deals, in section 3-402, with a "signature in an ambiguous capacity" and provides that "unless the instrument clearly indicates that a signature is made in some other capacity it is an endorsement".

⁸² See 31. *Aval* is discussed *supra* at paragraph 35.

⁸³ See 26.

⁸⁴ E.g., 54.

D. "Consideration" or "Value", "Provision" and "Abstraction"

50. These varying concepts of common law and of civil law do not appear to have given rise to any serious difficulties, and there are few replies which refer to them.⁸⁵

E. Forgery and alterations

(a) Forged signatures and endorsements

51. The two principal systems differ sharply with respect to the rights obtained under a forged endorsement.⁸⁶ Numerous replies report the existence of problems occurring in connexion with forged signatures;⁸⁷ most draw attention to the divergency of legal rules in respect of forgery as being at the root of the problems.⁸⁸

(b) Alterations

52. Although a few replies⁸⁹ mention problems that have been encountered in connexion with alterations

made on instruments without initialling by the party who made the alterations, it is not clear that these problems result from differences in the legal rules.

F. Lost instruments

53. Problems arising in this context are sometimes seen as predominantly practical and sometimes as legal. A few of the replies on this point indicate the frequency with which these problems have occurred.⁹⁰ These replies suggest that the incidence of lost instruments is low.

54. Some replies point to the differences which exist in respect of the rules applicable to lost or stolen instruments, *inter alia* in the following contexts: the effect of loss or theft on the rights of the parties; procedures for cancelling a lost instrument; the obligation to replace a lost instrument; protection of the rights of the person having lost the instrument, and extinction of obligations under such an instrument. Reference is also made to problems caused by lost travellers' cheques and a few replies indicate the desirability of a uniform regulation in this field.

G. Protest and notice of dishonour

(a) Protest for non-acceptance or non-payment⁹¹

55. The problems referred to in the replies under this heading relate mainly to difficulties or legal divergencies concerning the formal requisites of protest and the time within which a bill must be protested. Reference is made to the divergency of rules as to the necessity for protest.⁹² Thus, it is said that divergent rules present a serious problem. Particular attention is drawn to the fact that under the law of certain countries protest is a prerequisite to legal action against the acceptor, and not only in the case of recourse. In addition, where an *aval* has been given for the acceptor, it is not always clear whether protest is necessary if the holder wishes to take legal action against the guarantor for non-payment on the part of the acceptor.

56. It is noted that although rules on protest often relate only to the manner of proof of the fact that the bill was presented, the enactments of certain countries also provide for protest as a statutory requirement so that, if protest is not made in accordance with this requirement, the drawer and the endorsers are discharged from liability.⁹³ Another respondent⁹⁴ refers to provision in foreign countries regulating the duties of agents in respect to giving notice of dishonour to their principals. It is noted that these provisions may be less stringent than those to which those agents are required to conform

⁸⁵ E.g., 26, 37.

⁸⁶ Under section 24 BEA, in the case of bills of exchange, no title can be made through a forged signature and the forged (or unauthorized) signature is wholly inoperative. Forgery, therefore, nullifies the claims of subsequent transferees against parties prior to the forgery. The Geneva Uniform Law adopts the opposite principle. Under article 16 ULB, title to a bill is established through an uninterrupted series of endorsements. Consequently, a party taking a transfer of a bill bearing a forged endorsement from a holder subsequent to the forgery obtains a good title.

Under section 3-404 UCC "any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it". The term "unauthorized signature" is defined by section 1-201 UCC to include both a forgery and a signature made by an agent exceeding his actual or apparent authority. Hence, if a signature on the instrument, necessary to the transfer of title (as in the case of a payee's endorsement) is forged, the holder under it cannot take good title and, if he obtains payment or acceptance, will have breached his warranty to the payor or acceptor. Where the UCC may not be applicable to the endorser's contract (as where the endorser is located outside the U.S.), it is the practice of at least some U.S. bankers to obtain from those endorsers special undertakings giving the payor bankers a protection not less than that afforded by the UCC in this regard.

⁸⁷ E.g., 1, 4, 5, 26, 28, 30, 33, 34, 35, 40, 49, 60, 62, 64, 69, 73 and 75. But see 69 (legal differences not the principal cause of difficulties).

⁸⁸ See 69.

The following example of a problem arising from the difference between the Geneva rules and the rules obtaining under the Uniform Commercial Code is given by the Swedish Bankers' Association. A Swedish bank received for collection a cheque drawn on a bank in the United States. The Swedish bank forwarded the item for collection, received payment in due order without reservations and accounted the proceeds to its principal, after which the Swedish bank assumed that the matter was closed. To gain as much security as possible, Swedish banks often send cheques drawn on U.S. banks for collection with the request for crediting only after final payment. Nevertheless, the Swedish Bank can risk several years later receiving a demand from the relevant bank in the United States, with the information that an endorsement is forged. After so long a period, the Swedish bank usually has no opportunity of following up the matter in Sweden or of obtaining payment from whomsoever was principal at the time.

⁸⁹ E.g., 7 and 30.

⁹⁰ 15, 16, 36, 43, 44, 64, 74 and 75.

⁹¹ Both the Geneva Uniform Laws (article 44 ULB) and the Anglo-American statutes (section 51 (2) BEA and section 3-501 (3) UCC) require, as a condition for the right to exercise recourse against the drawer and the endorsers, that the holder protest a dishonoured bill for non-acceptance or non-payment. Under Anglo-American law, however, this requirement must be satisfied only in the case of a foreign bill.

⁹² See 54 where it is noted that instructions to protest are sometimes given without real necessity.

⁹³ E.g., 33.

⁹⁴ See 2.

by the local legislation; difficult practical and legal problems arise since under such legislation principals are responsible for the acts and omissions of their agents. Still another respondent,⁹⁵ in a similar context, refers to cases in which these problems have arisen.⁹⁶

57. Several other replies refer to the different legal effects of protest or failure to make protest. It is said that the absence of uniform rules with regard to the procedural consequences of protest of dishonour gives rise to certain practical and legal difficulties in recovery actions. For instance, the procedural law of certain countries offers the holder of the protested bill certain advantages (accelerated proceedings, attachment of property of the debtor and so forth), while the law of other countries does not confer the same advantages.⁹⁷ Some replies merely mention that there have been problems as a result of the fact that the requirements concerning protest of a bill of exchange differ from country to country.⁹⁸

58. More generally, problems are said to arise through a lack of clear understanding, internationally, of the rules on protesting for dishonour and the practice of countermanding payment in respect of bank drafts.⁹⁹

(b) *Formal requisites of protest*¹⁰⁰

59. Some of the replies state in general terms that difficulties have been experienced owing to differences

⁹⁵ See 69.

⁹⁶ It is reported that in the United States, the law of the place of issuance of a bill of exchange determines whether protest is required to charge the drawer. The reply of the U.S. Federal Reserve System refers to the following proposition in *Amsinck v. Rogers*, 189 N.Y. 252, 82 N.E. 134 (1907): "Where [a] bill of exchange was endorsed by the drawers to a firm of bankers in the city of New York, who sent it to their agent in Vienna for collection, and such agent failed to demand payment thereof, in accordance with the laws of this state, and upon the refusal of the drawers to pay, failed to protest the same and give notice of such protest to the drawers in the manner required by the law of this state, the latter are discharged from any liability thereunder, notwithstanding the instrument might have been, under the law of Austria, a mere 'commercial order' for the payment of money of which no protest need be made".

The application of the law of the place of issuance was reaffirmed in *Bank of Nova Scotia v. San Miguel*, 214 F.2d. 102 (1st Cir. 1954).

⁹⁷ See 70.

⁹⁸ E.g., 25 and 26.

⁹⁹ E.g., 36.

The reply of the Central Bank of Ireland specifies that under Irish law a bill of exchange may be noted as a preparatory step to protest. A bill may be noted on the day of its dishonour and must be noted not later than the succeeding day. The protest may be extended subsequently as of the day of the noting. This procedure, it is stated, is at variance with that obtaining in many countries. In the event of litigation a protested bill is admitted as evidence. It is necessary to have a bill noted or protested, in order to preserve the recourse against the drawer and endorsers, unless the remitter of the bill sends instructions to the contrary. When a bill has been dishonoured, notice of dishonour may be given to the drawer and each endorser as soon as the bill is dishonoured and must be given within a reasonable time thereafter. The return of a dishonoured bill to the drawer or any endorser is deemed a sufficient notice of dishonour. Each endorser of a bill is liable thereon.

¹⁰⁰ By article 44 ULB, default of acceptance must be evidenced by an authentic act (protest for non-acceptance and non-payment) and article 8 of the Geneva Convention for the

between legal systems as regards form,¹⁰¹ or both form and procedure.¹⁰² Other replies specify in what connexion problems have arisen. It is stated that problems occur in connexion with differing interpretations "here and abroad" of legal requirements regarding noting and/or protesting. More specifically, it is noted that countries have varying notarial laws and that no precise pattern exists as to noting and protest.¹⁰³ Another reply notes that dissimilarities in the form of protest prescribed by legal systems have resulted in the loss of rights.¹⁰⁴

60. Many replies favour a simplification of the form and formalities of protest. It is said that, where international transactions are concerned, the formalities are cumbersome owing to the plurality of places and, hence, of applicable laws. (For example, acceptance may occur in one country, and payment in another). The view is expressed that a harmonization and simplification of the relevant rules would be desirable and that a simple bank confirmation should be sufficient.¹⁰⁵

61. One respondent state that, regardless of the procedure in force in any given country for establishing the fact of non-payment of a bill, all bills drawn for payment abroad are, in the case of dishonour, passed to the authorities by the correspondent bank in the foreign country so that an official protest can be entered.¹⁰⁶

(c) *Time for protest*¹⁰⁷

62. Some replies comment on difficulties encountered in respect of the time for protest. Reference is made

settlement of certain conflicts of laws in connexion with bills of exchange and promissory notes provides that

"The form of and the limits of time for protest, as well as the form of the other measures necessary for the exercise or preservation of rights concerning bills of exchange or promissory notes, are regulated by the laws of the country in which the protest must be drawn up or the measures in question taken."

Under section 51 (7) BEA a protest must contain a copy of the bill, and must be signed by the notary making it; it must also specify the person at whose request the bill is protested, and the place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found. (See also section 94 BEA.) By section 3-509 UCC: "A protest is a certificate of dishonour made under the hand and seal of a United States consul or vice consul or a notary public or other person authorized to certify dishonour by the law of the place where dishonour occurs."

¹⁰¹ E.g., 76, 31 and 62.

¹⁰² E.g., 14 and 15.

¹⁰³ See 71.

¹⁰⁴ See 16.

¹⁰⁵ E.g., 5 and 26.

Cf. in this connexion section 3-510 (6) UCC, by which "the purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonour" is admissible as evidence of dishonour and of notice of dishonour.

¹⁰⁶ See 70.

¹⁰⁷ Article 44 ULB provides that protest for non-acceptance must be made within the limit of time fixed for presentment for acceptance. Protest for non-payment of a bill of exchange payable on a fixed day or at a fixed period after date or sight must be made on one of the two business days following the day on which the bill is payable.

to difficulties experienced in respect of the time within which a bill must be protested under various legal systems. Thus, in several cases, observance of the time-limits has proved difficult or even impossible, and, because of brief time-limits, the commercial banks in some countries are reluctant to assume the obligation to protest.¹⁰⁸

III. COMMENTS IN REPLIES CONCERNING THE SUBSTANCE OF POSSIBLE NEW UNIFORM RULES

63. The first part of the Questionnaire (set out in full at para. 7, *supra*) elicited information on the current practices followed in making and receiving international payments. The responses are summarized in part I of this report at paragraphs 13-38, *supra*. The second part of the Questionnaire sought information concerning the problems encountered in making and receiving international payments by means of negotiable instruments. The responses are summarized in part II of the report at paragraphs 39-62, *supra*.

64. In addition, an annex accompanying the Questionnaire invited comments concerning the possible content of new rules applicable to international transactions, if such rules should be formulated. These questions were primarily concerned with points on which there are divergencies among the prevailing legal systems. The replies to these questions constitute a voluminous and valuable documentation on the views of Governments and banking institutions on important issues of negotiable instruments law in the context of international payments.

65. The richness and variety of these replies present difficult problems for analysis. The suggestions and opinions concerning new rules that might be proposed point in various directions. In addition, opinions concerning the appropriate rule on one issue are often related to a proposed rule on a different point. In such cases it would be misleading to catalogue replies without taking full account of these complex relationships.

66. As has been noted (*supra*, para. 3), in evaluating the responses to the Questionnaire, the Secretariat has received valuable assistance from specialists related to various international organizations having interest and competence in this field. At the time of the most recent meeting for such consultation, held in Paris from 19-23 January 1970, several important replies from Govern-

ments and banking organizations were not yet available for analysis. In addition, it may now be advisable and feasible to consult international organizations and others who are in a position to contribute the experience and viewpoints of additional regions.

67. For these reasons, it was deemed appropriate to defer the preparation of the analysis of the comments concerning the substance of the possible new rules until after further study and consultation.

IV. CONCLUSIONS

A. *The question of continuation of work in respect of the law of negotiable instruments*

68. As was indicated in part II of this report, many replies support the view that international payments, for the most part, are effected efficiently and without legal difficulty; other replies note that the transactions in which difficulties arise because of legal disharmony constitute a very small percentage of the total body of international payments.¹⁰⁹

69. Certain replies have pointed to ways in which banks have been able to develop procedures or arrangements to overcome difficulties resulting from divergencies in the law. For example, although many replies have drawn attention to the problems resulting from the divergency between the rules of different legal systems with respect to the effect of a forged endorsement (para. 51, *supra*), it appears that certain banks have been able to secure special undertakings from foreign banks and customers by which they obtain protection that is equivalent to that afforded under local law¹¹⁰ or by which they safeguard themselves against liability.¹¹¹ Various banks have also pointed to the utility of standardized procedures and standard contract provisions such as those of the ICC Uniform Customs and Practice for Documentary Credits. On the other hand, it appears that such arrangements have their principal utility in defining the relationship between the banks and their own customers and in establishing a contractual definition of the obligations of banks in certain special situations, such as the handling of bills of lading and related documents submitted under letters of credit. It is not suggested that such arrangements solve the problems resulting from divergencies in the legal rules with respect to the rights and liabilities of all the parties to a negotiable instrument for international payments, such as the rights and liabilities of endorsers and drawees who are not parties to such undertakings. The replies also make it apparent that, even when transactions are settled satisfactorily by banks, delays may occur, or the customer may incur loss or extra expenses.¹¹²

¹⁰⁹ See the references at note 58, *supra*.

¹¹⁰ See *supra* at note 86. For concern by foreign banks with the legal rules resulting from such arrangements, see note 88.

¹¹¹ Banks in many countries incorporate clauses in their general conditions whereby transferors are responsible, vis-à-vis the bank that discounts or pays the negotiable instrument, for the consequences of forged endorsements or of forgeries in the text of a bill of exchange or cheque. Cf. 75.

¹¹² See also the reply of the French Bankers' Association which notes that problems and disparities "... are mitigated in practice only by compromise solutions, conventional exceptions

By section 51 BEA a bill must be noted on the day it is dishonoured, and when a bill has been duly noted, "the protest may be subsequently extended as of the date of the noting". Under the BEA, "the actual protest, as distinguished from the noting, may be drawn up and completed at any time before the commencement of the suit, or even before or during the trial, and antedated accordingly". (Byles on Bills of Exchange, 22nd ed., p. 174.) See section 93 BEA.

By section 3-509 (4) UCC, any necessary protest is due by the time that notice of dishonour is due.* However, under section 3-509 (5), "If, before protest is due, an instrument has been noted for protest by the officer to make protest, the protest may be made at any time hereafter as of the day of the noting".

* Section 3-508 (2) provides that "Any necessary notice must be given by a bank before its midnight deadline and by any other person before midnight of the third business day after dishonour or receipt of notice of dishonour".

¹⁰⁸ E.g., 16, 17, 62.

70. It is relevant to note the substantial number of replies, summarized in part II, *supra*, that point to specific problems resulting from disharmony in the law. Attention may be directed, for example, to the emphasis which the replies have given to difficulties that arise from disharmony in rules governing formal requisites for negotiable instruments,¹¹³ the effect of forged endorsements,¹¹⁴ and the requirements as to the mode and time for protest and notice of dishonour.¹¹⁵

71. It should also be pointed out that the analysis of reported problems in part II, *supra*, does not take into account several important replies that were received after the preparation of that part.¹¹⁶

72. The Commission may therefore think that there is, at this stage of the preparatory work, sufficient basis for continuing with the study. Possible steps for further action which the Commission may wish to consider are set out below.

B. Possible steps for further action

73. For the reasons indicated in paragraphs 67 and 71 above, the Commission may wish to request the Secretariat:

(a) To prepare a detailed analysis of the replies to the annex (the substance of possible new uniform rules), and to ask the respondents to supplement or clarify the information they have given where such information shows gaps;¹¹⁷

(b) To complete the analysis of part II of this report (problems encountered in settling international transactions by means of negotiable instruments) by including the replies that arrived too late for analysis herein.

74. The Commission may also wish to request the Secretariat to hold further consultations with international organizations for the purpose of analysing the information received and evaluating its bearing on commercial practice.¹¹⁸ In this connexion, the Commission may wish to provide guidance as to feasible ways to elicit assistance from organizations representing other regions and interests.

75. It is hoped that the evidence already before the Commission and any supplementary evidence which will be supplied to it in time for the fourth session will

enable the Commission to decide at that session whether further action in respect of the law of negotiable instruments is justified. If so, the Commission would then probably also wish to consider that approach, among the several that would in principle be open to it, would best correspond to the needs of commercial practice in that field. In order to assist it in its deliberations, the Commission may therefore wish to request the Secretariat, in addition to completing the analysis, to make a study of the alternative approaches by which the unification and harmonization of the law of negotiable instruments could be promoted. The alternative approaches might include the following:

- (i) A convention that would prescribe the rules governing negotiable instruments used for international payments. (Compare the approach of the Uniform Law for the International Sale of Goods attached to the Hague Convention of 1964.)
- (ii) A convention similar to that outlined in (a) above, but with substantive rules limited to the most troublesome problems of divergency under the present legal systems.
- (iii) A convention setting forth rules would be applicable only to those instruments used in international payments that bear an identifying label. (E.g. "International Bill of Exchange subject to the . . . Convention".) Thus, the uniform rules prescribed by such a convention would be applicable on an optional basis, i.e. when the parties so choose.¹¹⁹ This approach should be contrasted to that of the uniform rules prescribed by a convention of the type referred to under (i) above, which would be mandatory for international transactions in instruments defined in the convention.
- (iv) A programme directed towards harmonization of the existing systems by encouraging the modification of certain of the rules of the existing national laws that have proved to be particularly troublesome for international transactions.¹²⁰
- (v) Assistance or encouragement in the development and acceptance by banks of uniform contractual

¹¹⁹ A recent example of the optional application of legal provisions to an international document is provided by the Draft Convention on Combined Transports (Tokyo Rules). Articles 2 and 3 of this Draft Convention reads as follows:

"2. In this Convention, 'Combined Transport Bill of Lading' (CT A Bill of Lading) means a document evidencing a contract for the carriage of goods between two States by at least two modes of transport of which at least one is by sea or inland waterways and at least one is not by sea, which bears the heading 'Combined Transport Bill of Lading subject to the Tokyo Rules'.

"3. Each Contracting State shall apply the provisions of this Convention to every CT Bill of Lading and to the contract evidenced thereby whatever may be the place of issue, the place at which the goods are taken in charge, the place designated for delivery, or the nationality of the means of transport, the combined transport operator, the consignor, the consignee or any other interested person."

¹²⁰ Suggestions to this effect were made in some replies, e.g., 21, 22, 27.

or other purely empirical practices. There might be a temptation to think that these pragmatic and necessarily very varied options provide an element of flexibility which makes it possible for negotiable instruments to be adapted to the circumstances and special rights of those using them. In fact, this argument cannot outweigh the vital consideration of the need for clarity and security in the legal relations between all parties interested in the *dénouement* of the transaction to which the instrument relates. This clarity and security can come only from universally accepted rules reflected, in practical terms in formal liabilities which are as precise and strict as possible".

¹¹³ See paras. 43 and 44, *supra*.

¹¹⁴ See para. 51, *supra*.

¹¹⁵ See para. 55, *supra*.

¹¹⁶ Nineteen further replies were received between 19 January and 9 March 1970.

¹¹⁷ Many respondents declared their willingness to supply the Commission with further information, if so requested.

¹¹⁸ See the Commission's decision in this regard, quoted in para. 2 of this report.

arrangements or guides to practice, designed to minimize misunderstanding or dispute.

76. In view of the time needed for the completion of the analysis, the preparation of studies and the con-

sultation with interested organizations, the Commission may wish to defer a decision on the creation of a Working Group on Negotiable Instruments until its next session.

B. Bankers' Commercial Credits

*Note by the Secretary-General transmitting a study by the International Chamber of Commerce on documentary credits and observations thereon**

1. The United Nations Commission on International Trade Law (UNCITRAL), at its first session, decided to include in its work programme, as a priority item, the subject of bankers' commercial credits as related to international payments.¹ In view of the interest of, and work done by, the International Chamber of Commerce on this and related topics, the Commission further decided to request the Secretary-General to inquire whether the International Chamber of Commerce would be prepared to undertake a study of the subject.² The Secretary-General was also requested to consult with other organizations concerned.³

2. In accordance with the Commission's request, the Secretary-General, by a letter dated 21 May 1968, inquired whether the International Chamber of Commerce would be prepared to submit, for transmission to the Commission, a study on the above topic. In response to the Secretary-General's inquiry, the International Chamber of Commerce prepared a study entitled "Documentary Credits", which is reproduced in annex I below.

3. By a letter dated 11 November 1968, the Secretary-General transmitted the study to the organs and organizations listed in annex II to this document and invited them to submit any observations they might wish to make on the subject of bankers' commercial credits as related to international payments, as well as any suggestions on steps which UNCITRAL might usefully take in promoting the harmonization and unification of law in this matter.

4. At the time of writing of this note, replies had been received from the secretariats of the Economic Commission for Europe and the International Institute for the Unification of Private Law (UNIDROIT).⁴

5. The Executive Secretary of the Economic Commission for Europe stated that the Uniform Customs and Practice for Documentary Credits, codified by the International Chamber of Commerce, "appeared to meet fully the requirements of the interested parties" and endorsed the suggestion made by the International Chamber of Commerce in its study that UNCITRAL

should commend the Code to all Member States of the United Nations.

6. The Secretary-General of UNIDROIT qualified the Code as "the most typical example of the efficacy of the unification of law realized through standardization of commercial customs and practice" and advised that UNIDROIT, in collaboration with the international Chamber of Commerce and the Economic Commission for Europe, was preparing for 1969 a round-table conference of interested international organizations on legal problems concerning the international through bill of lading and, particularly, the document of carriage and title to be used in respect of goods shipped in large containers. It was suggested by UNIDROIT that the conclusions reached at that conference might be considered by the International Chamber of Commerce at a future review of the Uniform Customs and Practice for Documentary Credits.

ANNEX I

Documentary credits:

STUDY SUBMITTED TO THE UNITED NATIONS
BY THE INTERNATIONAL CHAMBER OF COMMERCE

Introduction

1. From the viewpoint of the merchants involved international trade can present many problems, not the least being that of providing the "commercial security" desired by both buyer and seller, i.e. ensuring that both the making and receiving of payment for the goods shall be effectively linked with the passing of title to such goods.

2. For nearly a century—and on an increasing scale since the 1920s—internationally operating bankers have been making a major contribution to the solving of this specific problem by providing "documentary credits"—sometimes also referred to as "documentary letters of credit" or "commercial credits" or "commercial letters of credit".

Definition

3. Currently, these credits are internationally defined as:

"...any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and in accordance with the instructions of a customer (the applicant for the credit), is to make payment to or to the order of a third party (the beneficiary) or is to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary, or authorises such drafts to be paid, accepted or negotiated by another bank, against stipulated documents and in compliance with stipulated terms and conditions."

4. Basically, therefore, such "arrangement", whether described as a "credit" or a "letter of credit", or as "documentary"

¹ Report of the Commission on the work of its first session, (A/7216), para. 25.

² *Ibid.*, para. 28.

³ *Ibid.*

⁴ Comments and observations that may be received hereafter from other organizations are summarized in the addendum to this document.

or "commercial", always involves at least three parties, i.e. the banker issuing the credit, the applicant for the credit (usually the buyer) and the beneficiary of the credit (usually the seller), and results in the banker giving to the seller a conditional undertaking regarding payment at the request and on the instructions of the buyer.

5. It thereby assures the seller of due payment by substituting the credit-worthiness of the bank for that of the buyer, enabling the seller, subject to compliance with the "stipulated terms and conditions", to get his money from a bank—usually in his own country—instead of himself seeking the exact settlement of his invoiced price from a remote buyer who might well be hampered by exchange controls and their attendant red tape. At the same time it interposes that bank's expertise on behalf of the buyer to ensure that the documents presented are in compliance with the credit, and, where the documents presented are documents of title to the goods, to ensure for him "constructive delivery" of the goods. It is, however, a fundamental principle of such a banking instrument that the bank shall only be concerned to see that the documents "appear on their face to be in accordance with the terms and conditions of the credit" and that the bank shall not need to concern itself with the content of the underlying business transaction.

6. This principle is important, for the complete and deliberate separation of the bank's commitment to the beneficiary from the rights and liabilities arising from the "sale and other contracts" on which the credit is based enables it successfully to play its dual economic role, that of providing both credit and security—although, from the viewpoint of the seller, the security aspect, i.e. the assurance of receiving payment, may well seem to be the factor of major importance throughout the three stages in a documentary credit operation.

Operation

7. Thus, in the first stage, the issuing of the credit, the issuing bank, acting by order and for account of its customer (the applicant for the credit, usually the buyer) gives its unilateral undertaking to a third party beneficiary (usually the seller) to pay him a certain sum of money subject to his compliance with certain stated terms and conditions.

8. The undertaking may be "revocable", i.e. NOT constituting "a legally binding undertaking between the bank or banks concerned and the beneficiary", since it "may be modified or cancelled at any moment without notice to the beneficiary". More usually, however, it will be "irrevocable", i.e. as "a definite undertaking on the part of the issuing bank" it will constitute "the engagement of that bank to the beneficiary". Or it may provide for that "engagement" of the issuing bank to be "confirmed", i.e. to be reinforced by the addition of a similar undertaking of another bank, thereby binding that bank also.

9. The undertakings, however, are all subject to the beneficiary complying with the stated terms and conditions, and these are likely to cover such matters as the method and place of payment (e.g. in cash against a sight draft, or by acceptance of a tenor draft providing for payment at a future date), the documents required and the shipment to which they are to relate (e.g. an invoice showing what the goods are and their value, an insurance policy or certificate covering the goods against loss or damage whilst in transit, and a document of carriage—such as an ocean bill of lading—representing them whilst in transit and giving rights to them on arrival at destination), and the expiry date, i.e. the latest date by which the terms and conditions must be complied with and payment claimed.

10. However, although the beneficiary has to meet these requirements if he wishes to be paid, he does not incur any liability to the bank(s) if he fails to do so. He merely, in effect, releases the bank(s) from the undertaking(s) given.

11. The second stage in the documentary credit operation therefore calls for the beneficiary to send the right documents to the right bank at the right time, for the bank to examine the "documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit", and for the bank then to honour its payment undertaking, either by direct payment of the sum involved or by the acceptance—or negotiation—of tenor drafts, according to whether they are required to be drawn on the bank or on a third party.

12. In the third stage the issuing bank's client, the applicant for the credit, is required to reimburse the bank for the monies it has paid out, plus its commission. Because it is basic that "in documentary credit operations all parties concerned deal in documents and not in goods" the applicant for the credit cannot refuse to meet the demand for reimbursement so long as the documents "appear on their face to be in accordance with the terms and conditions of the credit". Consequently, he cannot oppose the bank's demand for reimbursement on grounds relating, for example, to such matters as the quality of the goods, or the way in which the underlying business transaction has been carried out, but he can refuse to accept the documents and reimburse the bank on the grounds that it had made payment to the beneficiary against irregular documents, or in violation of a term or condition of the credit.

Uniform Code

13. It is on these grounds that difficulties, friction and even litigation can arise—and have arisen—for, since traders are merchants rather than legal or financial experts, and because outlook, understanding, knowledge and experience can vary from country to country, from bank to bank and from merchant to merchant it is possible for there to be misunderstandings regarding the precise meaning of terms used and for disputes to develop over the exact nature of obligations imposed.

14. This uncertainty with regard both to specific terms and conditions and to the essential nature of this banking operation and its legal implications, together with a lack of international uniformity of banking practice, led the International Chamber of Commerce to attempt to standardize the customs and practice relating to these credits, in order that a clear and acceptable code might be established.

15. Its initial "Uniform Regulation on Documentary Credits" adopted at its Amsterdam Congress in 1929 was, however, only put into practice by the banks in France and Belgium. Complete revision was therefore deemed necessary and its first "Uniform Customs and Practice for Documentary Credits", adopted at its Vienna Congress in 1933, became accepted by banks throughout Continental Europe. The post-war need to take note of American practice and the desirability of altering certain matters of detail in the light of experience led to a further revision, adopted at the 1951 Lisbon Congress, this version securing the collective adherence of the banks in some thirty countries.

16. The need was still for wider support, for agreement on a common code of practice, formulated as a written set of rules likely to be both universally adopted and uniformly interpreted. This need was not effectively met until the 1962 revision, completed with the full and active co-operation of the British banking system, produced its brochure No. 222, "Uniform Customs and Practice for Documentary Credits", giving a code which the banks and banking association of one hundred and eighty States and territories, including both capitalist and socialist economies, voluntarily have agreed shall govern their documentary credit operations.*

* Additionally, the individual adherence of banks in a further forty or so countries was registered.

Brochure No. 222

17. This Code which, being "the only set of international trade rules applied globally, may be deemed to represent commercial usage in the legal sense of the term", commences with "General Provisions and Definitions", which include the definition of credits given above, and prepares the ground for the basic principle stressed throughout the Code's forty-six articles, that the duty of the applicant for the credit is to give complete and precise instructions to the issuing bank—for writing fully into the credit document itself—so that there can be no grounds for doubt or uncertainty at any stage in the chain between the applicant for the credit and the beneficiary of the credit by reason of incompleteness or ambiguity.

18. It then deals with the "Form and Notification of Credits", explaining the different forms of documentary credits, i.e. revocable, irrevocable and confirmed—and the distinguishing features of each—so as to avoid, as far as may be possible, future misunderstandings and dissatisfactions. In this section article 6 serves to stress the basic principle that it is the duty of the applicant, who is the party knowing exactly what is needed, to ensure the effective operation of the credit by giving clear and complete instructions.

19. Proceeding to "Liabilities and Responsibilities" the Code develops a second basic principle, following naturally from the first one. This, as set out in article 8, is that it is the bank's duty to comply strictly with the terms and conditions of the credit when taking up documents, and to reject—and withhold payment for—those which are not in accordance with such terms and conditions, unless the applicant for the credit should sanction acceptance of—and payment against—those irregular documents. In this latter case the bank has the right to demand reimbursement from the applicant for payments made under the credit because the applicant has, in effect, "amended" the original credit terms to fit the documents presented, which, expressed in reserve, means that the documents presented now meet the credit (including "amendments") terms and conditions.

20. The third part, "Documents" stresses that it is for the applicant to specify what he wants in the way of documents, and not for the banker to guess, and goes on to define the conditions which, in the absence of any specific requirements laid down by the applicant, the documents prescribed must fulfil. In particular, it gives a simple and specific definition of a "clean" bill of lading, previously a cause of much friction and dispute.

21. Fourthly, it groups, as "Miscellaneous Provisions", definitions and interpretation of terms which, lacking such

definitions and uniformity of interpretation, have in the past hampered the smooth working and successful operation of documentary credits.

22. Finally, it uses its article 46 to deal clearly, precisely and comprehensively with the "transfer" of credits; a special form of passing all or part of the benefit of a credit to a third party, previously a steady source of supply of problems.

Review

23. The International Chamber of Commerce, without underestimating the importance—and success—of its past endeavours in this specialist sphere, does not overlook the need to make sure that its Code as set out in brochure No. 222 does not drop behind current changes in international trade and shipping practice. The Code is therefore kept under constant review, and queries which are from time to time raised from various parts of the world are considered at the half-yearly meetings of its Commission on Banking Technique and Practice, a body which is already looking ahead to the need for certain alterations to be internationally agreed and written into these rules when agreement is eventually reached in connexion with the document of carriage and title to be used in respect of goods shipped in large "containers".

Legal aspect

24. Such reviews, necessitated by changes in trade practice, can be agreed, and written into the Code as specific amendments more speedily and with less friction when the Code is accepted internationally by voluntary agreement than when the rules are written specifically into any national, statutory law.

25. It is for this reason that the whole Code is written into each application for the bank to issue a credit, as well as into the credit itself, so that these rules form part of the "finance" contract ancillary to the "purchase and sales contract".

26. It would, however, be of considerable help to have the United Nations, through UNCITRAL, commend this Code to all Member nations, including, if possible, those where these rules are not yet applied.

ANNEX II**List of organs and organizations to which the study of the International Chamber of Commerce was transmitted**

[Annex not reproduced. The names of the respondent organizations are given in the summary of comments in document A/CN.9/15/Add.1 which follows.]

Addendum to the note by the Secretary-General on bankers' commercial credits***INTRODUCTION**

1. In his note A/CN.9/15 the Secretary-General reproduced the study on documentary credits submitted to the United Nations by the International Chamber of Commerce, together with a summary of the comments which had been received from the Secretariats of the Economic Commission for Europe (ECE) and the International Institute for the Unification of Private Law (UNIDROIT).

2. The present addendum contains a summary of the comments which have been received since the circulation of document A/CN.9/15.

SUMMARY OF COMMENTS SUBMITTED BY ORGANS AND ORGANIZATIONS ON BANKERS' COMMERCIAL CREDITS

3. The Executive-Secretary of the United Nations Economic Commission for Latin America informed the Secretary-General that the commercial banks of the countries of Latin America follow the rules of the Uniform Customs and Practice for Documentary Credits, prepared by the International Chamber of Commerce, in documentary credit operations with banks which are their agents in foreign countries.

4. The secretariat of ECLA suggested that "it would be useful for some specialized body of the United

* A/CN.9/15/Add.1.

Nations to be made responsible for supervising not only the existing code of practice and usage, but also any amendments to it that may be made in the future as a result of the work of the ICC Commission on Banking Technique and Practice. This United Nations supervision would be permanent in character and would automatically constitute a form of approval of what the ICC agrees at the private level. This suggestion is prompted by the fact that, in matters of such great importance, uniform standards to be applied by all should be subjected to legal review at a more comprehensive level than is possible with a private organization. For this purpose, it would be advisable for the United Nations commission or committee carrying out the review to be composed of representatives of the monetary authorities to ensure the greatest possible amount of technical support and flexibility."

5. The reply from ECLA emphasized that in reviewing and unifying existing provisions, special attention should be paid to practices that might affect transactions of the banking institutions of developing countries. It was further suggested that it would be useful to consider the "possible effect of these comprehensive and widely applied rules on the efforts of regional integration groups to co-ordinate their international payments systems, and also into the possible emergence of new and different practices and procedures, particularly with regard to documents and guarantees".

6. The secretariat of the International Monetary Fund drew attention to the use of advance import deposits which the authorities of the Fund members may require of importers in connexion with the opening of letters of credit. These "arrangements raise the issue of Fund jurisdiction if they operate through the exchange system, making payments or transfers for current international transactions subject to the deposit requirement. It is generally Fund policy to discourage the use of such

advance deposit arrangements in view of their restrictive and sometimes discriminatory *effects on import*. Accordingly, the Fund favours the elimination or reduction in reliance on these arrangements, whenever this is possible without adverse effects on the prevailing monetary and balance of payments position of its members."

7. The general secretariat of the Organization of American States stated that none of the organs of the Organization, including the Inter-American Juridical alterations in the ICC rules might be necessary in Committee and the general secretariat, have so far dealt with this specific subject. It was suggested that certain connexion with the document of carriage and title to be used in respect of goods shipped in containers.

8. According to the Secretary-General of the Commission of the European Communities "*l'extension d'usages uniformes dans le domaine des crédits commerciaux bancaires semble être un des moyens les plus appropriés pour la promotion du commerce international*," ("the extension of uniform practices with regard to bankers' commercial credits seems one of the most appropriate means of promoting international trade.")

9. The secretariat of the European Free Trade Association reported that the Association has not yet had the occasion to consider the subject of banker's commercial credits. Although all practical obstacles to the free movement of trade between the Member States are regularly reviewed by the Committee of Trade Experts, there have not been any complaints of difficulties in this regard.

10. The Vice-President of the African Development Bank stated that the Bank "highly appreciates the objectives of the study and concurs with the view that it would be very helpful if a greater degree of uniformity in international practice in this field could be achieved. It would serve in its own way to facilitate and promote world trade."

C. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Preliminary study of guaranties and securities as related to international payments	A/CN.9/20 and Add.1
Bank guaranties: proposal by the Hungarian delegation concerning the preparation of uniform rules and practice relating to bank guaranties	A/CN.9/L.13
Guaranties and securities: note by the Secretary-General	A/CN.9/37
International payments banker's commercial credits: report of the Secretary-General	A/CN.9/44
Guaranties and securities: note by the Secretary-General	A/CN.9/45, Add.1

IV. INTERNATIONAL COMMERCIAL ARBITRATION*

A. Steps to be taken for promoting the harmonization and unification of the law of international commercial arbitration: report of the Secretary-General**

CONTENTS

	<i>Paragraphs</i>
INTRODUCTION	1-4
I. REVIEW OF INTERNATIONAL COMMERCIAL ARBITRATION INSTRUMENTS	5-244
A. Preliminary questions	5-31
1. Provisions in international instruments concerning their scope of application	
Parties to arbitration agreements	9-18
(a) Persons	9-13
(b) Residence or seat of parties	14-17
(c) Nationality of the parties	18
2. Provisions in international instruments concerning their scope of application	
Disputes referable to arbitration	19-31
(a) Existing and future disputes	19-25
(b) Subject-matter of disputes	26-31
B. The arbitration agreement	32-85
1. Form of arbitration agreement	32-45
(a) No requirement as to written form	33-36
(b) Requirement as to written form	37-40
(c) Definition of notion of "in writing"	41-42
(d) Interpretation of requirements as to written form	43-45
2. The content of the arbitration agreement	46-85
(a) Equality of the parties	46-48
(b) Content of the arbitration agreement: general	49-53
(c) Number and appointment of arbitrators	54-64
(d) The place of arbitration	65-71
(e) Rules of procedure	72-73
(f) The applicable law	74-85
C. Arbitration proceedings	86-154
1. Rules applicable to arbitral procedure	86-104
(a) Examples of mandatory rules	87-94
(b) Participation in proceedings	95-104
2. Rules applicable to the arbitrators	105-120
(a) Resignation and inability of arbitrators to perform their functions	105-109
(b) Challenging of the arbitrators	110-120
3. Jurisdiction	121-154
(a) Jurisdiction of the arbitration tribunal	121-130
(b) Jurisdiction over questions relating to the validity of the arbitration agree-	
ment	131-139
(c) Jurisdiction of courts	140-154
D. The award	155-221
1. Time-limit for making the award	158-169
(a) Time-limits prescribed	158-164
(b) Extension of time-limits	165-169
2. Rendering of the award	170-184
(a) Majority for award	170-176
(b) Awards on the basis of documents alone	177-180
(c) Form of award	181-184

* For action by the Commission with respect to this subject, see part two, section II, A, report of the Commission on the work of its second session (1969) paragraphs 101-113. See also part two, section III, A, report of the Commission on the work of its third session (1970), paragraphs 146-156.

** A/CN.9/21 and Corr.1.

CONTENTS (*continued*)

	<i>Paragraphs</i>
3. Content of the award	185-204
(a) Interim, interlocutory and partial awards	185-186
(b) Awards on agreed terms	187-191
(c) Reasons for awards	192-198
(d) Costs of arbitration	199-204
4. Notification of parties, deposit, interpretation, revision and publication of awards	205-221
(a) Notification of parties	205-210
(b) Deposit of awards	211-212
(c) Interpretation of award	213-215
(d) Revision of awards	216-218
(e) Publication of awards	219-221
E. Recognition and enforcement of awards	222-244
1. Law applicable to the recognition and enforcement of awards	223-224
2. Finality of awards	225-231
3. Domestic or foreign character of awards	232-233
4. Refusal of recognition and enforcement	234-240
5. Staying of enforcement	241-244
II. COMMENTS ON CERTAIN ASPECTS OF THE REVIEW	245-262
III. NATIONAL LAW AND INTERNATIONAL COMMERCIAL ARBITRATION	263-273
IV. POSSIBLE METHODS FOR HARMONIZATION AND UNIFICATION OF THE LAW RELATING TO INTERNATIONAL COMMERCIAL ARBITRATION	274-282
A. Measures recommended by the United Nations Conference on International Commercial Arbitration and by the Economic and Social Council	274-277
B. Other measures	278-282

Annexes

	<i>Page</i>
I. Resolution adopted by the United Nations Conference on International Commercial Arbitration	283
II. Economic and Social Council resolution 708 (XXVII)	284

Introduction

1. The United Nations Commission on International Trade Law, at its first session, decided to include in its work programme, as a priority topic, the law of international commercial arbitration.¹ The Commission requested the Secretary-General "to prepare a preliminary study of steps that might be taken with a view to promoting the harmonization and unification of law in this field, having particularly in mind the desirability of avoiding divergencies among the different instruments on this subject".² This preliminary study, prepared by the Secretariat,³ is submitted pursuant to the Commission's request.

2. This report consists of four chapters. Chapter I contains a review, on a comparative basis, of the provisions of certain international instruments in the field of international commercial arbitration. The pro-

visions of the instruments have been grouped and compared from the point of view of the principal phases of the process of arbitration: the arbitration agreement, the arbitration proceedings, the award, and the recognition and enforcement of awards. Chapter II discusses similarities and dissimilarities found in the instruments examined and, on certain matters, contains preliminary suggestions as to what would appear to be desirable solutions. Chapter III reviews the relationship between national law and international commercial arbitration. Chapter IV discusses certain measures recommended by United Nations organs and other possible measures which might be adopted for the purpose of promoting the harmonization and unification of law in this field and reducing or eliminating divergencies among the different instruments on the subject.

3. The review is not intended to be an exhaustive study of the provisions of all instruments relating to international commercial arbitration. A number of instruments, for instance, have not been considered,⁴ and

¹ See the report of the Commission on the work of its first session, para. 2.

² *Ibid.*, para. 32.

³ In the preparation of this preliminary study, Dr. Martin Domke, Professor of Law at New York University and formerly Vice-President of the American Arbitration Association and Vice-Chairman of the Inter-American Commercial Arbitration Commission, served as consultant to the Secretariat.

⁴ E.g., the various bilateral agreements concerning judicial assistance and the enforcement of judgements and arbitral awards; the arbitration rules of institutions, such as the International Chamber of Commerce and the Inter-American Commercial Arbitration Commission; and the arbitration rules of trade associations and chambers of commerce.

no attempt has been made to identify all questions relating to the instruments reviewed.

4. The international instruments reviewed in chapter I of this report are listed below. They are grouped as follows: (a) International agreements and other instruments in force, (b) International agreements not yet in force, draft international agreements, and other draft instruments, and (c) Arbitration rules.

(a) INTERNATIONAL AGREEMENTS
AND OTHER INSTRUMENTS IN FORCE

International agreements

(1) Treaty on the Law of Procedure approved by the South American Congress at Montevideo on 4 January 1889 and revised at Montevideo on 19 March 1940 (hereinafter called the Montevideo Agreement).

(2) Geneva Protocol on Arbitration Clauses of 24 September 1923 prepared under the auspices of the League of Nations (hereinafter called the Geneva Protocol).

(3) Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927 prepared under the auspices of the League of Nations (hereinafter called the Geneva Convention).

(4) Bustamante Code of 1928 (hereinafter called the Bustamante Code).

(5) Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 prepared under the auspices of the United Nations (hereinafter called the UN Convention).

(6) European Convention on International Commercial Arbitration of 21 April 1961 prepared under the auspices of the United Nations Economic Commission for Europe (hereinafter called the European Convention).

(7) Agreement relating to Application of the European Convention on International Commercial Arbitration of 17 December 1962 prepared under the auspices of the Council of Europe (hereinafter called the CE Agreement).

(8) Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 prepared under the auspices of the International Bank for Reconstruction and Development (hereinafter called the ICRD Convention).

Other instruments

(9) The General Conditions for Delivery of Goods Between Organizations of the Member States of Comecon of 1968, prepared by the Council of Mutual Economic Assistance (hereinafter called the Comecon GCD).

(b) INTERNATIONAL AGREEMENTS NOT YET IN FORCE, DRAFT INTERNATIONAL AGREEMENTS AND OTHER DRAFT INSTRUMENTS

(1) Draft of a Uniform Law on Arbitration in respect of International Relations of Private Law prepared in 1937 and revised in 1953 by the International Institute for the Unification of Private Law (UNIDROIT) (hereinafter called the UNIDROIT Draft).

(2) Draft Convention on International Commercial Arbitration of 1956, prepared by the Inter-American Juridical Committee (hereinafter called the OAS Draft Convention).

(3) Draft Uniform Law on Inter-American Commercial Arbitration of 1956, prepared by the Inter-American Juridical Committee (hereinafter called the OAS Draft Uniform Law).

(4) European Convention providing a Uniform Law on Arbitration of 1966, prepared by the Council of Europe (hereinafter called the CE Uniform Law).

(5) The Annex to the Draft Convention on the Protection of Foreign Property of 1967, prepared by the Organisation for Economic Co-operation and Development. (The Annex relates to the Statute of an Arbitral Tribunal and is referred to hereinafter as the Annex to the OECD Draft.)

(6) Protocol on the Recognition and Enforcement of Arbitral Awards of 1967, prepared by the Council of Europe (hereinafter called the CE Protocol).

(c) ARBITRATION RULES

(1) Rules on International Commercial Arbitration of 1950, prepared by the International Law Association (hereinafter called the Copenhagen Rules).

(2) Rules on Arbitration in International Private Law contained in the Resolutions of the International Law Institute adopted in Amsterdam in 1957 (Amsterdam Rules) and in Neuchâtel in 1959 (Neuchâtel Rules). (The unified text of the rules contained in both resolutions is referred to hereinafter as the Neuchâtel Rules.)

(3) ECAFE Rules for International Commercial Arbitration of 1966, prepared by the United Nations Economic Commission for Asia and the Far East (hereinafter called the ECAFE Rules).

(4) Arbitration Rules of the United Nations Economic Commission for Europe of 1966 (hereinafter called the European Rules).

I. Review of international commercial arbitration instruments

A. PRELIMINARY QUESTIONS

5. The concept of international commercial arbitration is not specifically defined in any of the international instruments on the subject. The basic elements of the concept, however, are reflected in the initial or preliminary articles of some international arbitration instruments, in those provisions which define the scope of application of such instruments.

6. The scope of application of an international arbitration instrument is usually defined by a description of the types of arbitration agreements which are to be covered by the instrument. Such a description is generally twofold, involving (1) a reference to who might be parties to such arbitration agreements, and (2) a reference to the disputes to be covered by such arbitration agreements. For example, article I.1 of the European Convention states, on the question of the scope of application of the Convention, that the Convention shall apply "to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States".

7. Some aspects of the provisions of international arbitration instruments relating to the question of their scope of application are referred to in Part A and Part B below.

8. Part A refers to the provisions which concern the question of who might be parties to the arbitration agreements covered by a particular instrument. Part B refers to the provisions which concern the disputes to be covered by such arbitration agreements.

1. *Provisions in international instruments concerning their scope of application parties to arbitration agreements*

(a) *Persons*

9. The European Convention in article I.1(a) and the United Nations Convention in Article I (1) state that the arbitration agreements to which the Conventions apply should, among other requirements, be arbitration agreements concluded between "physical and legal persons".

10. The European Convention in article II.1 expressly includes within its scope of application arbitration agreements to which "legal persons considered by the law which is applicable to them as 'legal persons of public law' " are parties.

11. The ECAFE Rules in article 13 contain specific provisions to the effect that disputes referable to arbitration under the Rules may include those to which a Government or state trading agency is party.

12. The jurisdiction of the International Centre for Settlement of Investment Disputes established under the ICRD Convention applies, in terms of Article 25 of the Convention, to a dispute between "a Contracting State (or any constituent sub-division or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State".

13. The commonly accepted meaning of the expression "legal persons" would seem to include States and state agencies, as well as state-owned or state-controlled institutions.⁵ A matter to be noted in this connexion is that, in cases where States or state agencies or state-owned or state-controlled institutions are involved, questions may arise as to the applicability of the principle of sovereign immunity. Where the defence of sovereign immunity is invoked, the question is usually one of some difficulty, as views differ as to the scope of the defence.⁶

(b) *Residence or seat of parties*

14. A number of international instruments limit the scope of their application to arbitration agreements concluded between parties who have their place of residence or seat in different countries.

15. The ECAFE Rules require in article I.1 (c) that the parties should be residents of different countries. The Geneva Protocol in article 1 requires that the parties should be "subject respectively to the jurisdiction of different Contracting States".

16. Article I.1 (a) of the European Convention provides that the parties should have "when concluding

the agreement, their habitual place of residence or seat in different Contracting States". Article 1 of UNIDROIT's Draft Uniform Law states that the Uniform Law "shall apply when, at the time an arbitration agreement is concluded, the parties thereto have their respective habitual residences in different countries where the present law [the Uniform Law] is in force".

17. The European Convention and the UNIDROIT Draft, therefore, would also seem to apply in a case where parties resident in different States at the time of the agreement are at the time of the dispute resident in the same country, or in countries where the Convention is not in force.

(c) *Nationality of the parties*

18. The only international instrument which contains a reference to the nationality of the parties is the UNIDROIT Draft. Article 1 of the Draft, when dealing with the question of the residence of the parties in relation to the subject of the scope of application of the Uniform Law, states that the nationality of the parties shall not be taken into consideration.

2. *Provisions in international instruments concerning their scope of application disputes referable to arbitration*

(a) *Existing and future disputes*

19. The question whether an international instrument is applicable both to the arbitration of existing disputes and to the arbitration of future disputes assumes importance because of the fact that in a number of countries the requirements for the conclusion of arbitration agreements relating to existing disputes (the "submission" or the "compromis") differ from the requirements for the conclusion of arbitration agreements relating to future disputes.⁷

20. A number of international instruments pointedly include within their scope of application existing and future disputes. The expressions used in the instruments for this purpose vary.

21. The OAS Draft Uniform Law in Article 1 and the Comecon GCD in paragraph 90 used the expression "differences that may arise".

22. The CE Uniform Law in article 1, the ECAFE rules in article I (2) and the United Nations Convention in article II (1) refer to any dispute which has arisen or may arise. The expressions used in the Geneva Protocol in article 1 are "existing or future differences" as well as "all or any differences that may arise".

23. The Copenhagen Rules also expressly include within their scope of application both existing and future disputes. According to rule 9 of the Copenhagen Rules, in the case of an existing dispute, a special submission to arbitration should be signed if "legally required in the country where the arbitration takes place or where the award is to take effect".

24. The European Convention in article I.1 (a) uses the expression "disputes arising from...", and article 25 of the ICRD Convention uses the expression "any legal

⁵ E/CONF.26/SR.23, p. 5. See P. Contini, "International Commercial Arbitration — The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" in the *American Journal of Comparative Law* (1959), vol. 8, p. 294.

⁶ For a discussion of such differences in view, see "Symposium on State Trading" in *Law and Contemporary Problems* (1959), Vol. 24, pp. 241-528; H. Battifol, "Arbitration Clauses Concluded between French Government-Owned Enterprises and Foreign Private Parties" in *Columbia Journal of Transnational Law* (1968), vol. 7, p. 32; and R. David, "The Methods of Unification" in *American Journal of Comparative Law* (1968), vol. 16, p. 25.

⁷ István Szász, *International Civil Procedure* (A. W. Sijthoff-Leyden) (1967) p. 604.

dispute arising out of...". The expressions would seem to include both existing and future disputes.

25. Other international instruments, however, such as the Montevideo Agreement, the European Rules and the UNIDROIT Draft, do not seem to make special reference to existing and future disputes, or any differentiation between such disputes.

(b) *Subject-matter of disputes*

26. The disputes to which the various international arbitration instruments are intended to apply are characterized in broad terms from the point of view of the nature of their subject-matter.

27. The relevant provision of article 3 of the UNIDROIT Draft, for example, reads as follows: "Any person may submit to arbitration any right which he is competent to dispose of." The Geneva Protocol in article 1 refers to disputes "relating to commercial matters or to any other matter capable of settlement by arbitration". The reference in article II.1 of the United Nations Convention is to differences "in respect to a defined legal relationship whether contractual or not concerning a subject matter capable of settlement by arbitration". The CE Uniform Law in article 1 speaks of disputes arising out of a specific legal relationship and "in respect of which it is permissible to compromise".

28. The corresponding provisions of other instruments contain the qualification that the disputes should relate to commercial matters or should arise out of international trade, or contain other qualifications to similar effect. The expression used in article 5 of the Montevideo Agreement is "civil and commercial" matters. The European Convention in article I.1 (a) refers to "disputes arising from international trade"; the OAS Draft Convention in article 1 and the OAS Draft Uniform Law in articles 1 and 20, to controversies on "a mercantile matter"; and the Comecon GCD in paragraph 90, disputes arising out of or in connexion with contracts of international sale of goods.

29. The provisions contained in the ECAFE rules are rather different. Article 1 of the ECAFE rules states that the rules are applicable to the arbitration of "disputes arising from the international trade of the ECAFE region", but article 1 also contains the clarification that "disputes arising from international trade would include disputes arising out of contracts concerning industrial, financial, engineering services or related subjects involving residents of different countries".

30. Article I.3 of the United Nations Convention permits States to make declarations to the effect that they "will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration". A similar provision is contained in the Geneva Protocol. Article 1 of the Protocol enables each Contracting State to restrict its obligation to enforce foreign arbitral awards to awards relating to contracts "considered as commercial under [its] national law".

31. A matter to be noted, in this connexion, is the fact that differences may exist between national laws on, for example, such a question as whether a partic-

ular matter should be regarded as falling within the scope of "international trade"; and such differences could on occasion lead to uncertainty as to the arbitrability of a particular dispute. For instance, in some countries anti-trust disputes may not be referred to arbitration,⁸ whereas in other countries the arbitration of such disputes is permissible. Similarly, there are differences in national laws on the question whether a dispute associated with a contract but involving a tort may be referred to arbitration.

B. THE ARBITRATION AGREEMENT

1. *Form of arbitration agreement*

32. The majority of international arbitration instruments relate only to arbitration agreements which are in written form. As a matter of fact, arbitration agreements are in practice generally expressed in written form.

(a) *No requirement as to written form*

33. The ECAFE rules and the Geneva Protocol are, however, exceptional in this respect. They are not applicable solely to written arbitration agreements.

34. Article I.2 of the ECAFE rules states that the rules apply in cases where parties have "agreed" that disputes shall be referred to arbitration under the ECAFE rules. The agreement of the parties may be included in their contract or, if not so included, may be concluded separately by the parties after a dispute has arisen.

35. Article 1 of the Geneva Protocol refers only to "an agreement by which the parties to a contract agree to submit all or any differences that may arise in connexion with such a contract".

36. The provisions of the European Convention are also exceptional in this connexion. Article I.2 (a) of the Convention provides that "in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement [may be] concluded in the form authorized by these laws". It is the only international arbitration instrument which contains such a provision.

(b) *Requirement as to written form*

37. Among instruments which contain requirements as to written form, noticeable differences exist.

38. Some instruments merely require that an arbitration agreement should be "in writing". A provision to this effect is contained in article 20 of the OAS Draft Uniform Law. A similar provision is contained in article 25 (1) of the IBRD Convention. Under article 25 (1) the jurisdiction of the International Centre for Settlement of Investment Disputes would extend to disputes which the parties "consent in writing to submit to the Centre".

⁸ For examples of statutory provisions to that effect, see section 91 of the German Law against Restriction of Competition of 1957. See also F. Kind, *Staatsrechtliche Aspekte der Verbandsschiedsgerichtsbarkeit im Kartellwesen* (Bern, 1958). For examples of case law, see S. Farber, "The Antitrust Claimants and Compulsory Arbitration Clauses" in *Federal Bar Journal* (1968), vol. 28, p. 90.

39. Signature of the arbitration agreement is a specific requirement in certain instruments. The European Convention in article I.2 (a) requires that the agreement be "signed by the parties". The CE Uniform Law in article 2 and the United Nations Convention in article II.2 require that the agreement be "in writing and signed by the parties".

40. A different formulation contained in article 4 of the UNIDROIT Draft reads thus: "An arbitration agreement or any modification thereof must be proved by documents demonstrating directly or indirectly the intention of the parties to submit their differences to arbitration." A similar provision is also contained in article 2 of the CE Uniform Law.

(c) *Definition of notion of "in writing"*

41. The United Nations Convention in article II.2 defines the expression "agreement in writing" in these terms: "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

42. The expression "arbitration agreement" is defined in article I.2 (a) of the European Convention. The definition mentions the forms referred to in the definition contained in the United Nations Convention, but also includes an additional form, namely, communication by teleprinter.

(d) *Interpretation of requirements as to written form*

43. Uncertainties may, of course, arise from time to time as to the exact meanings of these provisions as to form in international arbitration instruments, which may affect the validity of an arbitration agreement.

44. For example, in a recent decision a court in Geneva refused to enforce in Switzerland, under the United Nations Convention, an award made in the Netherlands, on the ground that the expression "an exchange of letters" contained in article II.2 of the Convention required that a proposal made in a written offer to the effect that disputes be referred to arbitration should have been accepted expressly, and not, impliedly, through the opening of a letter of credit.⁹

45. An element of uncertainty, as to the forms of agreement required under international conventions, may also be present where the provisions of international instruments make reference to requirements under "national laws". The exact requirements of "national laws" may not always be apparent. One example of such a reference to "national laws" is contained in article I.2 (a) of the European Convention. (See paragraph 36 above.)

2. *The content of the arbitration agreement*

(a) *Equality of the parties*

46. A provision to be effect that an arbitration agreement shall not be valid if it gives one of the parties

a privileged position with regard to the appointment of arbitrators is contained in article 3 of the CE Uniform Law.

47. It is possible that a requirement of this kind might lead to a reduction in the number of cases where contracts formulated by economically stronger parties must usually be accepted by economically weaker parties without modification — contracts usually referred to as "adhesion" contracts.

48. Some national arbitration laws also declare arbitration agreements void for other reasons as well.¹⁰

(b) *Content of the arbitration agreement: general*

49. The particular terms that should be included in an arbitration agreement depend, in large measure, on whether it is the intention of the parties to submit their dispute to institutional arbitration or to an *ad hoc* arbitration tribunal.

50. The many institutional tribunals, or permanent arbitration tribunals which have been established by international or national organizations (principally by chambers of commerce, commodity exchanges and trade associations) have their own established rules of arbitration procedure; and the mere submission of disputes to arbitration by this type of tribunal generally implies an acceptance of the rules of the tribunal. Accordingly, in such cases, the parties do not have to consider and agree expressly upon the various specific questions that are involved in an arbitration proceeding.

51. If the parties, however, choose to submit their dispute to an *ad hoc* or private arbitration tribunal, the situation is quite different. It then becomes necessary for them to provide in their agreement for a number of procedural matters, and to refer also to those rules which they would like to see applied. If they do not do so, and if they merely record the fact that disputes will be referred to arbitration (the "blank" arbitration clause, they are likely to experience considerable difficulty, should a dispute arise, in establishing an arbitration tribunal, in deciding on what rules of procedure should apply, and on other procedural and substantive matters. Moreover, substantial differences exist between national laws in regard to particular aspects.

52. These difficulties are not likely to arise where the parties agree to apply to their arbitration a set of established rules of arbitration procedure which provide for the necessary procedural and substantive matters, or should an international convention which provides for the necessary substantive and procedural matters be applicable to the arbitration.

53. Among the principal substantive and procedural matters involved in an arbitration proceeding are the following: the question of the number and the method of appointment of the arbitrators, the question of the place of arbitration, the question of rules of procedure that should apply to the arbitration proceeding, and the question of the applicable law. The provisions of international arbitration instruments in so far as they relate

⁹ Martin Schwartz, "La Forme Écrite de l'Art. II, al. 2 de la Convention de New York pour la Reconnaissance et l'Exécution des Sentences Arbitrales Étrangères du 10 juin 1958" in *Revue Suisse de Jurisprudence* (1968), vol. 64, p. 49; and for the text of the decision of 8 June 1967, in the case of J. A. van Walsum, N.V. v. Chevalines S.A., *ibid.*, p. 56.

¹⁰ For references to such national laws, see M. Domke, *The Law and Practice of Commercial Arbitration* (Chicago, 1968), p. 42, n. 31-33.

to these questions are referred to in sections (c) to (f) below.

(c) *Number and appointment of arbitrators*

Number of arbitrators

54. All international arbitration instruments which deal with the matter leave the question of the number of arbitrators to the parties, in the first instance, although a certain limitation on the number of arbitrators that might be appointed by agreement between the parties is contained in the CE Uniform Law. Article 5 (2) of the Uniform Law requires that "if the arbitration agreement provides for an even number of arbitrators, an additional arbitrator shall be appointed".

55. However, these instruments also contain provisions prescribing the number of arbitrators to be appointed in cases where the parties have not agreed on the number.

56. The usual provision calls for an uneven number of arbitrators, where the parties do not agree on the number. The European rules in article 4, the CE Uniform Law in article 5 (3), the OAS Draft Uniform Law in article 7 and the IBRD Convention in article 37 (2) (b) provide for an arbitral tribunal consisting of three members.

57. The European rules and the OAS Draft Uniform Law specify that of the three arbitrators one is to be appointed by the two other arbitrators as presiding arbitrator. A similar provision is contained in article 9 of the CE Uniform Law. The IBRD Convention in article 37 (2) (b) provides for the third arbitrator, the president of the tribunal, to be appointed by agreement of the parties.

58. According to the UNIDROIT Draft in article 7, each party shall appoint one arbitrator, and when there is an even number of arbitrators,¹¹ they "shall appoint another arbitrator who shall, as of right, be president of the arbitral tribunal".

59. Article IV (4) of the European Convention provides for the appointment of a "sole arbitrator, presiding arbitrator, umpire, or referee". These terms are not defined in the Convention nor in the European rules nor in any other international instrument on arbitration. It is of interest to note, however, that, in the course of the preparation of the European Convention, a suggestion¹² was made to the effect that the expressions "presiding arbitrator", "umpire" and "referee" be defined as follows: the "presiding arbitrator" is "an arbitrator who forms with the other arbitrators an odd-numbered collegium over which he presides"; an "umpire" is "an arbitrator who gives a ruling as sole arbitrator where the two arbitrators appointed by the parties disagree on the merits of the dispute"; the "referee" is "an arbitrator who gives a casting vote between the other two arbitrators appointed, although he is bound to agree with one of the opinions expressed by the arbitrators who disagree on the merits of the dispute".

¹¹ It may happen that an arbitration involves more than two parties.

¹² United Nations document E/ECE/424 — E/ECE/TRADE/47, para. 7.

Method of appointment

60. The method of appointment of arbitrators under all instruments is left in the first instance to the parties to determine.

61. The parties may, under certain instruments, either make the appointment themselves or, alternatively, establish another method for the appointment. The European Convention in article IV (1) (i), for example, provides that where parties submit their disputes to an *ad hoc* arbitral procedure they shall be free "to appoint arbitrators or to establish means for their appointment". Under article 6 of the CE Uniform Law they might "entrust the appointment to a third person". A similar provision is contained in article 6 of the OAS Draft Uniform Law.

62. All instruments also include provision for the appointment of an arbitrator by an "appointing authority" in a case where the appointment of an arbitrator might not otherwise be possible; where for instance, a party having agreed to appoint an arbitrator fails to make the appointment or the arbitrators appointed by the parties fail to appoint the third arbitrator. The "appointing authorities" are also entrusted with the function of naming substitute arbitrators, should that become necessary and should the appointment of the substitute arbitrator not otherwise be effected. The "appointing authorities" under the instruments include the following: (a) the president of the competent Chamber of Commerce of the country of the defaulting party's habitual place of residence or seat or, where a sole arbitrator or the third arbitrator should be appointed, of the country of the place of arbitration or of the respondent's habitual place of residence or seat or, in some cases, the Special Committee¹³ composed of three members elected by the Chambers of Commerce of the States parties to the European Convention (article IV.3 of the European Convention); (b) the judicial authority (article 8 of the CE Uniform Law, articles 7 and 9 of the UNIDROIT Draft); (c) the Special Committee of ECAFE, composed of seven persons selected by the Executive Secretary of ECAFE from among all the representatives on ECAFE or the authority selected by the Special Committee (article II.5 of the ECAFE rules); (d) the judge of the place of performance of the contract (article 11 of the OAS Draft Uniform Law).

Foreigners as arbitrators

63. While a prohibition against the appointment of foreigners as arbitrators is not contained in any of the instruments examined, such appointments are expressly made permissible in some instruments to resolve uncertainties that arise from the fact that some national laws provide that foreigners may not act as arbitrators. The European Convention in article III the OAS Draft Uniform Law in article 8, the OAS Draft Convention in article 2 and the ECAFE rules in article II (2) provide expressly that foreigners may act as arbitrators.

¹³ United Nations document ECE/TRADE/194, dated 18 September 1967, states, at page 3, that since the first organizational meeting of the Special Committee on 18 October 1965, no party had recourse to the Special Committee.

64. Article 39 of the IBCD Convention requires that, unless stipulated otherwise by the parties, the majority of the arbitrators "shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute".

(d) *The place of arbitration*

65. The selection of a place of arbitration is generally a matter for agreement between the parties, under the majority of national laws as well as under international instruments.

66. The selection of a place of arbitration, however, is often a considerably difficult matter in practice. An obvious reason for this, of course, is that each party quite understandably has strong preference for arbitration in his own country. Accordingly, arbitration clauses in standard forms of contract providing for arbitration in the country of one party, usually the economically stronger, may be found to be unacceptable.¹⁴ Moreover, even where a party may be prepared to agree to arbitration outside his own country, arbitration in a third country may be strongly preferred by him if it offers better opportunity for the enforcement of the award.

67. Of the international arbitral instruments reviewed, the majority acknowledge the right of parties to determine the place of arbitration, either when concluding their arbitration agreement or at a later stage. No restriction on the place which may be selected is generally imposed.

68. A degree of limitation on the choice of parties, however, is to be found under the OAS Draft Uniform Law. Article 13 of the Uniform Law provides that if the arbitration agreement does not provide for the location of the Arbitration Tribunal, the parties may subsequently decide that the tribunal should be established (a) in the State in which the parties have a common domicile, (b) at the place where the contract was entered into or performed or where the events at issue took place, or (c) at the place "where the thing is located that is the object of the difference", provided the transfer of jurisdiction is permissible under the law of the place of performance of the contract.

69. The European rules in article 14, the CE Uniform Law in article 15.1, the OAS Draft Uniform Law in article 13 and the UNIDROIT Draft in article 15 require that the place of arbitration be determined by arbitrators, if the parties are unable to do so.

70. Article IV.2 of the ECAFE rules entrusts such a function, where the parties cannot agree, to a Special Committee. The rules require that the Special Committee should in reaching its decision take into consideration the following: (a) the convenience of the parties; (b) the location of the goods and relevant documents; (c) the availability of witnesses, surveys and of pre-investigation reports; (d) the recognition and enforcement of the

arbitration agreement and the award; and (e) the advantages, if any, of the arbitration being held in the country of the respondent.

71. A different provision is contained in the Neuchâtel rules. Article 1 of the rules reads as follows: "If the parties have expressly chosen the law applicable to the arbitral agreement, without settling the seat of the arbitral tribunal, they shall be deemed tacitly to have agreed that the tribunal shall sit in the territory of the country the law of which has been chosen by them."

(e) *Rules of procedure*

72. National laws generally require that the rules of procedure to be followed by an arbitral tribunal should be determined by the laws of the country in which the tribunal has its seat. However, priority is accorded, in several countries, to the rules of procedure agreed upon between the parties.¹⁵

73. The majority of international instruments also accord priority to the rules of procedure agreed upon by the parties. The position under international instruments may be summarized as follows:

(a) Where parties submit a dispute to an institutional arbitral tribunal, the rules of procedure of that tribunal will apply (European Convention in article IV.1 (a), Comecon GCD in paragraph 91 and IBCD Convention in article 44);

(b) Where parties agree to an already established set of rules of procedure, such rules will apply (CE Uniform Law in article 2.2);

(c) Where parties may establish their own rules of procedure, such rules will apply [European Convention in article IV.1 (b), CE Uniform Law in article 15.1, OAS Draft Uniform Law in article 15, the UNIDROIT Draft in article 15]. Article 9 of the Neuchâtel rules, which contains a similar provision but with certain differences, reads thus: "The law of the place of the seat of the arbitral tribunal shall determine whether the procedure to be followed by the arbitrators may be freely established by the parties, and whether, failing agreement on this subject between the contracting parties, it may be settled by the arbitrators or should be replaced by the provisions applicable to procedure before the ordinary courts.";

(d) The arbitral procedure shall be governed by the will of the parties and also by the law of the country in whose territory the arbitration takes place (article 2 of the Geneva Protocol);

(e) The arbitrators and not the parties shall be entitled to conduct the arbitration in such manner as they deem fit (the European rules in article 22, the ECAFE rules in article VI.1 and the Copenhagen rules in Rule 11).

(f) *The applicable law*

74. A number of instruments provide that the question of the law applicable to the substance of a dispute

¹⁴ For proposals as to how the choice of the place of arbitration may be made more satisfactory and useful to countries outside the Western sphere, see the six papers on *Venue of Arbitration in International Commercial Disputes*, submitted to the International Seminar on Commercial Arbitration, New Delhi, 18-19 March 1968, published by the Indian Council of Arbitration, pp. 169-224.

¹⁵ See, for example, the German Code of Civil Procedure, § 1034; the Italian Civil Code, Art. 816; the Luxembourg Civil Code, Art. 1009; the Civil Code of Norway, Art. 459; the Arbitration Act of Ghana (1961), section 15 (1) and (2).

is a matter for determination by the parties. They also provide, however, for the possibility that the parties may not reach agreement on the matter. The European Convention in article VII, the European rules in article 38, the ECAFE rules in article VII.4 (a), the IBRD Convention in article 42 (1) and the Neuchâtel rules in articles 1 and 2 are examples of such instruments.

75. In practice, it is seldom that the applicable law is specified in an arbitration agreement. This, perhaps, is due to the fact that the parties are unaware of the provisions of foreign laws or believe that technical questions are likely to be involved in the choice of a particular law and that, therefore, such a choice should rather be left to the arbitrators.

76. One example of what would appear to be only a partial solution to the problem is article VII.4 (a) of the ECAFE rules. The article states that in the absence of an indication by the parties as to the applicable law, the arbitrators are bound to apply the law "they consider applicable in accordance with the rules of conflict of laws". The question as to which particular country's (conflict-of-laws) rules are to apply is unresolved.

77. The position seems similar under article VII of the European Convention and under article 38 of the European rules, which require, in the absence of agreement between the parties that "the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable".

78. A partial solution of this kind does not appear to provide the arbitrators with sufficient guidance and leaves parties uncertain as to how they might test the merits of their claims.

79. On the other hand, the provisions of the OAS Draft Uniform Law, the IBRD Convention and the Neuchâtel rules seem to be complete in this respect. The OAS Draft Uniform Law, in article 3, provides that the "laws of the country in which the contractual obligations at issue are being carried out, or have been carried out" are to apply. The IBRD Convention provides in article 42 (1) that "the law of the Contracting State¹⁶ party to the dispute (including its rules on the conflict of laws)" applies. Article 11 of the Neuchâtel rules provides that "the rules of choice of law in force in the state of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference".

80. Some of the instruments, in addition to providing for the law applicable to the substance of a dispute, stipulate also which law should apply to certain other specific matters such as the following:

(a) The capacity of the parties to submit a dispute to arbitration (the Neuchâtel rules in article 4);

(b) The validity of the arbitration agreement (the UN Convention in article V.1 (a), the European Convention in article VI.2, the Neuchâtel rules in article 5, the OAS Draft Uniform Law in article 3);

(c) The form of the arbitration agreement and the

appointment of the arbitrators (Neuchâtel rules in article 7).

81. The European Convention and rules, the ECAFE rules, the OAS Draft Uniform Law and the CE Uniform Law contain provisions on the question whether arbitrators may act as *amiables compositeurs* and determine issues *ex aequo et bono* and not on the basis of rules of law.¹⁷

82. The provisions of article VII.2 of the European Convention, of article 39 of the European rules and of article VII.4 (b) of the ECAFE rules are similar. They require that "the arbitrators shall act as *amiables compositeurs* if the parties so decide and if they may do so under the law applicable to the arbitration".

83. Article 16 of the OAS Draft Uniform Law states that "the arbitrators shall decide the controversy as *amiables compositeurs* unless the parties have agreed upon another basis for the decision".

84. Article 21 of the CE Uniform Law requires that "except where otherwise stipulated, arbitrators shall make their awards in accordance with the rules of law".¹⁸

85. Among international arbitration instruments, therefore, there would seem to be a fundamental uniformity of approach in the sense that they clearly acknowledge the competence of parties to determine what law is to be applied by the arbitrators to the substance of a dispute.

C. ARBITRATION PROCEEDINGS

1. Rules applicable to arbitral procedure

86. The provisions contained in international arbitration instruments on the question of how the rules of procedure to be applied to an arbitration proceeding are to be determined have been referred to in section B (2) (e) above. The present chapter refers to the provisions of international arbitration instruments in so far as they relate to certain other aspects of the arbitration proceeding.

(a) Examples of mandatory rules of procedure

87. The observance of certain basic procedural provisions is made mandatory under a number of instruments, to ensure that parties obtain a fair hearing.

88. The European Rules, for instance, in article 22 require that "the arbitrators shall in every case give the parties a fair hearing on the basis of absolute equality". The Rules do not stipulate, however, what consequences are entailed by a non-observance of such a requirement.

89. Other examples are to be found in articles dealing with the grounds for the annulment of awards or the conditions for their recognition and enforcement. Article IX.1 (b) of the European Convention states that an

¹⁷ J. Robert, *Arbitrage Civil et Commercial, Droit Interne et Droit International Privé*, 4th ed. (Paris, 1967), p. 50.

¹⁸ The principle of observance of the rules of law instead of the requirements of equity has been also elsewhere strongly advocated. See F. A. Mann, *Lex Facit Arbitrum*, in *International Arbitration, Liber Amicorum for Martin Domke* (Martinus Nijhoff, The Hague 1967) p. 157; J. Robert, *De la Place de la loi dans l'Arbitrage*, *ibid.*, p. 226.

¹⁶ The IBRD Convention applies to a dispute between a State party to the Convention and a national of another State party to the Convention.

award may be set aside if, among other grounds, "the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case". In terms of article V.1 (b) of the UN Convention, the enforcement of an award might be refused for the same reason.

90. Similarly, in terms of article 2 (b) of the CE Protocol, the recognition and enforcement of an award may be refused if "the party against whom the award is invoked did not appear before the arbitral tribunal, having not been given notice of the arbitral proceedings in due time to enable him to defend the proceedings". Article 25 (g) of the CE Uniform Law allows the annulment of an award on the following conditions: "if the parties have not been given an opportunity of substantiating their claims and presenting their case, or if there has been disregard of any other obligatory rule of the arbitral procedure, in so far as such disregard has had an influence on the arbitral award". Article 29 (4) of the UNIDROIT Draft is similar.

91. Recognition of an arbitral award may be denied under article III.5 (c) of the Montevideo Agreement if the party against whom the award was pronounced had not been "legally summoned, or represented or declared in default, in conformity with the law of the country in which the trial was held".

92. The enforcement of an award might be refused under article 423.2 of the Bustamante Code if the parties had not been "summoned for the trial either personally or through their legal representative".

93. The provisions of article 2 of the Geneva Convention read as follows: "recognition and enforcement of the award shall be refused if the court is satisfied:... (b) that the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that being under a legal incapacity, he was not properly represented".

94. A matter for consideration, however, is whether an international instrument should not also, when setting out a mandatory rule of procedure, stipulate in every case what specific consequences would be entailed if the mandatory rule was not observed.

(b) *Participation in proceedings*

95. It is a basic requirement, in several of the instruments reviewed, that the parties should receive adequate notice of a proposed arbitration proceeding and be granted adequate opportunity to present their cases.

Failure to participate in proceedings

96. Aside from the requirement that parties should receive adequate notice of a proposed arbitration proceeding and be granted adequate opportunity to present their cases, a number of instruments also provide for the situation in which a party may fail to appear or, having appeared, may fail to present his case.

97. Article 31 of the European Rules provides, for example, that "should either party fail to appear at a hearing properly convened without showing sufficient cause, the arbitrators shall be entitled to proceed with the arbitration in its absence".

98. Article 17 of the CE Uniform Law is similar: "if without legitimate cause a party properly summoned does not appear or does not present his case within the period fixed, the arbitral tribunal may, unless the other party requests an adjournment, investigate the matter in dispute and make an award".

99. The provisions of article 17 of the UNIDROIT Draft and of article 45 (2) of the IBRD Convention are to the same effect.

100. The IBRD Convention also contains the additional requirement in article 45 (2) that "before rendering an award, the Tribunal shall notify, and grant a period of grace to the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so"; and the requirement in article 45 (1) that the "failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions".¹⁹

Representation of parties

101. It is not obligatory, under any of the instruments examined, that parties should appear in person before an arbitration tribunal. Some instruments, however, contain express provisions on the matter.

102. For example, article 30 of the European Rules provides that "either party shall be entitled to appear in the arbitration by a duly accredited agent". Article 16.4 of the CE Uniform Law makes representation by "an advocate or by a duly accredited representative" permissible.

103. The language in article VI.8 of the ECAFE Rules and in article 17 of the UNIDROIT Draft is very broad. Parties may be represented "by persons of their choice" or "by others".

104. It would seem, therefore, that all instruments agree in principle that

(a) Parties do not need to appear in person before an arbitral tribunal and may designate a representative to appear for them, and

(b) The default of a party to appear at a hearing or to present his case does not prevent the arbitral tribunal from proceeding with the arbitration and rendering an award.

2. *Rules applicable to the arbitrators*

(a) *Resignation and inability of arbitrators to perform their functions*

105. The satisfactory progress of an arbitration is dependent obviously on the willingness and ability of the arbitrators to continue to act as arbitrators throughout the proceedings. The possibility, however, that an arbitrator might, in the course of an arbitration, resign or become incapable of acting cannot be excluded.

¹⁹ It may be observed, in this connexion, that article 25 of the draft adopted in 1958 by the International Law Commission concerning "Model Rules of Arbitral Procedure" provides that after the expiry of a period of grace granted to the party failing to appear, the arbitral tribunal "may only decide in favour of the submissions of the party appearing, if satisfied that they are well-founded in fact and in law". The Model Rules deal with the settlement of disputes between States.

106. The majority of instruments provide for such an eventuality and prescribe the method by which a substitute arbitrator might be appointed should an arbitrator resign, become incapable of continuing to act, or die in the course of an arbitration. Among the instruments which do so are the European Convention in article IV.2, the European Rules in articles 6-12, the CE Uniform Law in articles 10.1 and 13.3, the ECAFE Rules in articles III.3 and 4, the OAS Draft Uniform Law in article 10, the IBRD Convention in article 56 (1), the UNIDROIT Draft in article 10 and the Copenhagen Rules in rule 7.

107. Some of these instruments also contain certain other rules which should be mentioned. Article 14 of the UNIDROIT Draft states that "if an arbitrator, having accepted his office, shall unduly delay to fulfil it, the authority settled by the agreement of the parties or, in default of such agreement, the court may, at the request of one of the parties, remove such arbitrator".

108. Article 13.3 of the CE Uniform Law provides that should an arbitrator resign voluntarily or if the challenge of an arbitrator is upheld by judicial authority the arbitration agreement shall, in cases where the arbitrator has been named in the arbitration agreement, terminate *ipso jure*. Article 10.1 of the Uniform Law provides also for *ipso jure* termination of the agreement "if an arbitrator dies or cannot for a reason of law or of fact perform his office, or if he refuses to accept it or does not carry it out, or if his office is terminated by mutual agreement of the parties". Whether it is desirable that an arbitration agreement should terminate in such circumstances seems open to doubt. The principal purpose of an arbitration agreement would appear to be the expeditious settlement of a dispute, the designation of an arbitrator being one of the many steps involved in the process of arbitration.

109. The question whether an arbitration proceeding should take place *de novo* upon the appointment of a substitute arbitrator is dealt with only in the ECE Rules. Article 13 requires that "after the hearing has commenced, it shall be the duty of the arbitrators at the request of the substitute to recommence such hearing *ab initio*".

(b) *Challenging of the arbitrators*

110. It often happens that a party is reluctant to refer a dispute to an arbitration tribunal because of the belief that the arbitrator appointed by the other party might act as an advocate of the interests of the party by whom he was appointed rather than as an independent judge. A party may also be concerned about the impartiality of the third arbitrator should he believe that the election of the third arbitrator was influenced by the other party. Accordingly, a number of international instruments contain provisions permitting the challenging of arbitrators. There are, however, differences between these instruments with respect to such matters as (a) the grounds upon which challenges may be made, (b) who may determine the validity of a challenge and (c) when challenges may be made.

Grounds for challenge

111. Article 6 of the European Rules and, with minor

differences in language, article III (1) of the ECAFE Rules permit the challenge of an arbitrator if "any circumstance exists capable of casting justifiable doubts as to his impartiality or independence".

112. Arbitrators may be challenged under article 12 of the CE Uniform Law "on the same grounds as judges" but "a party may not challenge an arbitrator appointed by him except on a ground of which the party becomes aware after the appointment".

113. A differentiation is made in article 12 of the OAS Draft Uniform Law between arbitrators appointed from panels of the Inter-American Arbitration Committee and those appointed "by the litigants themselves or by a natural or a juridical person". The former may be challenged "provided that the grounds alleged are among those that, according to the local law, justify the challenge of judges". The latter may be challenged on the grounds listed in article 9 of the Uniform Law, such grounds being similar to those on which judges usually may be challenged.

Who may determine validity of challenge

114. Article 6 of the European Rules and article 13 of the UNIDROIT Draft provide that the validity of a challenge shall be a matter for the arbitral tribunal to determine.

115. The provisions of the IBRD Convention are somewhat different. Article 58 of the Convention requires that the decision on any proposal to disqualify an arbitrator be taken by the other members of the tribunal. However, in cases where the other members of the tribunal are equally divided, the decision is to be made by the Chairman of the Administrative Council of the International Centre for Settlement of Investment Disputes established under the Convention. (In terms of article 5 of the Convention, the President of the Bank shall be *ex officio* Chairman of the Administrative Council.) The decision is also to be made by the Chairman of the Administrative Council of the Centre in cases of proposals to disqualify a sole arbitrator or a majority of arbitrators.²⁰

116. The ECAFE Rules in article III (1) and (2) state that challenges shall be passed on in the first instance by the arbitrator concerned, and that should the challenge be rejected by the arbitrator an appeal may be made to the ECAFE Centre for Commercial Arbitration, which shall for this purpose utilize the Special Committee (established under its rules) to determine whether or not the challenge is justified. The decision of the Special Committee is final.

117. A quite different procedure is embodied in article 13 of the CE Uniform Law, which authorizes "the judicial authority" to decide on the challenge.

When challenges may be made

118. The UNIDROIT Draft and the CE Uniform Law are the only instruments containing provisions imposing a time limitation on challenges, obviously with a view to preventing unjustifiable delays.

²⁰ It may be observed in this connexion that the Arbitration Rules of the International Centre for Settlement of Investment Disputes, prepared pursuant to the IBRD Convention, require

119. The UNIDROIT Draft in article 13 requires "that a challenge must be addressed by a party to the arbitral tribunal before the award is made".

120. The CE Uniform Law in article 13 (1) and (2) requires that a challenge should be made "as soon as the challenger becomes aware of the ground of challenge". If within a period of ten days the arbitrator challenged has not resigned "the challenger shall, on pain of being barred, bring the matter before the judicial authority within a period of ten days".

3. Jurisdiction

(a) Jurisdiction of the arbitration tribunal

121. Questions as to the jurisdiction of an arbitration tribunal over a particular dispute are usually based either (a) on the contention that the arbitration agreement is invalid, or (b) on the contention that, although the agreement is valid, the particular dispute is not within the jurisdiction of the tribunal.

122. The principal procedural issues which arise in that connexion appear to be, firstly, when should a plea to the effect that the arbitration tribunal is without jurisdiction be made; and secondly, who should determine the validity of such a plea.

When pleas as to jurisdiction of the arbitration tribunal should be made

123. The question of the appropriate time for pleas relating to jurisdiction is dealt with only in the European Convention and the European Rules.

124. The European Convention in article V.1 requires that pleas as to jurisdiction, based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed, should be made during the arbitration proceedings, not later than the delivery, by the party making the plea, of his statement of claim or defence relating to the substance of the dispute. It is also required that pleas as to jurisdiction, based on the fact that an arbitrator has exceeded his terms of reference, shall be raised during the arbitration proceedings as soon as the question on which the arbitrator is alleged to have no jurisdiction is raised during the arbitral proceedings.

125. The European Rules in article 17 provide that a party which intends to raise a plea as to jurisdiction based on the fact that the arbitration agreement was non-existent or null and void or had lapsed "shall do so not later than the delivery of its statement of claim or defence relating to the substance of the dispute". As to pleas based on the fact that an arbitrator has exceeded his terms of reference, the provisions of article 17 of the European Rules are identical to those of article V.1 of the European Convention.

Who may determine the validity of pleas as to jurisdiction

126. All instruments which contain provisions on the matter authorize the arbitration tribunal to determine questions which may arise as to their jurisdiction (i.e.,

in rule 9 (4) that a proposal concerning the disqualification of any arbitrator is to be considered and voted on in the absence of the arbitrator concerned.

the arbitrators have the so-called *Kompetenz-Kompetenz*).

127. The European Convention in article V.3 and the European Rules in article 18 provide that "the arbitrator(s) whose jurisdiction is called in question shall be entitled... to rule on his (their) own jurisdiction". However, the competence of the arbitrators to do so is made subject to the European Rules "to any control provided for under the law applicable to the arbitral proceedings". The general reference in the European Rules to the "law applicable to the arbitral proceedings" may give rise to some uncertainty, as the European Rules do not, in article 18 or in any other provision, indicate which law is applicable to the arbitral proceedings.

128. The provisions of the CE Uniform Law, the ECAFE Rules and the IBRD Convention are similar. The CE Uniform Law in article 18.1 states that "the arbitral tribunal may rule in respect of its own jurisdiction". The ECAFE Rules in article VI.3 state that "the arbitrator/s shall be entitled to... determine his/their own competence and jurisdiction". The IBRD Convention in article 41 provides that "the Tribunal shall be the judge of its own competence".

129. A plea as to the jurisdiction of an arbitration tribunal, if such a plea is not based on the contention that the arbitration agreement is invalid, does not imply that the party making the plea denies either the existence of a valid arbitration agreement or the competence of the tribunal to rule on disputes referred to in the arbitration agreement. Accordingly, the generally accepted solution, in terms of which the arbitration tribunal and not the courts would have the authority to decide on such pleas, seems to be in accordance with the agreement of the parties that disputes falling within the arbitration agreement should be decided upon by the arbitration tribunal.

130. It is to be noted, however, that under the majority of international instruments the fact that an arbitral tribunal has exceeded its jurisdiction is ground for refusal to recognize and enforce an award or ground for its annulment. Provisions permitting a refusal to recognize and enforce an award, in such circumstances, are contained in the OAS Draft Uniform Law in article 19.III, the Bustamante Code in article 423.1, the Geneva Convention in article 2 (c), the UN Convention in Article V (c), the Neuchâtel Rules in article 3 (c) and the European Convention in article IX.1 (c). Provisions permitting annulment are contained in the CE Uniform Law in article 25.2 (d), the IBRD Convention in article 52 (1) (b) and the UNIDROIT Draft in article 29 (3).

(b) Jurisdiction over questions relating to the validity of the arbitration agreement

131. There are substantial differences between the instruments examined on the question of the authority responsible for deciding issues relating to the validity of an arbitration agreement. Under some instruments, the arbitration tribunal is authorized to do so; under other instruments such issues are made subject to judicial decision.

132. The European Convention provides in article VI.2 that "in taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement. . .".

133. The provisions of the European Rules are different in that they vest the necessary authority in the arbitration tribunal. Article 18 of the rules states that "the arbitrators. . . shall be entitled. . . to decide upon the existence or the validity of the arbitration agreement, or of the contract of which the agreement forms part".

134. In this respect, the ECAFE Rules are similar to the European Rules. Article VI.3 states that "the arbitrator/s shall be entitled to decide on the existence and validity of the arbitration agreement". The CE Uniform Law also provides in article 18.1 that "the arbitral tribunal may. . . examine the validity of the arbitration agreement".

135. In contrast, the OAS Draft Uniform Law provides in article 5 that "any question between the parties to the agreement with reference to the existence of a valid contractual obligation to submit a difference to arbitral decision may be settled by the judge of the place of performance of the contract at the request of one of the parties, before proceeding with the arbitration".

136. Under article 13 of the Neuchâtel Rules a plea as to the validity of an arbitration agreement is to be made before the courts. The judge, however, "may also refer the parties to the arbitral tribunal, subject to any right of appeal to the courts laid down by the law of the seat of the arbitral tribunal".

137. In connexion with the question of the validity of an arbitration agreement, it should be noted that it often happens that a party pleading the invalidity of a contract also contends that as a consequence of the invalidity of the contract the arbitration clause it contains should also be considered void. An argument advanced to the contrary is that the question of the validity of the arbitration clause should be regarded as independent of and separable from the question of the validity of the contract. The principle of separability has been recently recognized by the highest courts of France²¹ and the United States.²²

138. Of the international arbitration agreements examined, however, only the CE Uniform Law deals with this matter. In terms of article 18.2 of the Uniform Law, which reflects the principle of separability, "a ruling that the contract is invalid shall not entail *ipso jure* the nullity of the arbitration agreement contained in it".

139. The jurisdiction of the courts to decide on the

validity of an arbitration agreement, after the conclusion of the arbitration proceedings, is also recognized in most of the international arbitration agreements, as under these agreements decisions of tribunals on the validity of the arbitration agreement can be reviewed when recognition or enforcement of the award is sought. For instance, the recognition and enforcement of an award may be refused "where the arbitration clause is invalid or vacated" (the OAS Draft Uniform Law in article 19.1), in cases where "the award has [not] been made in pursuance of a submission to arbitration which is valid under the law applicable thereto" [the Geneva Convention in article 1 (a)], or if "the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made" [UN Convention in article V (a)]. The award can be annulled "if there is no valid arbitration agreement" [the CE Uniform Law in article 25 (c); the UNIDROIT Draft in article 29 (1)].

(c) Jurisdiction of courts

Jurisdiction of courts with respect to disputes subject to arbitration agreements

140. A fundamental question is whether a court may entertain an action with respect to a dispute which is subject to an arbitration agreement between the parties.

141. National laws in some instances give courts a discretion in such cases, either to proceed with the action or to stay court proceedings pending the arbitration award.²³

142. The majority of international instruments require that a court should, in such circumstances, declare that, in view of the existence of an arbitration agreement, it has no jurisdiction to entertain the action. The Geneva Protocol states, for example, that a court in such a case "shall refer the parties on the application of either of them to the decision of the arbitrators". A similar provision is contained in article II.3 of the UN Convention.

143. Article 13 of the Neuchâtel Rules states that "every court before which one party begins judicial proceedings in violation of a submission to arbitrate or of an arbitral clause shall disavow itself of the matter at the request of the other party", and article 4.1 of the CE Uniform Law requires that "the judicial authority. . . shall, at the request of either party, declare that it has no jurisdiction".

144. The provisions of the IBCD Convention are formulated somewhat differently. In terms of article 26, "consent of the parties to arbitration under this Convention shall, unless otherwise stated be deemed consent to such arbitration to the exclusion of any other remedy".

145. The provisions of article 90 (i) of the Comecon GCD state explicitly that "the jurisdiction of general courts is excluded".

²¹ Cour de Cassation, 7 May 1963, *Etablissements Gosset*; *Dalloz* 1963, 545, note Robert; *Jurisclasseur Périodique* 1963 II 13405, note Goldman; *Revue Critique de Droit International* (1963), vol. 53, p. 615, note Motulsky; *Journal du Droit International* (1968), vol. 90, p. 32, note Bredin.

²² Supreme Court of the United States, 12 June 1967, *Prima Paint Corp. vs. Flood and Conklin Manufacturing Co.*, 388 U.S. 395. See also E. Mezger, "Vers la consécration aux Etats Unis de l'Autonomie de la Clause Compromissaire dans l'Arbitrage International" in *Revue Critique de Droit International Privé* (1968), vol. 57, p. 25.

²³ See, in this connexion, A. Nussbaum, "Treaties on Commercial Arbitration—A Test of International Private Law Legislation", *Harvard Law Review* (1942), vol. 56, p. 242, and Russell on the Law of Arbitration, 17th ed. (London, 1963), p. 77.

146. The period within which a plea as to the jurisdiction of a court should be made is dealt with in the OAS Draft Uniform Law. Article 4 provides that "the judge... shall, if he considers that the matter before him should be submitted to arbitration under the said agreement, order the suspension of proceedings until arbitration has taken place in conformity with the agreement, when requested to do so by the other party within the period allowed by the law of the forum to plead lack of jurisdiction".

147. The relevant provisions of the European Convention are contained in article VI.1 and 4 and are to the following effect: a plea as to the jurisdiction of the court, made on the basis that an arbitration agreement exists, shall be presented by the respondent before or at the same time as the presentation of his substantial defence, depending upon whether the law of the court seized regards this plea as one of procedure or of substance. However, in a case where arbitration proceedings have been initiated before any resort to a court, the ruling of the court as to the jurisdiction of the arbitration tribunal shall be stayed until the award is made, unless there is good and substantial reason to the contrary.

148. As is apparent, therefore, all the instruments referred to seem to contain some provision to the effect that courts should have no authority to deal with a matter which, under a valid arbitration agreement, should be submitted to arbitration. Accordingly, on this question, there seems to be no basic difference in concept between the instruments examined.

Matters referred to courts for decision

149. In several instruments it is provided that certain matters (aside from the jurisdiction of the courts with respect to the recognition and enforcement of arbitration awards which is discussed in section E below) should be referred to courts for decision.

150. As has been noted in paragraph 62 and paragraphs 131, *et seq.*, above, there are provisions to this effect, in certain instruments, in connexion with such matters as the appointment of arbitrators and the question of the validity of an arbitration agreement.

151. A reference, to the courts for the fixing of a date for the award is required under article 19.2 of the CE Uniform Law "if the arbitral tribunal delays in making the award and if a period of six months has elapsed from the date on which all the arbitrators accepted office".

152. Article 19 of the UNIDROIT Draft provides that "if the arbitral tribunal cannot perform an act that it deems necessary, such act may be accomplished by the competent authority at the request of one of the parties to the arbitration agreement".

153. In certain instruments, applications for interim measures are matters for judicial determination. Under article VI.4 of the European Convention, for instance, "a request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court". A similar principle is expressed in article

4.2 of the CE Uniform Law and in article 5 of the UNIDROIT Draft.²⁴

154. Other instruments, however, such as the European Rules in article 27, the ECAFE Rules in article VI.6, the IBRD Convention in article 47, authorize arbitration tribunals to take interim measures of protection in respect of the subject-matter of the dispute.

D. THE AWARD

155. There are certain formal requirements with which an award must comply if it is to be recognized and enforced. Such requirements may be set out in the arbitration agreement itself, in the applicable international convention or, in the absence of an applicable international convention, in the laws of the country where the award was rendered or its recognition and enforcement sought.

156. The observance of such requirements are not always simple. It may happen that the pertinent provisions of national laws are unfamiliar to the parties and to the arbitrators, as is very likely to be the case when the award is rendered in a country other than the country in which the arbitration was conducted.²⁵ The very identification of the place where an award was made may also prove difficult when arbitrators reside in different countries and an award prepared by one arbitrator is signed elsewhere by another arbitrator.²⁶

157. Some of the principal formal requirements for awards as prescribed in the international arbitration instruments reviewed are referred to below.

1. *Time-limit for making the award*

(a) *Time-limits prescribed*

158. A number of instruments state explicitly the period within which an award is to be rendered. A number leave it to the parties to determine, though they make provision for cases where the parties do not agree.

159. The European Rules in Article 34, the ECAFE Rules in Article VII.1, the Copenhagen Rules in Rule 15 and the UNIDROIT Draft in Article 21 specify the period within which an award is to be made. They differ, however, with respect to the date from which the period is to be calculated.

160. The provisions of Article 34 of the European Rules and Article VII.1 of the ECAFE Rules are in that connexion similar. They prescribe a period of nine

²⁴ The rules of institutional arbitration tribunals often refer to interim measures to be granted by judicial authorities. E.g., the Rules of the International Chamber of Commerce, article 13 (5): "The parties may, in case of urgency, whether prior to or during the proceedings before the arbitrator, apply to any competent judicial authority for interim measures of protection, without thereby contravening the arbitration clause binding them".

²⁵ It is permissible, for instance, under Article 37 of the European Convention for awards to be so rendered.

²⁶ The only instrument that deals with this question is the Neuchâtel Rules. According to Article 3 of the Rules, the award is considered to be rendered at the place of arbitration and on the date of its signature by the arbitrators, regardless of where the signatures were subscribed.

months to be calculated from the appointment of the presiding arbitrator or the sole arbitrator as the case may be.

161. The Copenhagen Rules in rule 15 require the tribunal to deliver its award within four months from the date of the constitution of the tribunal. The time taken for interlocutory proceedings is excluded in calculating the period.

162. The UNIDROIT Draft in Article 21 stipulates a period of two years, computed from the date on which the arbitration agreement was concluded; and in cases of arbitration agreements relating to future differences, from the date on which the arbitration agreement was invoked.

163. Under Article 19.1 of the CE Uniform Law, the parties may, up to the time of acceptance of office by the first arbitrator, settle the period within which the award is to be made or provide for a method according to which the period is to be settled. If they do not do so and if a period of six months has elapsed from the date on which all the arbitrators have accepted office, the judicial authority may, at the request of one of the parties, decide the matter.

164. Article 17 of the OAS Draft Uniform Law stipulates that "the award shall be made in writing within the period specified by the agreement between the parties, the local law, or the Rules of Procedure of the Inter-American Commercial Arbitration Commission, whichever may apply".

(b) *Extension of time-limits*

165. A number of instruments provide for the possibility that the time-limit prescribed may prove inadequate in certain cases.

166. Article 35 of the European Rules permits the extension of the time-limit by agreement between the parties. The time-limit may also be extended by the arbitrators to the extent that such extension is justified by reason of the replacement of an arbitrator, the necessity of hearing witnesses, the taking of expert opinion or any other valid reason.

167. Article VII.1 of the ECAFE Rules provides for extensions by agreement between the parties or by the arbitrator or the arbitrators "should he/they consider such an extension essential".

168. While the establishment of a time-limit for the making of an award is desirable from the point of view of eliminating unnecessary delays, it is apparent that cases may exist where a fixed time-limit may prove to be inadequate in fact.

169. To permit the extension of a time-limit only by way of agreement between the parties may not be an entirely satisfactory solution. Parties are not likely to agree easily on whether an extension is in fact essential or sufficiently adequate for the arbitrators. Reference of the matter to judicial decision may not also be entirely appropriate, as a court may not wish to determine the matter without a relatively substantial hearing which may be time-consuming. It may be, however, that a solution similar to that contained in the European Rules, in terms of which the parties and within certain limits the ar-

bitrators have authority to extend the time-limit for rendering the award will be satisfactory.

2. *Rendering of the award*

(a) *Majority for award*

170. There are differences in the instruments considered on the question of the majority required for decisions of the arbitrators in cases of tribunals involving three or more arbitrators.

171. A common provision is that a simple majority is required. This is the solution to be found in the European Rules in Article 33, the ECAFE Rules in Article VI.9, the OAS Draft Uniform Law in Article 17, the IBRD Convention in Article 48 (1), the Copenhagen Rules in Rule 14 and the annex to the OECD Draft in paragraph 6 (d).

172. The CE Uniform Law in Article 22.1 and the UNIDROIT Draft in Article 22 are somewhat different. They require an "absolute majority of votes". The CE Uniform Law, however, allows the parties to agree "on another majority".

173. Some instruments deal also with the question of the casting vote of the presiding arbitrator, or of the president of the arbitration tribunal. The CE Uniform Law, for example, in Article 22.2 states that the parties may agree that "when a majority cannot be obtained, the president of the arbitral tribunal shall have a casting vote".

174. The European Rules in Article 33 and the ECAFE Rules in Article VII.3 provide, without however requiring the agreement of the parties for the purpose, that "failing a majority, the presiding arbitrator alone shall make the award".

175. Article 22 of the UNIDROIT Draft deals with the matter as follows: if an absolute majority cannot be obtained, "the president's vote shall prevail. If, however, the president is an arbitrator who has been appointed by one party only, the arbitration agreement shall, so far as that particular dispute is concerned become inoperative. The same rule shall apply if the arbitral tribunal is composed of two arbitrators who fail to agree".

176. The following provisions in Article 22.3 of the CE Uniform Law seem noteworthy: "if the arbitrators are to award a sum of money, and a majority cannot be obtained for any particular sum, the votes for the highest sum shall be counted as votes for the next highest sum until a majority is obtained".

(b) *Awards on the basis of documents alone*

177. Awards made on the basis of documentary evidence alone are authorized under certain instruments. Article 23 of the European Rules provides that, subject to the agreement of the parties, "the arbitrators shall be entitled to render an award on documentary evidence without an oral hearing". The Copenhagen Rules in Rule 12 also authorize the arbitrators to decide a case upon documents only.

178. Some instruments expressly permit arbitrators to render an award on the basis of documentary evidence, should a party not appear at the hearing. It may

be noted, in this connexion, however, that the annex of the OECD Draft in paragraph 7 permits arbitrators to render an award against the defaulting party and does not seem to require that the arbitrators should act on the basis of evidence.²⁷

179. The relevant provisions of the instruments examined concerning the general question of the making of *ex parte* awards have been referred to in paragraphs 96 to 100 above.

180. In a case where a party absents himself from an arbitration proceeding without good reason, it seems reasonable to permit the arbitration proceeding to continue to its conclusion, notwithstanding the party's absence. It would also seem reasonable in such circumstances to permit arbitrators to render an award on the basis of documentary evidence alone, should the arbitrators be of the opinion that it would be unnecessary for them to examine such oral evidence as may have already been adduced or to require the party present to adduce any further oral evidence. However, to permit arbitrators, in a case where a party absents himself without good reason, to render an award in favour of the non-defaulting party solely on the ground that the other party is in default may not be an appropriate procedure from the point of view of promoting the wider use of arbitration.

(c) *Form of award*

181. Article 22.4 of the CE Uniform Law requires that awards be "set down in writing and signed by the arbitrators". If one or more arbitrators are unable or unwilling to sign, the fact shall be recorded in the award. The award, however, shall bear a number of signatures which is at least equal to a majority of the arbitrators.

182. The ECAFE Rules in Article VII.5 also require that awards be made in writing and stipulate that "in the case of an arbitral tribunal, the signature of the majority, or if no majority is obtainable, that of the presiding arbitrator shall suffice, provided the award states the reason for the absence of the signatures of the other arbitrators".

183. Awards under the IBRD Convention [Article 48 (2)] are to be in writing and are to be signed by the members of the tribunal who were in favour of the award.

184. Article 22 of the UNIDROIT Draft requires that "the award shall be reduced to writing and signed by the arbitrators".

3. *Content of the award*

(a) *Interim, interlocutory and partial awards*

185. Some instruments deal with the question of interim, interlocutory, or partial awards. One example is Article 36 of the European Rules, which states that "the arbitrators shall be entitled to make interim, in-

terlocutory or partial awards". The ECAFE Rules contain similar provisions in Article VII.2.

186. Article 23 of the UNIDROIT Draft provides that "the arbitral tribunal may, if it can do so without prejudice to the parties to the arbitration agreement, make a partial award, reserving some disputed questions for a further award".

(b) *Awards on agreed terms*

187. The question whether a settlement, arrived at between the parties to an arbitration proceeding, should be confirmed by the arbitrators in the form of an award is dealt with in some instruments, though not always in the same terms.

188. Article VIII.1 of the ECAFE Rules states that a settlement "shall be recorded by the arbitrators in the form of an arbitral award made on agreed terms".

189. The European Rules in Article 36 authorize the arbitrators, but do not require them, "to make an award on agreed terms".

190. The provisions of Article 31.1 of the CE Uniform Law are rather different. They provide that a "compromise may be recorded in an instrument" (which is not necessarily in the form of an award) "prepared by the arbitral tribunal and signed by the arbitrators as well as by the parties".

191. The fact that, in general, national laws and international arbitration conventions provide only for the enforcement of "awards" is an important reason for requiring that a settlement reached between parties to an arbitration should be confirmed by the arbitral tribunal in the form of an award. It should be noted, however, that Article 9 of the CE Protocol requires that "compromises", recorded as required under the CE Uniform Law (see paragraph 190), "be recognized and enforced". A matter which might be considered in this connexion is whether settlements recorded in a formal manner, but not in the form of awards, might not also be recognized and enforced in the manner in which "compromises" are recognized and enforced under the CE Protocol.

(c) *Reasons for awards*

192. Under the law of certain countries, such as the United Kingdom and the United States, a statement of the reasons on which an arbitration award is based does not seem to be obligatory and appears in practice to be generally omitted.²⁸ In other countries, however, such as France, Hungary, the Netherlands, Portugal and Spain, reasons are generally given; and in some countries it is made compulsory.²⁹

193. As regards the provisions of international instruments, a number of them require that the reasons for an award be stated. Provisions to this effect are found in the CE Uniform Law in Article 22.6, the IBRD Convention in Article 48 (3) and the Copenhagen Rules in Rule 13.

194. The European Convention in Article VIII and the European Rules in Article 40 require reasons, un-

²⁷ It may be observed in this connexion that the Rules of Procedure of the Inter-American Commercial Arbitration Commission provide in Article 28 (in contrast to the provisions of paragraph 7 of the annex of the OECD Draft that an award shall not be made in favour of one party solely on the basis that the other party is in default.

²⁸ I. Szász, *International Civil Procedure* (1967), p. 606.

²⁹ E.g., Article 823 (3) of the Civil Code of Italy; section 1041 (5) of the German Code of Civil Procedure.

less the parties (a) either expressly declare that reasons shall not be given or (b) have assented to an arbitral procedure under which it is not customary to give reasons for awards. If this is not the case, "the parties shall be presumed to have agreed that reasons shall be given for the award".

195. Article 25.2 (i) of the CE Uniform Law and Article 52 (1) (e) of the IBCD Convention provide that an award shall be annulled if the reasons are not stated.

196. Article 29 (i) of the UNIDROIT Draft provides that the award be set aside if the parties have agreed that the award should contain reasons and no reasons are given.

197. The ECAFE Rules and the OAS Draft Uniform Law do not contain any provisions on the matter.

198. A pertinent question is whether the enforcement of an award without reasons is possible in a country whose law requires that reasons be given. In recent decisions, courts in both France and the Federal Republic of Germany³⁰ have recognized the validity of foreign awards not incorporating reasons in cases where the law of the place where the award was rendered did not require that reasons be given and where it was generally known that arbitral tribunals located there usually rendered awards without reasons.

(d) Costs of arbitration

199. A question which though not relevant to the substance of the arbitration process but nevertheless of practical significance is how the costs of the arbitration proceeding should be borne by the parties.

200. The ECAFE Rules in Article VII.7 and the IBCD Convention in Article 61 (2) require that the costs of the arbitration be fixed in the award.

201. The European Rules in Article 43 also require the arbitrators to "determine in every case the costs payable", but do not specify whether this determination should be recorded in the award.

202. Article 43 of the European Rules and Article VII.7 of the ECAFE Rules provide that the costs shall be borne by the unsuccessful party, but permit the arbitrators in their discretion to apportion the costs between the parties.

203. Article 61 (2) of the IBCD Convention states that the arbitration tribunal may decide how and by whom the expenses shall be paid.

204. The question whether the arbitration tribunal has the authority to assess the fees of the legal representatives of the parties, and to decide by which of the parties these fees shall be borne, is not dealt with in any of the instruments considered. It is a matter, therefore, that is often determined in accordance with the *lex fori*. The law of many countries requires that the fees of the legal representatives of both parties be borne by the unsuccessful party; in some countries, on the other hand, each party is required to meet the costs of its own legal representative.

4. Notification of parties, deposit, interpretation, revision and publication of awards

(a) Notification of parties

205. Several international instruments require that the parties should be "notified" of the award. Requirements as to the manner of notification, however, differ.

206. The OAS Draft Uniform Law in Article 17 provides merely that "the parties shall be duly notified of the arbitration award".

207. The ECAFE Rules in Article VII.6 provide that the notification should be effected by communicating authentic copies to the parties. The annex of the OECD Draft in paragraph 7 provides for the transmission of signed counterparts.

208. The European Rules in Article 41 require that the "awards shall be communicated by registered letter".

209. Under the CE Uniform Law in Article 23, the president of the tribunal is required to communicate a copy of the award to each party; and under the UNIDROIT Draft in Article 24, the president of the tribunal is to communicate to each party the operative provisions of the award.

210. The Copenhagen Rules associate the communication of the award with the payment of costs. Rule 17 provides that "the award... shall be delivered upon payment of the costs".

(b) Deposit of awards

211. Provisions requiring the deposit of awards are contained in some instruments. Article 23 (2) of the CE Uniform Law, for example, requires that "the president of the arbitral tribunal shall deposit the original of the award with the registry of the court having jurisdiction" and "shall inform the parties of the deposit". The UNIDROIT Draft provides in Article 24 for the deposit of the award, not in court, but "in the place provided by the arbitration agreement, or if such place is not indicated therein, at some place settled by the arbitral tribunal itself".

212. As taxes or other charges in proportion to the amount of the award are payable under some national laws, the practice of deposit may not be observed as regularly as it might otherwise be. Whether the validity of an award is conditional upon its deposit, in countries where such deposit is made mandatory, seems questionable. In any event, courts do not seem to refuse the enforcement of a foreign award on the ground that the country where it was rendered required deposit and no deposit was made.

(c) Interpretation of award

213. The most appropriate procedure for the interpretation of an award would be for the award to be interpreted by the arbitrators who rendered it. The rendering of an award, however, generally marks the termination of the office of an arbitrator, and accordingly, specific authorization from the parties is necessary if an arbitrator is to be required to take any steps subsequent to the award.

214. The ECAFE Rules in Article VIII.2 specifically authorize the arbitrators to give, if requested by either

³⁰ M. Domke, *The Law and Practice of Commercial Arbitration* (1968), p. 375.

party within a period of thirty days after the making of the award, an authentic interpretation of the award.

215. Article 50 (2) of the IBCD Convention, which also deals with the question, provides that a request by a party for an interpretation should be submitted to the tribunal which rendered the award. However, if that is not possible, a new tribunal is to be constituted for the purpose.

(d) *Revision of awards*

216. The interpretation of an award and the correction of clerical errors, errors in compilation or typographical errors³¹ are to be distinguished from the "revision" of an award. A revision of an award is generally permitted within specified time-limits on the ground of the discovery of facts unknown at the time of the proceedings.

217. The IBCD Convention requires in Article 51 (1) that the new evidence required in this connexion should be "of such a nature as decisively to affect the award".³²

218. The revision of an award by the arbitrators who rendered the award appears to be a very useful procedure which would normally involve considerably less delay than judicial review.

(e) *Publication of awards*

219. The publication of arbitral awards has become a regular practice in a number of countries, including Japan,³³ the Netherlands,³⁴ and the Eastern European States.³⁵

220. The only international instrument, however, which contains a provision on the matter is the IBCD Convention, which states in Article 48 (5) that the Centre for Settlement of Investment Disputes is not to publish an award without the consent of the parties.

221. When evaluating the desirability of the publication of awards, a relevant consideration is the reluctance of parties to have awards relating to their disputes published.

³¹ See Article VIII.3 of the ECAC Rules.

³² It may be observed in this connexion that Article 38 (1) of the draft adopted in 1958 by the International Law Commission concerning "Model Rules of Arbitral Procedure" makes a party's entitlement to request a revision subject to the qualification that the new facts discovered are "of such a nature as to constitute a decisive factor, provided that when the award was rendered that fact was unknown to the tribunal and to the party contesting revision and that such ignorance was not due to the negligence of the party requesting revision".

³³ *Bulletin of the Japan Shipping Exchange* (1967), No. 4, pp. 1, 19.

³⁴ *Arbitrale Rechtspraak*, No. 569, October 1968.

³⁵ D. F. Ramzaitsev, "La Jurisprudence en Matière de Droit International Privé de la Commission Arbitrale Soviétique pour le Commerce Extérieur", *Revue Critique de Droit International Privé* (1958), p. 459; I. Szász, "Arbitration of Foreign Trade Transactions in the Popular Democracies", *American Journal of Comparative Law* (1964), vol. 13, p. 441; Jakubowski, "The Settlement of Foreign Trade Disputes", *International Comparative Law Quarterly* (1962), vol. 11, p. 806; L. Farago, "Decisions of the Hungarian Chamber of Commerce in 'Comecon' Arbitrations", *ibid.* (1964), vol. 14, p. 1124; as to Czechoslovakia, see S. Hanak in *Journal du Droit International* (1966), vol. 93, p. 886; as to Romania, see J. Nestor and O. Capitana, *ibid.* (1968), vol. 95, p. 412; as to Bulgaria, see Al. Kojouharoff, *ibid.* (1967), vol. 94, p. 152.

E. RECOGNITION AND ENFORCEMENT OF AWARDS

222. The establishment of criteria regulating the enforcement of an award, should enforcement become necessary, is fundamental to international commercial arbitration, as it is, indeed, fundamental to arbitration in general. Where an international commercial arbitration award is involved, it is essential also, for its enforcement, that it should be recognized by the competent court of the country in which enforcement is sought.

1. *Law applicable to the recognition and enforcement of awards*

223. The enforcement of arbitration awards is a matter within the jurisdiction of national courts; and being essentially of a procedural nature, enforcement is generally governed by the differing norms of the *lex fori*. It would seem, therefore, that if it was thought desirable to remove all the existing uncertainties on this matter, it would be necessary to bring about an international unification of the rules on all aspects of the recognition and enforcement of international commercial arbitration awards.

224. While the existing international instruments and draft instruments dealing with the recognition and enforcement of awards contain certain unified rules on such matters as the grounds upon which the recognition and enforcement of awards shall, or may, be refused, they do not cover all aspects of the enforcement process. Moreover, on certain specific matters they contain references to the provisions of national law, and such references may give rise to uncertainty where national laws differ. For example, paragraph 3 of the Geneva Protocol provides that awards are to be executed "in accordance with the provisions of its [the Contracting State's] national laws". The Geneva Convention in Article 1 states that arbitral awards "shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon". Provisions to the same effect are contained in article III of the United Nations Convention, in article 7 of the Montevideo Agreement, in article 18 of the OAS Draft Uniform Law, in article 54(3) of the IBCD Convention, in article 3 of the CE Protocol and in article 17 of the Neuchâtel Rules.

2. *Finality of awards*

225. One of the questions that arise when the enforcement of any arbitration award is sought is whether the award is in fact, so far as the arbitration is concerned, of a final nature or still open to further consideration by way of appeal or review. On this aspect for instance article 29.1 of the CE Uniform Law states that "an arbitral award may be enforced only when it can no longer be contested before arbitrators". A similar provision is to be found in article 1 of the CE Protocol.

226. A further question that arises when the enforcement of an international commercial arbitration award is involved is whether the award may be enforced when, under the national law of the country in which it was rendered or under the national law of the country

where its enforcement is sought, it may still be contested in court. Several international instruments contain specific provisions on the finality of the award. The OAS Draft Uniform Law, for example, provides in article 18 that "arbitration awards have the force of a final judgement". The Annex to the OECD Draft uses the expression "final". The Comecon GCD provide in paragraph 91(3) that "the decisions of the arbitral tribunal shall be final and binding on the parties". The Geneva Convention in Article 1 states that "an arbitral award... shall be recognized as binding". Under article V.1(e) of the United Nations Convention, the enforcement of an award may be refused if "the award has not yet become binding on the parties".

227. The enforcement of an award may be refused under article 5 of the Montevideo Agreement if the award does not have "a final character, or the authority of *res judicata*"; under article 19(V) of the OAS Draft Uniform Law "when the award does not settle the dispute in a final and definite manner"; and under article 423.4 of the Bustamante Code unless "it is executory in the State in which it was rendered".

228. The matter is dealt with in some detail in article 1(d) of the Geneva Convention, which provides that it shall be necessary for recognition or enforcement "that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appeal or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending".

229. Article 54(1) of the IBCD Convention requires that the Contracting States "shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that State". Article 42 of the European Rules appears to be similar in purpose. It requires that "the parties undertake to carry out the award without delay and, subject to any legal provisions to the contrary, renounce any right of appeal either before another arbitral institution or before a court of law unless otherwise expressly stipulated".

230. Of the instruments referred to above, the OAS Draft Uniform Law and the IBCD Convention appear to be the only instruments which give the force of a final judgement to an award. The other instruments appear to provide for enforcement only if the award is binding or final under the applicable national law. On this matter, in the course of the United Nations Conference on International Commercial Arbitration, it was observed that while "courts should remain free to refuse the enforcement of a foreign arbitral award if such action should be necessary to safeguard the basic rights of the losing party or if the award would impose obligations clearly incompatible with the public policy of the country of enforcement... the extent of judicial control over recognition and enforcement of arbitral awards must be defined with precision, so as to avoid the possibility that a losing party could invoke without ade-

quate justification a multiplicity of possible grounds for objections in order to frustrate the enforcement of awards rendered against it".³⁶

231. It would seem therefore that it is only through a formula similar to that contained in the OAS Draft Uniform Law and the IBCD Convention, or through a precise definition of the extent of judicial control to be exercised over the recognition and enforcement of arbitral awards, that all uncertainties connected with the requirement that only "final" or "binding" awards may be enforced might be effectively removed.

3. Domestic or foreign character of awards

232. Another question which arises in connexion with the recognition and enforcement of international commercial arbitration awards is whether the award is to be considered a "foreign" or a "domestic" award. The question is important, as international instruments provide only for the enforcement of foreign, and not of domestic awards: the enforcement of domestic awards being governed in every respect by the national law applicable.

233. The United Nations Convention, for example, states in article I(1) that it applies to arbitral awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" and also to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought". It may be noted here that under the law of the Federal Republic of Germany awards rendered in any country under German procedural law are considered to be domestic awards. The place where the award was rendered, therefore, is not under that law the determining factor.³⁷

4. Refusal of recognition and enforcement

234. Though the procedural aspects of the recognition and enforcement of awards are governed by the national law of the country where enforcement is sought, most of the international instruments examined determine the grounds upon which recognition and enforcement of awards shall, or may, be refused.

235. Article 29(2) of the CE Uniform Law, for example, makes denial of recognition and enforcement mandatory "if the award or its enforcement is contrary to *ordre public* or if the dispute was not capable of settlement by arbitration". The exact scope of this provision seems uncertain, as the Uniform Law does not appear to define clearly the kinds of disputes which are capable of settlement by arbitration. Although article 1 of the Uniform Law does state that "any dispute... in respect of which it is permissible to compromise may be the subject of an arbitration agreement", it does not specify which law should govern or which court or other authority should determine the question whether a particular

³⁶ E/CONF.26/2, p. 5. For references to the case law of, and writings in, various countries on this question, see W. J. Habscheid, "Nationale oder supranationale Schiedssprüche?" in *Zeitschrift fuer Zivilprozess* (1957), vol. 70, p. 32.

³⁷ E/CONF.26/SR.6, p. 8. Article 2(1) of the Law of 15 March 1961, *Bundesgesetzblatt* 1961, II, p. 121.

dispute may be the subject of a compromise. A similar, though more precise, provision is contained in article 26 of the UNIDROIT Draft, which states that "a judicial authority shall, of its own accord, refuse leave to issue execution, if the award is contrary to public policy or if the arbitrators have decided some question that was not capable of being submitted to arbitration according to the law of the place where leave to issue execution has been claimed".

236. The Geneva Convention in article 2 enumerates the grounds on which refusal of recognition and enforcement of awards is mandatory. The Montevideo Agreement in article 5, the Bustamante Code in article 423, the Geneva Convention in article 1, the United Nations Convention in article V, the OAS Draft Uniform Law in article 19, the CE Protocol in article 2 and the Neuchâtel Rules in article 15 contain detailed provisions concerning the grounds for or circumstances in respect of which the recognition and enforcement of awards may be refused.

237. Under most instruments, the recognition and enforcement of awards may be refused where the awards conflict with public policy, public order or *ordre public*. For example, under article 5(d) of the Montevideo Agreement, recognition and enforcement may be refused where an award conflicts "with public order in the country of their enforcement"; under article 423.3 of the Bustamante Code, where an award conflicts "with the public policy or the public laws of the country in which its execution is sought"; and under article 15 of the Neuchâtel Rules, where an award is contrary to "the public policy of the country in which it had been invoked".

238. The Geneva Convention in article 1(e) and the United Nations Convention in article V.2 (b) permit refusal of the recognition and enforcement of an award not where the award but where the recognition or enforcement of the award is contrary to "the public policy or to the principles of the law of the country in which it is sought to be relied upon" (in the case of the Geneva Convention) or to "the public policy" of the country in which recognition and enforcement is sought (in the case of the United Nations Convention).

239. Under article 2 of the CE Protocol, recognition and enforcement may be refused "if it is incompatible with the *ordre public*" of the requested State and in particular if the settlement of the dispute by arbitration is contrary to that *ordre public*. As has already been noted above in paragraph 235, under article 29.2 of the CE Uniform Law, denial of an application for the enforcement of an award is made mandatory "if the award or its enforcement is contrary to *ordre public*".

240. The differences that are likely to exist, however, between different legal systems in regard to what constitutes public policy, public order or *ordre public* may give rise to uncertainties.

5. Staying of enforcement

241. A few of the instruments which deal with the recognition and enforcement of awards permit enforcement to be stayed in certain circumstances. The United

Nations Convention in article VI provides that "if an application for the setting aside or suspension of the award has been made. . . the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award". The UNIDROIT Draft in article 27 states that "a judicial authority may adjourn the granting of leave to issue execution if a party cited to appear shows that he has a *prima facie* case for setting aside the award".

242. The IBCD Convention differentiates between cases in which enforcement may be stayed and cases in which enforcement shall be stayed. Under Article 51(4) of the Convention, where a request for the revision of an award has been made, "the Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision". However, "if the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request". A similar provision applies, in terms of Article 52(5) of the Convention, where a request is made for the annulment of an award.

243. The CE Uniform Law in article 30.5 empowers the judicial authority seized of an appeal, or of an application for setting aside, to order that the enforcement of the award be stayed. Article 8 of the CE Protocol States that "the authority. . . may delay its decision if, in the State in the territory or under the law of which the award was made, the award is the subject of an application to set it aside".

244. An award which is ignored by the party against whom it is made ceases to be of value if it is not enforceable in a country where satisfaction of the award may be realized. A matter of common concern to parties, therefore, is whether recourse to arbitration would be an effective method to settle a dispute if questions arise as to whether an award will be readily enforceable under the provisions of the applicable national laws. It seems important to international commercial arbitration that uncertainties of this kind should be resolved. In this connexion, a question which may be considered further is whether it would be possible to remove such uncertainties through the formulation of self-contained rules covering all aspects of the recognition and enforcement of awards. These rules should not, in so far as possible, contain provisions referring to national laws, as the requirements of national laws are likely to differ and give rise to further uncertainties.

II. Comments on certain aspects of the review

245. The review of international instruments made in the preceding chapter identified the existence of similarities and dissimilarities among those instruments in the treatment of the various elements of the arbitration process. This chapter will describe briefly the scope and extent of those similarities and dissimilarities considered to be of particular importance with respect to international commercial arbitration. Where possible, an attempt will also be made to indicate solutions, whether or not they are to be found in the instruments

reviewed, which appear to be especially suitable for the purpose of enhancing the effectiveness of international commercial arbitration.

(1) *Scope of application of the instruments*

(a) *Existing and future disputes*

246. One point of similarity in the instruments is that they all seem to include existing and future disputes within their scope of application; though only certain instruments contain express provisions to that effect.

(b) *Subject matter of disputes*

247. Where the instruments refer, for the purpose of defining their scope of application, to the subject matter of the disputes to be covered, the provisions of the instruments show marked differences in formulation. It would seem desirable, in this connexion, to arrive at a formulation of a comprehensive definition of "international commercial disputes", without reference to national law. The Uniform Law on the International Sale of Goods, it may be noted in this connexion, contains a definition of what constitutes an "international sale of goods".

(2) *For of arbitration agreements*

248. The desirability of arbitration agreements being reduced to writing seems to be recognized in the greater majority of the instruments examined, which limit their scope of application to arbitration agreements in written form. The definitions in some instruments of what might be regarded as "written forms" contain common elements. It would seem reasonable, in this connexion, to regard (as some instruments expressly do) agreements concluded by way of an exchange of letters, or of telegrams or of teletypes as constituting agreements in "written form".

(3) *The number and method of appointment of arbitrators*

249. Certain basic principles appear to be common to all instruments in regard to the number and method of appointment of arbitrators. All instruments seem to acknowledge the right of the parties to an arbitration to determine how many arbitrators there should be and how they should be appointed. All instruments provide also for "an appointing authority" to appoint an arbitrator in a case where a party fails to make the necessary appointment. The principal difference between the instruments lies in the variety of appointing authorities designated under the instruments; this is probably due to differences in the scope of application of the instruments, both geographically as well as in the nature of the disputes covered. The variety of appointing authorities provided for under the instruments, however, should not cause uncertainties in practice, as the appointing authorities designated in the instruments are only required to act if the parties themselves have not named an appointing authority.

250. The appointment of foreigners as arbitrators is permissible under all instruments. Some instruments contain express provisions to that effect in view of the re-

quirement in certain national laws that foreigners may not act as arbitrators.

(4) *Place of arbitration*

251. All instruments leave the determination of the place of arbitration to the parties, in the first instance, though the instruments differ on how the place should be determined where the parties have failed to agree. The problem is a complex one, yet it would seem on balance that a procedure which might be preferable would be to entrust to the arbitrators the determination of the place of arbitration where the parties are unable to agree. This is the procedure incorporated in the majority of instruments, and it would seem less time-consuming than other solutions.

(5) *Applicable law*

252. Uncertainty as to which law is to be applied to the substance of a dispute and which law is to be applied to questions of procedure, in cases where the parties have not agreed on the applicable law, constitutes one of the principal uncertainties in respect of international commercial arbitration. Any step towards the reduction or elimination of such uncertainty, in so far as is possible, would enhance effectiveness of arbitration.

253. There are differences in the way in which the question of the applicable law is handled in the instruments examined. Where, as is the case under some instruments, the question is left to the arbitrators to determine, uncertainties on the matter continue till the arbitrators decide on the law applicable.

(6) *Challenging of arbitrators*

254. It is reasonable that parties to arbitration proceedings should be entitled to challenge an arbitrator on good grounds. It is equally reasonable however to ensure so far as is possible that challenges are not misused, as they would be if parties challenge arbitrators merely for the sake of obstructing the proceedings. The requirement, contained in one of the instruments examined, that a challenge must be submitted as soon as the challenger becomes aware of the ground of the challenge, might prevent, in some measure, the misuse of challenges.

255. Once a challenge has been made, it is important that a decision on its merits should be reached as promptly as possible, and from this point of view a provision requiring the non-challenged members of the arbitration tribunal to decide on the challenge might prove useful. In cases, however, where (a) the non-challenged members are of an even number and disagree, or (b) the majority of the arbitrators are challenged, or (c) there is only a single arbitrator, it would seem necessary for the validity of the challenge to be determined by another authority, such as the "appointing authority" or the competent court of the place where the arbitration tribunal has its seat.

(7) *Jurisdiction over questions relating to the validity of the arbitration agreement*

256. Some of the instruments examined require questions relating to the validity of the arbitration agreement to be referred to the courts. Other instruments

authorize arbitration tribunals to decide such questions. Under most international agreements, a decision of an arbitration tribunal on the validity of an arbitration agreement can be reviewed by the judicial authorities when the recognition and enforcement of the award is sought.

257. It might be considered in this connexion whether it is preferable for a question relating to the validity of an arbitration agreement to be (a) referred to the competent court immediately the question has been raised before the arbitration tribunal, or (b) decided in the first instance by the arbitration tribunal and then, at the request of a party, reconsidered by the court when recognition and enforcement of the award is sought.

(8) *Pleas as to the jurisdiction of the arbitration tribunal, on grounds other than the invalidity of the arbitration agreement*

258. All instruments which contain provisions on this matter authorize arbitration tribunals to decide on the merits of such pleas. There are, however, certain difficult problems which arise, namely, (a) should the decisions of arbitration tribunals on such pleas be made subject to judicial review and (b) if so, at what stage of the arbitration proceeding should judicial review take place or, in other words, should judicial review take place immediately after the decision of the arbitration tribunal or at the stage when recognition and enforcement of the award is sought.

(9) *Reasons for award*

259. The provisions of international instruments and national laws differ on the question whether arbitration awards should set out the reasons on which they are based. The inclusion of reasons in awards may be desirable in certain respects. Awards incorporating reasons would be helpful as a guide to parties in business relations and would also be a useful source of information for future work in the field of international commercial arbitration and in the harmonization and unification of international trade law.

(10) *Publication of awards*

260. It would seem desirable to consider also the question whether arbitration awards should be published. The regular publication of awards would be especially useful to those involved in the particular branches of trade to which the awards relate and would also contribute to spreading the knowledge of the theory and practice of arbitration. On the other hand, it should be taken into account that in certain cases the parties may be opposed to the publication of awards relating to their disputes, even though their names might be omitted from such publication.

261. Comments with respect to certain other aspects of the arbitration process have been made in chapter I. The comments relate to such matters as mandatory rules of procedure (paragraph 94), representation of parties, and failure of a party to participate in an arbitration proceeding (paragraph 104) jurisdiction of courts with respect to disputes subject to valid arbitration agreements (paragraph 148), extension of the time-limit

fixed for the making of an award (paragraphs 168 and 169), making an award in a case where a party absents himself from the arbitration proceeding without good reason (paragraph 180), and the revision of an award (paragraph 218).

262. Section E of chapter I, which deals with the recognition and enforcement of arbitral awards, includes certain comments on the finality of awards (paragraphs 230 and 231), the refusal to recognize and enforce awards on the ground of public order, public policy or *ordre public* (paragraph 240), and the desirability of formulating self-contained rules covering all aspects of the recognition and enforcement of awards, in order that uncertainties connected with the recognition and enforcement of awards may be fully removed (paragraph 244).

III. National Law and international commercial arbitration

263. There seems to be no doubt, as confirmed also by the preceding review of existing international arbitration instruments, that national law plays a vital role in the arbitration process. This chapter will discuss briefly the extent to which the intervention of national law may at times impede and at other times enhance the usefulness of arbitration.

264. Where the parties to a commercial transaction, whether domestic or international, reach an amicable settlement of a dispute arising from that transaction, the law, as a general rule, does not interfere with the autonomy of the parties in resolving the dispute as they wish. The parties are free to agree on the procedure to be followed in arriving at a settlement and on the terms of the settlement. Only in exceptional circumstances, as for example in case of alleged fraud or error, a party may apply to the courts to challenge the terms of an agreed settlement.

265. On the other hand, where the parties refer a dispute to arbitration, normally the laws of the country or countries concerned exercise a degree of control over the arbitral procedure and the award and its enforcement.

266. The laws of most countries and the international instruments examined in this report acknowledge, in principle, the autonomy of the parties in respect of such matters as the submission of a dispute to arbitration, the selection of an institutional or *ad hoc* arbitral tribunal, the appointment of the arbitrators, the choice of law.

267. The whole arbitration process, however, is generally subject to the mandatory provisions of the applicable law, e.g. the law of the country where the arbitration agreement has been concluded, or where the arbitral tribunal has its seat, or where recognition or enforcement of the award is sought.

268. The fact that arbitration is not completely divorced from the authority of national laws or the jurisdiction of the courts may tend to inject an element of uncertainty in the effectiveness of arbitration as a means for the final settlement of commercial disputes.

This is especially true in the case of international trade, where the parties, not being able to rely exclusively on their own agreement or the decision of the freely chosen arbitrators may be deterred from having recourse to arbitration by the possibility that certain aspects of the arbitration process might be subject to a foreign law unknown to them.

269. It would be an over-simplification, however, to conclude that any intervention of the law impedes the usefulness of arbitration. In some cases the opposite is true. For example, normally a party may apply to the courts to plead that the arbitral tribunal had no proper jurisdiction or exceeded its powers. This kind of intervention of the law tends to promote confidence in arbitration. The same may be said where the intervention of the courts is necessary to enforce an arbitral award.

270. On the other hand, no control by the courts seems necessary or desirable over the merits of the arbitral award. Persons engaged in international trade often prefer to settle their disputes by arbitration rather than by judicial proceedings owing primarily to the greater speed of the arbitration process. This advantage is wiped out where the losing party is allowed to appeal to the courts against the merits of an arbitral award or where the courts are entitled to review the award *ex officio*. In such cases the intervention of the courts, in addition to delaying the settlement of a dispute, impedes arbitration by depriving the arbitrators, whose judgement was trusted by the parties, of the power to render a final and binding award.

271. For these reasons the international instruments examined in this report generally provide that arbitral awards should be final and have binding force, except where an award is contrary to the *ordre public* of the court of the country concerned (see paragraph 237 *et seq.* above).

272. Sometimes international arbitration instruments provide that certain matters will be governed by national laws (e.g. the law of the country where the arbitration takes place, or the law of the country where enforcement is sought). This often brings about uncertainties and complications. For example, when an arbitration agreement is concluded it may not be known where will be the seat of the arbitral tribunal, or where enforcement of the award may be sought by one of the parties. These locations may depend upon the decision of the arbitral tribunal, the place of residence of its president, the places where the debtor has or transfers his asset, or other factors. It may then occur that an arbitration agreement might not be valid under the law of the country where arbitration is supposed to take place, or an award might not be enforceable under the law of the country where enforcement is sought.

273. It is open to question whether, in the case of international commercial arbitration, it would be possible or desirable to avoid altogether any intervention by, or reference to, national laws. It seems clear, however, that, except in cases such as those mentioned in paragraph 269 above, a greater degree of autonomy from national laws would reduce the existing uncertainties and enhance the usefulness of arbitration.

IV. Possible methods for harmonization and unification of the law relating to international commercial arbitration

A. MEASURES RECOMMENDED BY THE UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION AND BY THE ECONOMIC AND SOCIAL COUNCIL

274. Among the measures which have been recommended by United Nations organs with respect to commercial arbitration special reference should be made to the resolutions adopted in 1958 by the United Nations Conference on International Commercial Arbitration and in 1959 by the Economic and Social Council. On 10 June 1958 the Conference adopted and opened for signature the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. On the same day the Conference adopted a resolution³⁸ on "other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes". In that resolution the Conference expressed its support for wider diffusion of information on arbitration laws and facilities, the establishment of new arbitration facilities, technical assistance in developing arbitral legislation and institutions, study groups and seminars, and greater uniformity of national laws on arbitration.

275. Resolution 708 (XXVII) adopted by the Economic and Social Council on 17 April 1959,³⁹ essentially restated the terms of the resolution of the United Nations Conference on International Commercial Arbitration. In addition, the Council, "considering that increased resort to arbitration in the settlement of private law disputes would facilitate the continued development of international trade and other private law transactions", invited "Governments to consider sympathetically any measures for improving their arbitral legislation and institutions" and requested the Secretary-General "to assist, within the limits of available staff and financial resources, Governments and organizations in their efforts to improve arbitral legislation, practice and institutions, in particular by helping them to obtain technical advice and assistance from appropriate sources available for this purpose and by providing guidance to Governments and organizations concerned in co-ordinating their efforts and promoting more effective use of arbitration in connexion with international trade and other private law transactions".

276. While the primary purpose of both resolutions was to promote the wider use and increase the effectiveness of international commercial arbitration, some of the measures recommended therein are relevant to the scope of this report, i.e. the consideration of steps that might be taken to promote the harmonization and unification of the law relating to international commercial arbitration and to avoid divergencies among existing international instruments. Thus, for instance, a greater uniformity among national arbitration laws, advocated in the resolutions, would reduce the divergencies and uncertainties deriving from the references to national laws

³⁸ See annex I.

³⁹ See annex II.

to be found in international instruments, and would therefore have the effect of speeding up the process of harmonization and unification of international commercial arbitration law.

277. Similarly, another measure recommended by the Conference and the Economic and Social Council, i.e. the wider diffusion of information on arbitration law and facilities, could promote harmonization and unification by, for example, disseminating information (a) on arbitration rules used in international trade and, (b) on the interpretation and application of international commercial arbitration instruments by arbitral tribunals and courts. The publication of awards rendered by arbitral tribunals in disputes relating to international trade is another measure which would contribute to the wider diffusion of information and at the same time might be useful in promoting the harmonization and unification of the law of international commercial arbitration.

B. OTHER MEASURES

278. A number of other measures might be considered in the context of this report, such as harmonization and unification on a regional or commodity basis, revision of existing conventions with a view to reducing or eliminating divergencies, formulation of a new international instrument on international commercial arbitration.

279. The regional approach has been the basis of the activities undertaken in this field by United Nations organs and other organizations, e.g. the Economic Commission for Europe (ECE), the Economic Commission for Asia and the Far East (ECAFE) and the Organization of American States (OAS). Harmonization and unification of arbitration law on a regional scale is facilitated where the laws of the countries of a region are generally homogeneous, as is the case in Latin America. However, the fact that trade transcends regional boundaries is a limiting factor to this approach.

280. A degree of harmonization and unification of the practice of international commercial arbitration has been achieved on a commodity basis, primarily by trade associations. The effectiveness of this method is due to some extent to the similarity of trade customs and usages pertaining to a certain commodity in most countries of the world. Furthermore, the jurisdiction of arbitral tribunals established for different commodities by the respective trade associations is often accepted by persons engaged in trade in those commodities as a practical procedure for settling their commercial disputes. On the other hand, unification on the basis of individual commodities might tend to crystallize the different procedures applicable to different commodities, and any attempt to promote a more general approach might be consequently slowed down.

281. In order to reduce or eliminate divergencies among existing international instruments, consideration might be given to a revision of some of them. This course, however, would be impractical owing to the difficulties inherent in the procedures for revising conventions established by international conferences of sovereign States or by other intergovernmental bodies.

282. Finally, it might be considered whether the purpose of bringing about harmonization and unification could be achieved by the formulation of a new instrument (convention or uniform law) regulating on a world-wide scale all significant aspects of the arbitration process in respect of international commercial disputes. Should the Commission favour this approach it would be necessary to consider, among other matters, the question of whether and, if so, to what extent, a future convention would have the effect of superseding existing conventions.

ANNEX I

Resolution adopted by the United Nations Conference on International Commercial Arbitration

The Conference,

Believing that, in addition to the convention on the recognition and enforcement of foreign arbitral awards just concluded, which would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes, additional measures should be taken in this field,

Having considered the able survey and analysis of possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes prepared by the Secretary-General (document E/CONF.26/6),

Having given particular attention to the suggestions made therein for possible ways in which interested governmental and other organizations may make practical contributions to the more effective use of arbitration,

Expresses the following views with respect to the principal matters dealt with in the note of the Secretary-General:

1. It considers that wider diffusion of information on arbitration laws, practices and facilities contributes materially to progress in commercial arbitration; recognizes that work has already been done in this field by interested organizations, and expresses the wish that such organizations, so far as they have not concluded them, continue their activities in this regard, with particular attention to co-ordinating their respective efforts;

2. It recognizes the desirability of encouraging where necessary the establishment of new arbitration facilities and the improvement of existing facilities, particularly in some geographic regions and branches of trade; and believes that useful work may be done in this field by appropriate governmental and other organizations, which may be active in arbitration matters, due regard being given to the need to avoid duplication of effort and to concentrate upon those measures of greatest practical benefit to the regions and branches of trade concerned;

3. It recognizes the value of technical assistance in the development of effective arbitral legislation and institutions; and suggests that interested Governments and other organizations endeavour to furnish such assistance, within the means available, to those seeking it;

4. It recognizes that regional study groups, seminars or working parties may in appropriate circumstances have productive results; believes that consideration should be given to the advisability of the convening of such meetings by the appropriate regional commissions of the United Nations and other bodies, but regards it as important that any such action be taken with careful regard to avoiding duplication and assuring economy of effort and of resources;

5. It considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes, notes the work already done

in this field by various existing organizations, and suggests that by way of supplementing the efforts of these bodies appropriate attention be given to defining suitable subject matter for model arbitration statutes and other appropriate measures for encouraging the development of such legislation;

Expresses the wish that the United Nations, through its appropriate organs, take such steps as it deems feasible to encourage further study of measures for increasing the effectiveness of arbitration in the settlement of private law disputes through the facilities of existing regional bodies and non-governmental organizations and through such other institutions as may be established in the future;

Suggests that any such steps be taken in a manner that will assure proper co-ordination of effort, avoidance of duplication and due observance of budgetary considerations;

Requests that the Secretary-General submit this resolution to the appropriate organs of the United Nations.

ANNEX II

Economic and Social Council resolution 708 (XXVII)

708 (XXVII). INTERNATIONAL COMMERCIAL ARBITRATION

The Economic and Social Council,

Recognizing the value of arbitration as an instrument for settling disputes,

Considering that increased resort to arbitration in the settlement of private law disputes would facilitate the continued development of international trade and other private law transactions,

Considering further that substantial contributions have been made to this end by measures designed to strengthen and promote the recognition of the legal status of international private law arbitration,

Recognizing that measures to improve the legal status of arbitration should be accompanied by measures in the fields of arbitral organization and procedure, by educational activity and by technical assistance, if arbitration is to attain maximum usefulness in the development of international trade and other private law transactions,

Noting the resolution* adopted by the United Nations Conference on International Commercial Arbitration on 10 June

1958, which recognizes the value of practical measures in these fields,

Believing that, in addition to the contributions of inter-governmental and non-governmental organizations, much can be done directly and immediately through the initiative of Governments and of arbitration organizations to increase the effective use of arbitration,

1. *Expresses the wish* that arbitral associations, whether constituted along local, trade, national or international lines, give particular attention and emphasis to educational activities, especially among business and professional groups, to the establishment where necessary of new arbitration facilities or improvement of existing ones, and to facilitating international private law arbitrations;

2. *Invites* Governments to consider sympathetically any measures for improving their arbitral legislation and institutions, to encourage interested organizations in the development of arbitration facilities and related activities, and to avail themselves of appropriate opportunities to obtain or to furnish, as the case may be, technical advice and assistance;

3. *Suggests* that intergovernmental and non-governmental organizations active in the field of international private law arbitration co-operate with each other and with the United Nations organs concerned, especially in the diffusion of information on arbitration laws, practices and facilities, educational programmes, and studies and recommendations aiming at greater uniformity of arbitration laws and procedures;

4. *Recommends* that the regional economic commissions of the United Nations which have not as yet included such a project in their programme of work consider the desirability of undertaking a study of measures for the more effective use of arbitration by member States in their regions;

5. *Requests* the Secretary-General to assist, within the limits of available staff and financial resources, Governments and organizations in their efforts to improve arbitral legislation, practice and institutions, in particular by helping them to obtain technical advice and assistance from appropriate sources available for this purpose and by providing guidance to Governments and organizations concerned in co-ordinating their efforts and promoting more effective use of arbitration in connexion with international trade and other private law transactions.

1060th plenary meeting,
17 April 1959.

* See annex I above.

B. List of relevant documents not reproduced in the present volume

Title or description	Document reference
The United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards: report of the Secretary-General	A/CN.9/22, Add.1 and 2
International commercial arbitration: note by the Secretary-General	A/CN.9/42
International commercial arbitration: The United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards: note by the Secretary-General	A/CN.9/49, Add.1

V. SUGGESTIONS FOR FUTURE UNIFICATION TECHNIQUES*

A. Progressive codification of the law of international trade: note by the secretariat of the International Institute for the Unification of Private Law (UNIDROIT)**

The International Institute for the Unification of Private Law — UNIDROIT — which has a responsible role to play in the unification of private law in view of its institutional aims, which are universal in scope, of the composition of its membership, representing the principal legal systems of the world, and of its experience of over forty years, is undertaking a study of the progressive codification of international trade law as part of its programme of work.

In view of the interest taken by the United Nations in the unification and codification of international trade law, the secretariat of UNIDROIT has the honour to submit to the United Nations Commission on International Trade Law (UNCITRAL) a report outlining the salient features of the study and stating the reasons for the proposals made therein.

1. International trade is one of the most important factors in economic development and as such, a means of promoting understanding and peace among peoples. Consequently, all States are interested in its development.

The development of international trade must be rapid, confident, sure and certain, and only law can offer these guarantees. Those involved in international trade will act much more confidently if they know in advance what the legal status of the instruments they wish to conclude will be, particularly if they know that they have the same possibilities of securing respect for their rights as under their own legal system.

However, at the present time, trade transactions which have attained an unprecedented volume, intensity, variety and speed, are governed by a multitude of national laws, each of which constitutes an obstacle to the development of international trade.

2. Several methods might be employed to overcome these obstacles.

First, it should be noted that businessmen, with their keen awareness of the interests they have in common, while taking advantage of the general principle of the freedom of contract, have evolved a set of rules for certain international trade operations. These rules, contained in standard contracts and general conditions, or expressed in formulae or clauses hallowed by long practice, are beginning to constitute a kind of charter for the regulation of international trade, so that each contract will be covered by a single legal régime which will

be known and understood by each of the parties and will ensure a minimum of security for the transactions involved.

In their own way and using their own techniques, businessmen have established norms for the most urgent transactions in order to guarantee the indispensable certainty of the law, by the very simple method of establishing in advance what law is applicable to certain situations and certain relationships in international economic life. The regulations thus established to meet practical needs are effectively applied by almost all businessmen in all countries, both in the East and in the West. To a large extent, their application is also ensured by arbitration institutions.

Hence, when it was found that international economic relations did not fit satisfactorily into a national legal framework, international practice set about establishing uniform norms designed, parallel with national law, to promote international trade as much as possible and in certain particular fields.

3. However, it should be noted that standard contracts, general conditions and formulae or clauses established in practice cannot, and will never be able to cover all the legal relationships in international trade, or all the aspects of the problems which could arise. That is why general conditions either allow the contracting parties to introduce amendments (see the general conditions drawn up by the ECE), or establish the applicability of the municipal law of one of the parties (see the general conditions of sale adopted by the COMECON countries). In domestic trade, national trade law and the general principles of municipal law fill any gaps which may arise. Thus, there is an obvious need for international trade to be based on certain fundamental principles which can be applied to any situation which is not foreseen (in contracts or international conventions pertaining to them), and which can be used for the interpretation of contractual provisions without the necessity of having recourse to the municipal law of the parties concerned.

The Uniform Law on the International Sale of Goods (ULIS) thus includes a special article — article 17 — which provides that questions concerning matters governed by the Uniform Law which are not expressly settled therein shall be settled in conformity with the general principles on which the law is based. But this

* For action by the Commission with respect to this subject, see part two, section III, A, report of the Commission on the work of its third session (1970), paragraphs 212-218.

** A/CN.9/L.19.

elliptical reference to general principles has not proved fully satisfactorily and has given rise to much discussion: hence the need to establish certain fundamental principles to cover all the legal relationships of a contractual nature arising within the framework of international trade.

4. In other words, international trade also needs its own ordinary law with its own particular role and full range of functions.

It is clear that customary law, left to the hazards of private contract practice could not constitute the ordinary law of international trade. The latter can only derive from an understanding among States, for only thus will international trade obtain the legal framework it requires. Furthermore, it should be noted that States are becoming more and more interested in the regulation of international trade. In fact, by providing those involved in foreign trade with the security needed for their protection, international trade law contributes, *ipso facto*, to the defence of the national economy. This to a large extent explains why the increasing emphasis on State regulation of foreign trade in the countries of both East and West.

International trade is also a matter of particular concern to the developing countries, and its uniform regulation would be a highly important factor in their progress.

Finally, since international trade is one of the most important factors in economic development and at the same time a tool for the furtherance of understanding and peace, its regulation is also of concern to the international community. For that reason the United Nations, one of whose purposes is "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character" (Charter of the United Nations, Article 3), gave the General Assembly the task of initiating studies and making recommendations for the purpose of encouraging the progressive development of international law and its codification (Article 13, paragraph 1 (a)). Such action is entirely within the scope and competence of the United Nations itself under the terms of Chapters IX and X of its Charter.

The United Nations Conference on Trade and Development (UNCTAD), is particularly concerned with the question of promoting the establishment of rules that will further international trade. The same considerations prompted the establishment of the United Nations Commission on International Trade Law (UNCITRAL), whose purpose is "the promotion of the progressive harmonization and unification of the law of international trade".

5. The unification of international trade law might initially be viewed as unification of conflict rules. However, unification of those rules would hardly solve most of the difficulties stemming from the diversity in municipal trade law.

Although private international law makes it possible to determine which law applies to a given legal relationship, it does not, even when unified, afford absolute certainty regarding the content of that law which, in any

case, might establish the applicability of another law, of another country, with all the difficulties that would imply. Furthermore, the unification of conflict rules could become inoperative as a result of the indiscriminate use of the plea of public policy. Finally, doubts might arise because of the diversity of qualifications and interpretations in each legal system.

It therefore follows that the unification of conflict rules represents an attempt to settle a problem of *international* trade by applying municipal law, thus discounting any distinctive features which international relations may have and which no domestic law exactly suits. That is why, in recent doctrine, there has been speculation as to which municipal law is capable of satisfactorily regulating the international sale of goods, which is not a domestic sale merely complicated by a foreign element, but rather an original contract entailing its own stipulations.¹

6. The unification of substantive law therefore remains the only way in which the obstacles stemming from the diversity in municipal law can be overcome and a general body of international trade law can be provided.

In order better to understand the need to unify international trade law, however, one should bear in mind that international trade, with its economic, social and technical ramifications, its needs and requirements, was formed and developed in an international setting, so that the instruments in which it is reflected inevitably extend beyond the bounds of any municipal legal system and call for rules in keeping with their characteristics and purposes. International economic law has an inherent tendency to transcend States. By their very nature, legal relationships established within the context of international trade require a type of regulation that is altogether different from the regulation of domestic legal relationships. The very fact that the legal relationships of international trade are international in character puts them outside the jurisdiction of municipal law and makes them governable by a law removed from any national contingency, that is, an *ordinary law of international trade*, which alone can provide the legal framework which international trade needs in order to develop.

The unification achieved so far in order to meet the most urgent needs of international economic life — in the field of transport, for example — has been partial and fragmentary, and it soon became apparent that such a method had shortcomings as regards the application and interpretation of the individual provisions thus adopted. Since the basic principles of international trade law had not been generally regulated, it became necessary to fill the gaps which still remained by drawing on the basic principles of some municipal law, and it was not always easy to determine which one in advance.

The method adopted by UNIDROIT, which has been accepted by other organizations concerned with the unification of law and, very recently, by the United Nations Commission on International Trade Law, was the on-

¹ *Le droit commercial international*, by Yvon Loussouarn and Jean-Denis Bredin, (Sirey, 1969), p. 9.

ly method possible during the first phase of unification. At that time there was still a very distinct divergency between the legislative technique employed in the civil law countries and that employed in the common law countries. A unification process entailing codification, even if confined to commercial transactions, would have been bound to fail. It was therefore necessary to try to draw up texts of limited scope which most countries would be likely to accept and to avoid, as far as possible, any consideration of the general principles governing the various legal systems. The definition and interpretation of certain basic concepts was left to the national legislators and judges. The process of unification by sectors has, to some extent, been successful, especially in fields that are intrinsically international in scope, such as air and sea transport, arbitration and cultural property. But like anything built on a shaky foundation, it has proved to have serious weaknesses: contradictory provisions, divergent interpretations due to the lack of commonly held general principles, overlapping and duplication.²

This method, however, is far from affording international trade law the opportunity to produce satisfactory solutions to specific problems. Consequently, international trade now, as much as ever, needs a real *jus commune mercatorum*, a material law that can govern international relations.

On the other hand, the obstacles which originally stood in the way of codification have diminished in recent years. The gap between the common law countries and the civil law countries is no longer insurmountable. As the work programmes of the Law Commissions for England and Scotland show, the United Kingdom has made progress in codification, and the United States set a precedent in this connexion when it established its Uniform Commercial Code.

Another important step in the process of unification by codification was the adoption by Czechoslovakia of its International Trade Code on 18 December 1963. This Code, which is in line with the system of unification employed by UNIDROIT in its draft on the international sale of goods and other matters confined to the sphere of international relations is notably in advance of the other attempts at unification made so far since it constitutes an organic body of rules applicable to international relations. These rules, which are preceded by a definition of the criteria used in classifying the relations concerned, are governed by common provisions relating to the subjects and objects of legal relationships, the concept of legal instruments and the conditions in which such instruments are valid.

The time has come, therefore, to proceed beyond the stage of partial and fragmentary unification and undertake the systematic codification of at least the basic principles of the law of international trade. This would lay the foundations for any subsequent regulation of the major legal institutions pertaining to this law, including those which have already been unified.

7. The importance to economic development of codifying the laws of international trade and the deep interest shown by the United Nations in the unification and codification of that law justify a bold advance to more ambitious schemes and an attempt at the progressive codification of international trade law by more up-to-date methods and on a wider scale.

The problems of methodology have already been subjected to an initial, and extremely probing scrutiny at the Fourth Meeting of Organizations concerned with the Unification of Law. We need therefore only refer the reader to the reports discussed at that meeting and to the official records, published in the UNIDROIT yearbook (1967-1968 Yearbook, vol II, 4 ed. UNIDROIT, Rome, 1969).

As for the scope of the task, we should point out that whenever the question of drawing up a contract arises, it also becomes necessary to devise a general set of rules relating to the basic principles which obtain wherever there is a lacuna in the special provisions of where-in the clauses of the contract need to be interpreted in the light of general principles. That is why the codification of the law of international trade should begin with a general section on obligations (which could be limited to contractual obligations alone).

There should also be a special provision specifying the *purpose* of codification, which is to develop international trade on a secure basis that would be afforded by uniform rules of substantive law. Such a provision (which is to be found in the Uniform Commercial Code drawn up by the American Law Institute and the National Conference of Commissioners on Uniform State Law, and also in the Czechoslovak Act No. 101 of 4 December 1963 on legal relationships in international trade relations) could even prove extremely useful for the interpretation of various codification provisions and of contract clauses.

As regards *interpretation*, we should point to the difficulties which have arisen in practice because certain legal institutions (such as the trust system) are found in some legal systems but not in others, and because some legal institutions are common to all or at least to most municipal laws although their content is interpreted in quite different ways. It may be recalled that controversies arose over the interpretation of article 25 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929. There are many other examples which could be given.

At the Second Meeting of Organizations concerned with the Unification of Law, many participants commented on the difficulties caused by differing interpretations of some very common concepts, such as "*faute*", "*bona fides*", "*force majeure*", "*causa*" and "*equity*". In their statements, they stressed that differences of interpretation could prejudice the certainty of law. The Third Meeting of Organizations concerned with the Unification of Law was thus devoted exclusively to disparities in the interpretation of uniform law.

For this reason, the general section of the proposed codification should contain not only rules concerning in-

² This situation led the Council of Europe to establish as a subsidiary organ of its Committee on Legal Co-operation, a sub-committee on fundamental legal concepts which has undertaken some important research and reconciliation work in this regard.

terpretation, but also definitions or classifications of certain concepts (such as those provided in the Uniform Commercial Code or those which some organizations are in the process of drawing up) without, however, turning the code into something akin to a dictionary.

As to the *object* of codification it is suggested that the latter should be restricted to the legal relationships arising in international trade relations. One could even provide a definition of those *international relations*, as has been done in some international conventions (for instance most of the conventions dealing with transport; article 1 of the Uniform Law on the International Sale of Goods (Corporal Movables); and article 1 of the Czechoslovak Act No. 101/1963 which specifies "the relationships arising in international trade relations"). Suitable formulas must be found, however, to take account of possible connexions between the concept of "international relationship" and that of "legal relationship with a foreign element".

The basic principles presented in the introduction to the proposed codification should be followed by a general section on *obligations* (sources, effects, extinction, the transfer of claims, evidence, and so on).

The progressive codification of international trade law will unquestionably be a large scale operation, spanning a long period of time and fraught with considerable difficulties. It would be unthinkable, however, either to allow international trade to continue to be governed by a host of national laws, since that places it in an impossible position, or to leave all the legal problems arising in international trade to be solved simply by practice. The conclusion which emerges from the foregoing observations is that the progressive codification of international trade law must be undertaken without delay.

This proposal, which might at first sight seem over-ambitious, is feasible in UNIDROIT's opinion, provided that certain conditions are met.

First of all, the codification should be gradual. The object is not to prepare a code of international trade law overnight, but rather to prepare an outline of an ideal code, examining all the subjects which should be covered. The task would be facilitated by using the Czechoslovak code as a model and also to some extent the Uniform Commercial Code of the United States of America. The uniform laws which have already been drawn up or are in the process of elaboration should be included in this Code as special chapters. They should

therefore be studied and, where appropriate, revised and harmonized in the light of these new requirements.

At the practical level, UNIDROIT is studying the possibility of formulating a general, organic unification plan.

Once this over-all plan has been devised, the first task will be to prepare a draft for the general section containing the basic principles which will form the foundations and the framework of the unification. The drafts relating to special subjects, including those which have been prepared or are in preparation, should be harmonized to tally with the basic principles in the general section. Thus, codification will gradually grow within the framework of uniform general principles until it covers the whole field assigned to it.

* * *

UNIDROIT took the initiative of arranging the four Meetings of Organizations Concerned with the Unification of Law previously referred to in this report. The discussions held on each of those occasions clearly pointed to the usefulness of regular meetings of the representatives of organizations contributing in some way to the unification of law, so that they can pool their experience, impart information about their individual programmes of action, air any problems of methodology they may have encountered and study some topics of common interest more closely.

As it is essential to start on the progressive codification of international trade law without delay, there is no alternative but to harness all the energies of all those who are willing to participate in this great scientific work if the end is to be attained. The best use must be made of all the experience acquired in the field by all the organizations concerned with the unification of trade law and by all those who, in one way or another, might assist in the task.

In this spirit UNIDROIT, which has already conducted a preliminary survey of the main problems likely to arise in the progressive codification of international trade law, has the honour to call the attention of the United Nations Commission on International Trade Law to this question. UNCITRAL's encouragement, support and co-operation would be an essential element in the accomplishment of a task whose successful outcome would do much to promote the development of international trade in the general interests of economic development and peace.

B. Draft basic convention establishing a common body of international trade law: proposal by the French delegation*

1. In the existing circumstances, international trade relations are customarily governed by municipal legislation, as though they were a matter of domestic legal relations. Only exceptionally have certain States agreed that such legal relations, which are international in character, should be governed by the municipal legislation of a given country (unification of rules governing con-

flicts) or should be subject to a particular régime (unification of substantive rules).

The very fact that UNCITRAL was established shows that this is an unsatisfactory situation. The results obtained in the matter of the unification of rules governing conflicts and of substantive rules are not such as to meet the needs of international trade.

* UNCITRAL/III/CRP/3.

2. Progress cannot be made merely by drafting new conventions or by urging States to ratify existing conventions. The very root of the difficulty must be attacked and the problem of international trade law must be dealt with in a new way. It is essential to formulate an approach different from that prevailing in the nineteenth century and recognize that international relations should as a matter of principle rather than by way of exception be regulated at the international level. The French Government urges UNCITRAL to adopt that approach by drafting a basic convention establishing a common body of international trade law.

3. This proposal would in no way entail sacrificing the sovereignty of States. It is not aimed at establishing a *supranational* law to be imposed on States in their own territory by decree of a body having higher authority than theirs. That would be an undesirable solution. It is legitimate, indeed necessary, that States should have some control over the rules to be enforced in their territory by their police. The French Government's proposal would leave the sovereignty of States entirely intact but would at the same time be based on the idea that co-operation and the search for appropriate solutions should be the rule in international trade relations rather than the exception, as had hitherto been the case. A system which would make that principle a reality should be devised and established.

4. History affords an example. From the thirteenth century to the nineteenth, the universities gradually built up a rational law based on the rules of Roman law, which was considered to constitute a common body of law (*jus commune*, *Gemeinrecht*) in every country on the continent of Europe. The universities had no authority to make laws; they merely proposed that the law they taught should be taken as a model. The courts in the individual countries could deviate from that model in order to take account of local customs or of decrees promulgated by their rulers. Nevertheless, a consensus emerged in the various countries of continental Europe to the effect that, in the absence of such customs or decrees, judges should, as a matter of principle, apply the rules of that common body of law because, since they were a product of man's reason, it was through them that justice was most likely to be achieved.

5. In the nineteenth century, the process of codification and the growth of nationalism destroyed this traditional concept. Today the problem is to revive it and constitute a new common body of law in such a way as to take account of present political realities.

The universities are no longer the proper authority to lay down the rules of a common body of law. They are disqualified from so doing by their multiplicity, their national ties and the role of law in modern societies. On the other hand, the scientific authority of a group of jurists might suffice to enable them to lay down the principles of a common body of law at the regional level affecting relations between countries whose legal systems are already very similar. The Restatement of the Law in the United States of America is a case in point. At the international level, where legal systems of great diversity may have to be reconciled, it is essential that

Governments should participate if a common body of law is to be reformulated in our era.

6. There are a number of ways in which UNCITRAL might serve this purpose. The French Government does not intend to propose a rigid plan but rather, at the present stage, to indicate the various approaches which might be contemplated. It will, however, be easier to present these ideas in the form of an outline which would serve merely as a starting point and to which various alternatives could be added.

7. A basic convention would be concluded, recognizing that it is for the United Nations to establish a new *jus gentium*, which would constitute a common body of international trade law. By virtue of that basic convention, four principles *applicable to the countries adhering to it* would be laid down: (1) UNCITRAL would be made responsible for establishing appropriate regulations within the various branches of law concerned with international trade; (2) those regulations would constitute the *common body of international trade law* and, under certain conditions, would automatically enter into force in those countries adhering to the basic convention; (3) in those States, they would henceforth constitute the law applicable to international legal relations, except in so far as a State had informed the international organization that it did not accept certain provisions proposed by UNCITRAL; (4) a country which rejected or modified a provision of the convention would have to stipulate which rule of its municipal law would replace that provision.

The following paragraphs set forth some of the details of this outline and should serve to demonstrate that it would have considerable flexibility.

8. The now accepted principle that UNCITRAL would be made responsible for establishing appropriate regulations within the various branches of the law concerned with international trade calls for some comment. Existing organizations and institutions dealing with a very broad range of subjects are considering the unification of international trade law: the International Civil Aviation Organization (ICAO), the United International Bureaux for the Protection of Intellectual Property (BIRPI), the Inter-Governmental Maritime Consultative Organization (IMCO), the International Institute for the Unification of Private Law (UNIDROIT), etc. It has already been recognized that UNCITRAL would not act in place of those bodies; its role could and should be merely to provide them with incentives, to induce them to bring existing Conventions up to date and perfect them, to encourage them to adopt new approaches and to urge States to give them more solid and more universal support. However, under the system provided for by the basic convention UNCITRAL would also have the function of examining the texts prepared by those bodies to determine whether, having regard to the circumstances in which they were drafted, their subject-matter and the advantages they might offer, they warranted elevation to the level of "common" law, with all the consequences which that would imply.

Rather than actually drafting texts, UNCITRAL would have the task of approving texts drafted elsewhere,

although perhaps on UNCITRAL's initiative and at its suggestion. More specifically, since UNCITRAL comprises representatives of only twenty-nine States, it would confine itself to making reports for submission to a higher body with broader representation, and it would be for the latter to make decisions.

The regulations approved by UNCITRAL could, of course, be highly varied in form and substance. Sometimes it would approve actual laws with specific, detailed provisions; sometimes it would approve mere principles for States to apply; and sometimes it would simply be a matter of definitions to elucidate the meaning and scope of various terms. Every kind of formula can be utilized in reconstituting a common body of law.

9. The regulations thus established, which would constitute the body of law governing international trade, would, under certain conditions, enter into force in all countries which had acceded to the basic convention.

The principle put forward here is inseparable from the accompanying reservation. Before taking up the latter, however, let us consider the principle itself. In the context of the proposed formula, it remains to be determined under what conditions the regulations established or approved by UNCITRAL would be elevated to the status of "common" law.

UNCITRAL itself is not competent to take that decision, which, in our view, falls within the purview of the General Assembly, where all the Member States of the United Nations are represented; under another formula, a conference comprising only those States which had acceded to the basic convention might be recognized as having the requisite competence. In addition, in the General Assembly or the conference a special majority of two-thirds or three-quarters might be required to enable a text to become a part of the common body of law. The length of the interval after which a text thus approved would be considered as an expression of the "common" law could also be discussed. Such an interval must be provided for so that the various States can, as appropriate, take advantage of the opportunity which will be afforded them to introduce into their municipal law changes reflecting the "common" law.

To impose the application of particular provisions on a State would be to infringe on the sovereignty of that State. The declaration that certain provisions constituted the "common" law of international trade would not have that effect; that would be no infringement of the sovereignty of a State when a majority of the other States declared that, in their view, certain rules were best and expressed the wish that the various States should take account of that circumstance and adapt their municipal legislation accordingly. A decision making a text a part of the "common" law of international trade would naturally have been taken by a majority; a unanimity rule would be justified only if it were a question of imposing an obligation on States, but that would not be the case in establishing the "common" law.

10. The regulations thus established would thenceforth constitute the law applicable in all countries to international legal relations, except in so far as a State (bound by the basic convention) had made it known

that it would not accept the elevation of a particular provision to the status of "common" law.

This reservation makes clear our thinking on the matter. No restriction would or should be placed upon the sovereignty of States. They could say at any time that they did not accept the elevation of any particular provision to the status of "common" law. However, one element in the existing situation would be changed and the change would be a basic one: a State which did not wish to introduce a provision of the "common" law into its municipal legislation would have to make that fact known to a particular international organization (which would have to be specified in the case of each text declared to be "common" law).

The proposal thus formulated would have the effect of confronting each State with its responsibilities. However, that would not be its main objective, which would rather be to counteract the effects of bureaucratic routine. The reason why international conventions are rarely or belatedly ratified is not that they give rise to objections; more often, it is that they are lost in the archives or forgotten in the files of some administrative office. A text drawn up at the international level and approved by a high international authority deserves a better fate. It might very well happen that some State would not be satisfied and would not wish to accept it; that would be legitimate. What cannot be tolerated is the possibility that a State might be unaware of the existence of the text and take no position on it; it is not asking too much of States to impose upon them the obligation to take a position on a text and state that it is unacceptable to them. Of course certain States, as a precautionary measure, might adopt the practice of objecting to all texts proposed as "common" law without considering them. It is to be hoped, however, that a spirit of international co-operation would prevail in the majority of States, that there would be a predisposition in favour of texts declared to be "common" law, and that they would be rejected only with full knowledge of their context where pressing considerations gave rise to serious objections to them in a particular country.

The system proposed here is not entirely original. It is already in effect in certain international organizations: ICAO (with respect to the annexes to the Chicago Convention), the Food and Agriculture Organization (FAO), the World Health Organization (WHO), the Central Office for International Transport by Rail (OCTI). There seems to be nothing to prevent the general application of the system to all international trade matters dealt with by UNCITRAL.

If, despite its moderation, the system still appears too revolutionary, States which are hesitant to adopt it may accept as an alternative, the less radical solution provided for in the Constitution of the International Labour Organisation (ILO). Conventions concluded under the auspices of ILO do not enter into force automatically in the territory of member States; rather, the Governments of those States are under an obligation to submit them to their legislatures for ratification within a certain time-limit. An analogous rule could perhaps be adopted with regard to the subject which concerns us here; however, it would to some extent constitute a distortion of

the concept of "common" law, the revival of which is, in our view, a matter of urgency.

11. A State (bound by the basic convention) which rejected or amended a provision of "common" law would have to indicate by what rule of its municipal law that provision was to be replaced. "Indicate what your law is" States would be told; "otherwise, it will be taken to be in accordance with 'common' law".

The purpose of making this proposal is clear. International trade today suffers not only from the diversity of laws relating to it, but also from uncertainty regarding those laws. A judge knows the laws of his State; he does not know the laws of other States and he generally has no sure and practical means of acquainting himself with them. This situation does not appear to be irremediable; it is in the interest of States themselves to find a solution if they wish their own laws, when recognized as being applicable, to be applied correctly by judges in other countries.

That is the object of the present proposal. Considerable progress would be made if, for every provision of the texts of "common" law, it could be indicated in which countries the provision in question had been rejected and by what other provision it had been replaced in each of those countries.

However, the principle thus formulated may well give rise to difficulties and objections. Therefore it should be stressed that this particular suggestion, however desirable its adoption may seem, would not constitute a basic element of the proposed system. It would certainly be regrettable if, when notification was received that a State was rejecting certain provisions of the uniform law, it was not known what rules were to be substituted for those of the uniform law in the legislation of that State. In that respect, however, nothing in the present situation would be changed. An invitation should be addressed to States to comply with the wish reflected in our proposal; the latter should not, however, be seen as anything more than a wish. The countries which did not comply with it would be the losers, for they would thus expose themselves to the danger that their own legislation would not be applied or would be applied incorrectly.

12. The procedures used so far for reaching an agreement have afforded only disappointing results. That of international conventions, taken as a whole, has failed because States, rightly or wrongly, do not wish to commit themselves; that fact must be taken into account, and a procedure must be found which would provide a satisfactory legal system governing international trade regardless of any such commitment. The simple model-law procedure has, on the whole, proved ineffective: States pay little heed to the model laws proposed to them, and that indifference must also be taken into account. The concept of "common" law, situated between those two extremes, offers a middle course. It would not be merely a model law: it would be a law which would be applicable in practice, yet would not impose any obligation upon States, which could at any time and on any point uphold a provision of their municipal law which is at variance with it.

International trade law should in principle be declared by an international organization and not by States;

the role of the latter is merely to say whether and to what extent they agree to apply the rules of such law and, by thus expressing reservations, to give direction to its development.

13. It may be useful, in conclusion, to make two observations. The first is that "common" law cannot be made indefinitely binding. Its content is and must be constantly reviewed in the light of technological developments and of the new relationships between nations resulting from the most diverse circumstances. We do not consider derogations by different States to the texts of "common" law to be a weakness. On the contrary, they are an extremely useful instrument for improving the "common" law and keeping it constantly up to date. Owing to its flexibility, "common" law provides a technique which is in many cases superior to that provided by international conventions. The latter may seem to have the defect of "freezing" the law; in our era of rapidly changing social conditions that is perhaps one of the reasons for the often demonstrated reluctance to conclude and ratify them.

The second observation is that the existence of a "common" law of universal scope places no obstacle in the way of the establishment of regional agreements. On the contrary, it is desirable that States should not propose derogating to the texts of "common" law on an individual basis. If the diversity of solutions proposed were as great as the diversity of the States capable of adopting legislation in the world of today, international trade could not accommodate them; nor is such diversity justified by the needs of States. A rule obliging States to communicate their derogating to "common" law to an international body would greatly clarify the situation and would very likely lead to realignments which would make it considerably simpler to understand the law as it applies to international trade.

14. On the basis of the ideas set forth above, the French Government proposes that the United Nations Commission on International Trade Law should prepare a draft international convention.

The object of the convention should be to determine under what conditions certain texts approved by UNCITRAL could be elevated to the status of a *common body of law governing international trade*. The object would also be to specify in what way the texts in question could be rejected or modified by certain States. On the other hand, it would not be the object of the convention to establish UNCITRAL's work programme or to indicate how the texts were to be drawn up and approved by UNCITRAL itself, for it would be essential to retain the greatest flexibility with respect to those two points.

The adoption of a new policy on international trade law is, in the opinion of the French Government, the *sine qua non* for genuine progress in that field. Without it, we fear that UNCITRAL might become an academic assembly devoid of any real effectiveness. The plan which the French Government is submitting to UNCITRAL is assuredly an ambitious one; nevertheless, all things considered, it does no more than assign to UNCITRAL the role to which a body constituted by the United Nations can and must lay claim.

C. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Programme of work until the end of 1972: proposal by the French delegation	A/CN.9/L.7

CHECK LIST OF UNCITRAL DOCUMENTS

I. Documents of the First Session

A. GENERAL SERIES

<i>Title or description</i>	<i>Document reference</i>
First session of the United Nations Commission on International Trade Law: note by the Secretariat	A/CN.9/1
Provisional agenda	A/CN.9/2
Adoption of rules of procedure: note by the Secretary-General	A/CN.9/3
Comments by Member States, organs and organizations on the work programme of the Commission: note by the Secretary-General	A/CN.9/4 and Corr.1
Analysis of the comments submitted by Member States, organs and organizations on the work programme of the Commission: note by the Secretary-General	A/CN.9/4 and Add.1 and 2
Survey of activities of organizations concerned with the harmonization and unification of the law of international trade: note by the Secretary-General	A/CN.9/5
Organization and methods of work: note by the Secretary-General	A/CN.9/6 and Corr.1
Collaboration and working relationships with organs and organizations concerned with international trade law: note by the Secretary-General	A/CN.9/7
Agenda adopted at the 2nd meeting, on 30 January 1968	A/CN.9/8
Methods of work for priority topics (Working paper submitted by the Working Group on agenda item 5 (a) and (b) as adopted, with amendments, by the Commission at its 19th meeting on 22 February 1968)	A/CN.9/9
Recommendation approved by the Commission at its 21st meeting, on 23 February 1968, for inclusion in the report	A/CN.9/10
Summary records of the first session of the Commission (1968)	A/CN.9/SR. 1-25

B. LIMITED SERIES

Congo (Democratic Republic of), Ghana, India, Iran, Japan, Kenya, Nigeria, Syria, Thailand, Tunisia, United Arab Republic and United Republic of Tanzania: working paper	A/CN.9/L.1
Working paper (accepted by the Commission as a working paper at its 13th meeting, on 14 February 1968)	A/CN.9/L.1/ Rev.1
United Kingdom of Great Britain and Northern Ireland: working paper	A/CN.9/L.2
Methods of work for priority topics: working paper submitted by the Working Group	A/CN.9/L.3 and Corr.1
Argentina, Brazil, Chile, Colombia, Mexico and United States of America: draft resolution	A/CN.9/L.4

<i>Title or description</i>	<i>Document reference</i>
United Kingdom of Great Britain and Northern Ireland: draft recommendation	A/CN.9/L.5
Financial and administrative implications of the draft recommendations contained in document A/CN.9/L.5: note by the Secretary-General	A/CN.9/L.5/ Add.1
Draft report of the Commission on the work of its first session	A/CN.9/L.6 and Add.1/Corr.1 and Corr.2, Add.2/Rev.1 and Add.3

C. INFORMATION SERIES

List of participants	A/CN.9/INF.1 and Add.1 and Rev.1
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II. Documents of the Second Session

A. GENERAL SERIES

<i>Title or description</i>	<i>Document reference</i>
Replies and studies by States concerning the Hague Conventions of 1964: note by the Secretary-General	A/CN.9/11, Corr.1, Add.
Replies by States concerning the Hague Convention of 1955 on the law applicable to international sale of goods: note by the Secretary-General	1,2 and 3 ^a A/CN.9/12, Add.1,2,3 and 4 ^a
Provisional agenda	A/CN.9/13 and Add.1
Incoterms and other trade terms: note by the Secretary-General	A/CN.9/14
Bankers' commercial credits: note by the Secretary-General	A/CN.9/15 and Add.1
Time-limits and limitations (prescription) in the field of international sale of goods: note by the Secretary-General	A/CN.9/16, Add.1 and 2
International sale of goods. The Hague Conventions of 1964. Analysis of the replies and studies received from Governments: report of the Secretary-General	A/CN.9/17
General conditions of sale and standard contracts: report of the Secretary-General	A/CN.9/18
Negotiable instruments: note by the Secretary-General	A/CN.9/19
Preliminary study of guarantees and securities as related to international payments: report of the Secretary-General	A/CN.9/20 and Add.1
International commercial arbitration: report of the Secretary-General	A/CN.9/21 and Corr.1
The United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards	A/CN.9/22, Add.1 and 2 ^a
Consideration of inclusion of international shipping legislation among the priority topics in the work programme	A/CN.9/23
Register of organizations and register of texts: note by the Secretary-General	A/CN.9/24, Add.1 and 2

^a This document was issued after the end of the second session.

<i>Title or description</i>	<i>Document reference</i>
Co-ordination of the work of organizations active in international trade law: report of the Secretary-General	A/CN.9/25
Working relationships and collaboration with other bodies: note by the Secretary-General	A/CN.9/26
Training and assistance in the field of international trade law: report of the Secretary-General	A/CN.9/27
Consideration of the possibility of issuing a yearbook: note by the Secretary-General	A/CN.9/28
Agenda	A/CN.9/29
Summary records of the second session of the Commission (1969)	A/CN.9/SR. 26-49

B. LIMITED SERIES

Programme of work until the end of 1972: proposal by the French delegation	A/CN.9/L.7
General conditions of sale and standard contracts: proposal by the United States of America concerning the role of the United Nations Commission on International Trade Law (UNCITRAL) in furthering the use of general conditions, standard contracts uniform trade terms as aids to uniformity	A/CN.9/L.8
The Hague Conventions of 1964: proposal by the delegation of the Union of Soviet Socialist Republics concerning the unification of rules of law regulating the international sale of goods	A/CN.9/L.9
International sale of goods. The Hague Conventions of 1964 and the Hague Convention on Applicable Law of 1955; draft resolution proposed by the delegations of Brazil, Ghana, Hungary, India, United States of America	A/CN.9/L.10
International sale of goods. The Hague Conventions of 1964 and the Hague Convention on Applicable Law of 1955: draft resolution approved by Committee I at its 10th meeting	A/CN.9/L.11
Report of Committee II to the Commission	A/CN.9/L.12
Bank guarantees: proposal by the Hungarian delegation concerning the preparation of uniform rules and practice relating to bank guarantees	A/CN.9/L.13
Time-limits and limitations (prescription) in the field of international sale of goods	A/CN.9/L.14
Report of Committee I to the Commission	A/CN.9/L.15, Corr.1 and Add.1
Draft report of the United Nations Commission on International Trade Law on the work of its second session	A/CN.9/L.16, Corr.1,2, ^b 3, Add.1, Corr.1, Add.2,3,4,5,6, Rev.1,7,8,9,10, 11,12 and 13
Consideration of inclusion of international shipping legislation among the priority topics in the work programme: draft resolution proposed by Ghana, India	A/CN.9/L.17
Consideration of inclusion of international shipping legislation among the priority topics in the work programme:	A/CN.9/L.17/ Rev.1

^b In Russian only

<i>Title of description</i>	<i>Document reference</i>
draft resolution proposed by Argentina, Brazil, Chile, Ghana, India, Iran, Kenya, Mexico, the United Republic of Tanzania, Tunisia and the United Arab Republic	
Consideration of inclusion of international shipping legislation among the priority topics in the work programme: draft resolution proposed by Argentina, Belgium, Brazil, Chile, Ghana, India, Iran, Kenya, Mexico, Spain, United Republic of Tanzania, Tunisia and United Arab Republic	A/CN.9/L.17/ Rev.2
Consideration of inclusion of international shipping legislation among the priority topics in the work programme: Belgium, Italy: draft resolution	A/CN.9/L.18

C. INFORMATION SERIES

List of participants	A/CN.9/INF.2
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III. Documents of the Third Session

A. GENERAL SERIES

<i>Title or description</i>	<i>Document reference</i>
Report of the Working Group on Time-limits and limitations (Prescription) in the International Sale of Goods, on its session held at Geneva from 18 to 22 August 1969	A/CN.9/31
Analysis of the Studies and Comments by Governments on the Hague Conventions of 1964: report of the Secretary-General	A/CN.9/31
The Establishment of an UNCITRAL Yearbook: Report of the Secretary-General	A/CN.9/32, Add.1
Analysis of the Replies and Comments by Governments on the Hague Convention of 1955: report of the Secretary-General	A/CN.9/33
General conditions of Sale and Standard Contracts: report of the Secretary-General	A/CN.9/34
Report of the Working Group on the International Sale of Goods on its Session held at New York from 5 to 16 January 1970	A/CN.9/35
Provisional agenda	A/CN.9/36, Add.1, Corr.1 and 2*
Guarantees and Securities (Bank Guarantees): note by the Secretary-General	A/CN.9/37
International Payments — Negotiable Instruments; Analysis of the replies received from Governments and banking and trade institutions to the questionnaire on negotiable instruments used for making international payments: report of the Secretary-General	A/CN.9/38
Training and Assistance in the field of International Trade Law: report of the Secretary-General	A/CN.9/39
Register of Organizations and Register of Texts: report by the Secretary-General	A/CN.9/40
International Legislation on Shipping: report of the Secretary-General	A/CN.9/41
International Commercial Arbitration: note by the Secretary-General	A/CN.9/42

* English only.

<i>Title of description</i>	<i>Document reference</i>
Bibliography on International Trade Law: report by the Secretary-General	A/CN.9/43
International Payments — Bankers' Commercial Credits: report of the Secretary-General	A/CN.9/44
Guarantees and Securities: note by the Secretary-General	A/CN.9/45, Add.1
Programme of Work through 1973: note by the Secretary-General	A/CN.9/46
International Commercial Arbitration: The United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards: note by the Secretary-General	A/CN.9/49, Add.1
Summary records of the third session of the Commission (1970)	A/CN.9/SR. 50-62
B. LIMITED SERIES	
Programme of Work through 1973; Progressive Codification of the law of International Trade: note by the Secretariat of the International Institute for the Unification of Private Law (UNIDROIT)	A/CN.9/L.19
C. RESTRICTED SERIES	
Time-limits and Limitations (prescription) in the International Sale of Goods: note by the Secretariat (Suggestions concerning alternative approaches for consideration of the Report of the Working Group)	A/CN.9/R.1
Uniform Rules Governing the International Sale of Goods: note by the Secretariat	A/CN.9/R.2
Bibliography	A/CN.9/R.3
Guarantees and Securities: Bank Guarantees: note and questionnaire addressed by the International Chamber of Commerce (ICC) to its national committees for its report on "Bank Guarantees", reproduced in annex 1 of document A/CN.9/37	UNCITRAL/III/ CRP/1
Register of Organizations: Replies from Organizations regarding their current activities in the subjects of international trade within the Commission's Work Programme: note by the Secretary-General	UNCITRAL/III/ CRP/2
Draft basic convention establishing a common body of international trade Law: proposal by the French delegation	UNCITRAL/III/ CRP/3
Provisional list of participants: members of the Commission in attendance at the third session	UNCITRAL/III/ CRP/4
Uniform rules governing the international sale of goods: proposal of Japan concerning ULIS article 1 (a)	UNCITRAL/III/ CRP/5
Proposal of the Spanish delegation concerning the Commission's future work on international sales	UNCITRAL/III/ CRP/6
Register of Texts: draft report of Committee II	UNCITRAL/III/ CRP/8
Register of Organizations: draft report of Committee II	UNCITRAL/III/ CRP/9
Yearbook of UNCITRAL: draft report of Committee II	UNCITRAL/III/ CRP/10
Proposal of the USSR delegation concerning amendments and additions to article IV of the Hague Convention of 1964 on Uniform Law for international sale	UNCITRAL/III/ CRP/II

<i>Title of description</i>	<i>Document reference</i>
Bibliography on International Trade Law: draft report of Committee II	UNCITRAL/III/ CRP/12
General conditions of sale and standard contracts: draft report of Committee I	UNCITRAL/III/ CRP/13
Bankers commercial credits: draft report of Committee II	UNCITRAL/III/ CRP/14
Guarantees and securities: draft report of Committee II	UNCITRAL/III/ CRP/15
Draft report of the Commission on the work of its third session	UNCITRAL/III/ CRP/16, and Add.1-16, UNCITRAL/ III/CRP/19, UNCITRAL/ III/CRP/21
Uniform rules governing the international sale of goods: draft report of Committee I	UNCITRAL/III/ CRP/17
Time-limits and limitations (prescription) in the field of international sale of goods: draft report of Committee I	UNCITRAL/III/ CRP/18
Proposal by India concerning ULIS — Article 2, para. 2	UNCITRAL/III/ CRP/20
Participants official address list	UNCITRAL/III/ CRP/24

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