II. THE THIRTEENTH SESSION (1980)

A. Report of the United Nations Commission on International Trade Law on the work of its thirteenth session (New York, 14–25 July 1980) (A/35/17)*

CONTENTS

INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's thirteenth session, held at New York from 14 to 25 July 1980.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the General Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

CHAPTER I. ORGANIZATION OF THE SESSION

A. *Opening*

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its thirteenth session on 14 July 1980. The session was opened on behalf of the Secretary-General by Mr. Erik Suy, the Legal Counsel.

B. *Membership and attendance*

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Com-

* *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17.*

mission from 29 to 36 States. The present members of the Commission, elected on 15 December 1976 and 9 November 1979, are the following States:[1] Australia,* Austria,* Burundi,* Chile,* Colombia,* Cuba,** Cyprus,** Czechoslovakia,** Egypt,* Finland,* France,* German Democratic Republic,* Germany, Federal Republic of,** Ghana,* Guatemala,** Hungary,** India,** Indonesia,* Iraq,** Italy,** Japan,* Kenya,** Nigeria,* Peru,** Philippines,** Senegal,** Sierra Leone,** Singapore,* Spain,** Trinidad and Tobago,** Uganda,** Union of Soviet Socialist Republics,* United Kingdom of Great Britain and Northern Ireland,* United Republic of Tanzania,* United States of America** and Yugoslavia.**

5. With the exception of Burundi, all members of the Commission were represented at the session.

6. The session was also attended by observers from the following States Members of the United Nations: Argentina, Bahrain, Brazil, Bulgaria, Burma, Canada, China, El Salvador, Greece, Israel, Mali, Mexico, Morocco, Netherlands, Nicaragua, Panama, Poland, Syrian Arab Republic, Tunisia, Ukrainian Soviet Socialist Republic and Venezuela.

7. The following United Nations organs, specialized agency, intergovernmental organizations and international non-governmental organization were represented by observers:

(a) *United Nations organs*
United Nations Conference on Trade and Development and the United Nations Industrial Development Organization.

(b) *Specialized agency*
World Bank.

(c) *Intergovernmental organizations*
Hague Conference on Private International Law and International Institute for the Unification of Private Law.

(d) *International non-governmental organization*
International Chamber of Commerce.

C. *Election of officers*

8. The Commission elected the following officers by acclamation:[2]

Chairman	Mr. R. Herber (Federal Republic of Germany)
Vice-Chairmen . . .	Mr. P. C. Goh (Singapore) Mr. J. Simani (Kenya) Mr. H. Wagner (German Democratic Republic)
Rapporteur	Mrs. O. R. Valdés Pérez (Cuba)

D. *Agenda*

9. The agenda of the session as adopted by the Commission at its 227th meeting, on 14 July 1980, was as follows:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda: tentative schedule of meetings
4. International sale of goods
5. International contract practices
6. International payments
7. International commercial arbitration
8. New international economic order
9. Co-ordination of work
10. Training and assistance in the field of international trade law
11. Future work
12. Other business
13. Date and place of the fourteenth session
14. Adoption of the report of the Commission.

E. *Decisions of the Commission*

10. The decisions taken by the Commission in the course of its thirteenth session were all reached by consensus.

F. *Adoption of the report*

11. The Commission adopted the present report at its 242nd meeting, on 25 July 1980.

CHAPTER II. INTERNATIONAL SALE OF GOODS

12. The Commission had before it a note by the Secretary-General on the United Nations Conference on

* Term of office expires on the day before the opening of the regular annual session of the Commission in 1983.

** Term of office expires on the day before the opening of the regular annual session of the Commission in 1986.

[1] Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years, except that, in connexion with the initial election, the terms of 14 members, selected by the President of the Assembly by drawing lots, expired at the end of three years (31 December 1970); the terms of the 15 other members expired at the end of six years (31 December 1973). Accordingly, the General Assembly, at its twenty-fifth session, elected 14 members to serve for a full term of six years, ending on 31 December 1976 and, at its twenty-eighth session, elected 15 members to serve for a full term of six years, ending on 31 December 1979. The General Assembly, at its twenty-eighth session, also selected seven additional members. Of these additional members, the term of three members, selected by the President of the Assembly by drawing lots, would expire at the end of three years (31 December 1976) and the term of four members would expire at the end of six years (31 December 1979). To fill the vacancies on the Commission which would occur on 31 December 1976, the General Assembly, at its thirty-first session, on 15 December 1976, elected (or re-elected) 17 members to the Commission. Pursuant to resolution 31/99 of 15 December 1976, the new members took office on the first day of the regular annual session of the Commission immediately following their election (23 May 1977) and their term will expire on the last day prior to the opening of the seventh regular annual session of the Commission following their election (in 1983). In addition, the term of office of those members whose term would expire on 31 December 1979 was by the same resolution extended till the last day prior to the beginning of the regular annual session of the Commission in 1980. To fill the vacancies that would occur on that date, the General Assembly, at its thirty-fourth session on 9 November 1979, elected (or re-elected) 19 members to the Commission. Pursuant to resolution 31/99 of 15 December 1976, the new members took office on the first day of the regular annual session of the Commission immediately following their election (14 July 1980) and their term will expire on the last day prior to the opening of the seventh regular annual session of the Commission following their election (in 1986).

[2] The elections took place at the 227th meeting on 14 July 1980, the 230th meeting on 15 July 1980 and the 236th and 237th meetings on 21 July 1980. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216), para. 14 (Yearbook . . . 1968–1970, part two, I, para. 14)).

Contracts for the International Sale of Goods (A/CN.9/183).* The Conference was held at Vienna, Austria, from 10 March to 11 April 1980. The Commission noted with appreciation that the Conference had adopted the United Nations Convention on Contracts for the International Sale of Goods and a Protocol Amending the Convention on the Limitation Period in the International Sale of Goods. It expressed its hope that the Convention, which has already been signed by six States, would receive the widest possible acceptance. Several delegations indicated that their Governments were actively examining the Convention with a view to its being signed and ratified.

CHAPTER III. INTERNATIONAL TRADE CONTRACTS[3]

13. The Commission, at its eleventh session, decided to commence a study of international contract practices with special reference to "hardship" clauses, *force majeure* clauses, liquidated damages and penalty clauses protecting parties against the effects of fluctuations in the value of currency.[4]

14. At its twelfth session, the Commission had before it, among other reports dealing with international contract practices, a report of the Secretary-General entitled "Liquidated damages and penalty clauses" (A/CN.9/161). At that session, the Commission decided that work should be undertaken directed to the formulation of uniform rules regulating liquidated damages and penalty clauses, and entrusted the work to the Working Group on International Contract Practices, with a mandate to consider the feasibility of formulating uniform rules on liquidated damages and penalty clauses applicable to a wide range of international trade contracts.[5]

15. At the present session, the Commission had before it the report of the Working Group on International Contract Practices on the work of its first session, held at Vienna from 24 to 28 September 1979 (A/CN.9/177).** The report noted that, after a general discussion, the Working Group had considered preliminary draft rules regulating liquidated damages and penalty clauses prepared by the Secretariat. While the discussion of these preliminary rules by the Working Group had revealed a consensus on certain principles set forth in the draft rules, it had also shown that divergent views were entertained on other principles. However, there was general agreement in the Working Group that further work on the subject was justified, and that greater consensus might be achieved on a set of rules designed to regulate liquidated damages and penalty clauses in selected types of international trade contracts. The Working Group therefore recommended to the Commission that another session of the Working Group should be convened and that the Secretariat be requested to undertake a further study to be submitted to that session focusing on the following issues:

(*a*) The manner in which liquidated damages and penalty clauses are drafted and used in various types of international trade contracts;

(*b*) The particular types of international trade contracts which might usefully be regulated by uniform rules; and

(*c*) The legal difficulties encountered in the use of liquidated damages and penalty clauses, as shown by court and arbitral decisions.

16. The Commission, after expressing its appreciation to the Working Group for the progress made by it, accepted its recommendations.

CHAPTER IV. INTERNATIONAL PAYMENTS

A. *Draft Convention on International Bills of Exchange and International Promissory Notes, and Uniform Rules on International Cheques*[6]

17. The Commission had before it the reports of the Working Group on International Negotiable Instruments on the work of its eighth session, held at Geneva from 3 to 14 September 1979, and of its ninth session, held at New York from 3 to 11 January 1980 (A/CN.9/178* and A/CN.9/181).** The reports set forth the progress made by the Working Group at these sessions on the preparation of a draft Convention on International Bills of Exchange and International Promissory Notes, and on the preparation of Uniform Rules on International Cheques. The proposed instruments would establish uniform rules applicable to an international instrument (bill of exchange, promissory note or cheque) for optional use in international payments.

18. The report of the Working Group on the work of its eighth session (A/CN.9/178) noted that the Working Group considered in second reading articles 1, 5, 9, 11 and 70 to 86 of the draft Convention and in third reading articles 1 to 12 of the draft Convention. The Working Group requested the Secretariat to make appropriate arrangements for the establishment of corresponding versions of the draft Convention in the four working languages of the Commission (English, French, Spanish and Russian) and to find a way of establishing corresponding versions in Arabic and Chinese[7] before the draft Convention was considered at a diplomatic conference. The Working Group also noted that the Commission, at its twelfth session, had authorized the Working Group to proceed with the drafting of uniform rules for international cheques if the Group was of the view that the formulation of such rules was desirable and the application of the draft Convention could be extended to include international cheques.[8]

* Reproduced in this volume, part two, I, below.

** Reproduced in this volume, part two, II, below.

[3] The Commission considered this subject at its 227th meeting on 14 July 1980.

[4] *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17), paras. 47, 67 (*c*) (i) *b* (Yearbook ... 1978, part one, II, A).

[5] *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 31 (Yearbook ... 1979, part one, II, A).

* Reproduced in this volume, part two, III, A, below.

** Reproduced in this volume, part two, III, B, below.

[6] The Commission considered this subject at its 227th and 228th meetings on 14 July 1980.

[7] A Chinese version of the draft Convention has now been established; see A/CN.9/181, Annex, in the Chinese version.

[8] *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 44 (Yearbook ... 1979, part one, II, A).

The Working Group also noted that the UNCITRAL Study Group on International Payments was of the view that the cheque was widely used for settling international commercial transactions, and that there was substantial support for the establishment of uniform rules applicable to international cheques. The Working Group accordingly requested the Secretariat to commence preparatory work in respect of international cheques.

19. The report of the Working Group on the work of its ninth session (A/CN.9/181) noted that the Working Group considered in its third reading articles 13 to 85 of the draft Convention, and also considered article 5 (10) in connexion with article 22. The Working Group thereby completed the substance of its work on the draft Convention subject to reconsideration of certain issues referred to the UNCITRAL Study Group on International Payments for its opinion. The report further noted that the Working Group held a preliminary exchange of views on articles 1 to 30 of the draft Uniform Rules applicable to International Cheques drawn up by the Secretariat (A/CN.9/WG.10/WP.15). The Working Group requested the Secretariat to complete the draft Uniform Rules, including rules on crossed cheques, and to submit a study on legal issues arising outside the cheque. The Working Group also agreed to a suggestion by the Secretariat that it convene a Drafting Group for the purpose of harmonizing the language versions of the draft Convention, and requested the Secretariat to establish a commentary on the draft Convention.

Discussion at the session

20. The view was expressed that, since the Working Group had completed the substance of its work on the draft Convention on International Bills of Exchange and International Promissory Notes, this text should be circulated for comments to Governments and then considered by the Commission without awaiting the completion of the work by the Working Group on uniform rules for international cheques. Such an approach, it was submitted, would accelerate the course of the work. The prevailing view, however, was that the Commission should defer its consideration of the draft Convention until the Working Group had completed its work on international cheques. Such a course would enable the Working Group to reconsider relevant articles in the draft Convention in the light of issues which may arise during the consideration of the uniform rules on international cheques, and to present either a single integrated text or two texts which were harmonized to the extent possible.

21. It was also submitted that as international cheques, which were mainly payment instruments, differed in their legal character from international bills of exchange and international promissory notes, which were mainly credit instruments, the uniform rules relating to cheques should be set forth in a separate draft Convention. Under another view, however, the question as to whether it was appropriate to have one or two conventions should be left in the first instance for decision by the Working Group.

22. The Commission expressed its appreciation of the progress made by the Working Group, and requested it to complete its work as expeditiously as possible. The Commission also was agreed that the Secretariat should prepare a commentary to the draft Convention with the least possible delay.

B. *Security interests in goods*[9]

Introduction

23. At its twelfth session the Commission had before it a report (A/CN.9/165)* submitted by the Secretary-General in compliance with a request made by the Commission at its tenth session. The report considered the feasibility of uniform rules on security interests and their possible content. It suggested that, in the present state of development of the law, it would not be feasible to try to achieve unification by means of a uniform law in the form of a convention but that, instead, a model law could be formulated with suggested alternatives.

24. After considering this report, the Commission requested the Secretariat to prepare a further report setting out the issues to be considered in the preparation of uniform rules on security interests and to propose the manner in which those issues might be decided.[10]

25. At the present session the Commission had before it a report of the Secretary-General entitled "Security Interests: Issues to be considered in the preparation of uniform rules" (A/CN.9/186)** submitted in compliance with the request made by the Commission at its twelfth session.

Discussion at the session

26. The discussion at the session revealed a concern that the subject of security interests was too complex for there to be reasonable expectations that uniform rules might be developed. It was pointed out that concepts of security interests and title retention were understood differently in various legal systems and it would be difficult for many of those legal systems to make the adjustments necessary to accommodate the different concepts envisaged. This was thought to be particularly true since the subject-matter of security interests was closely connected with other areas of the law, such as that of bankruptcy, which would also have to be unified or harmonized for the proposed model law to be effective.

27. It was suggested that the Commission might wish to await the outcome of the work on retention of title by the Council of Europe and on factoring by the International Institute for the Unification of Private Law (UNIDROIT) before it undertook any further work of its own. It was also suggested that, if further work were to be undertaken in the future, emphasis should be placed on the practical problems in respect of security interests in international trade.

---

* Reproduced in Yearbook ... 1979, part two, II, C.

** Reproduced in this volume, part two, III, D, below.

[9] The Commission considered this subject at its 236th meeting on 21 July 1980.

[10] *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 54 (Yearbook ... 1979, part one, III, A).

Decision

28. The Commission took note of the report of the Secretary-General. After a general discussion the view was reached that world-wide unification of the law of security interests in goods, for the reasons brought out in the discussions, was in all likelihood unattainable. The Commission therefore decided that no further work should at present be carried out by the Secretariat and that the item should no longer be accorded priority. However, the report prepared by the Secretary-General and previous reports on the subject might well prove useful if and when the subject was considered in other fora.

CHAPTER V. INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION

A. *UNCITRAL Conciliation Rules*[11]

Introduction

29. The Commission, at its twelfth session, considered preliminary draft UNCITRAL Conciliation Rules drawn up by the Secretariat (A/CN.9/166)* and requested the Secretary-General:

"(*a*) To prepare, in consultation with interested international organizations and arbitral institutions, including the International Council for Commercial Arbitration, a revised draft of the UNCITRAL Conciliation Rules, taking into account the views expressed during the discussions at the present session;

"(*b*) To transmit the revised draft Rules, together with a commentary, to Governments and interested international organizations and institutions for their observations;

"(*c*) To submit to the Commission at the thirteenth session the revised draft Rules and commentary together with the observations received."[12]

30. At the present session, the Commission had before it revised draft UNCITRAL Conciliation Rules (A/CN.9/179),** together with a commentary (A/CN.9/180)*** and the observations of Governments and international organizations (A/CN.9/187 and Add. 1, 2 and 3).**** The Commission noted that, in drawing up the revised Rules, the Secretariat had taken into account the views expressed by representatives and observers at the twelfth session and had held consultations with representatives of the International Council for Commercial Arbitration and the International Chamber of Commerce.

31. After a general discussion relating in particular to the different nature of conciliation when compared with arbitration, the Commission considered the articles of the revised draft Rules separately and in turn.

32. The Commission established a Drafting Party consisting of the representatives of Chile, China, France, Iraq, Nigeria, Spain, the Union of Soviet Socialist Republics, the United Kingdom and the United States. The Commission requested the Drafting Party to review the articles considered by the Commission and to ensure that the various language versions (Arabic, Chinese, English, French, Russian, Spanish) were in concordance.

"Application of the Rules

"Article 1

"(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

"(2) The parties may agree to any modification of these Rules."

Paragraph (1)

33. The question was raised whether the agreement between the parties to apply the UNCITRAL Conciliation Rules to a conciliation procedure should be in writing. In favour of such a requirement it was stated that conciliation proceedings under the UNCITRAL Conciliation Rules had certain legal consequences, such as the undertaking by the parties not to initiate during the conciliation proceedings any arbitral or judicial proceedings in respect of the same dispute (art. 16) or the undertaking in respect of evidence to be introduced in such proceedings (art. 20). The contrary view was expressed that the requirement of writing should not be included in article 1 since it would prevent parties from agreeing orally on the application of the Rules.

34. The Commission, after discussion, was of the view that the requirement of writing was already to a certain extent met by article 2 which required a party initiating conciliation to send an invitation in written form to the other party. The requirement of writing in paragraph (1) of article 2 should therefore be expanded to include a reference to the UNCITRAL Conciliation Rules. Such requirement would be fully met if article 2 provided that the acceptance would also be in writing.

35. The Commission considered the question whether the Rules should state specifically that their application was limited to disputes arising out of international commercial relationships. One representative suggested that the word "international" should be inserted before the word "disputes". It was noted that the UNCITRAL Arbitration Rules did not set forth any such restriction, but that the General Assembly in its resolution 31/98 of 15 December 1976 had recommended the use of these Rules for "the settlement of disputes arising in the context of international commercial relations". The Commission, after deliberation, was agreed that the same procedure should be followed in respect of the UNCITRAL Conciliation Rules and that it should invite the General Assembly to adopt a similar resolution.

* Reproduced in Yearbook ... 1979, part two, III, A.

** Reproduced in this volume, part two, IV, A, below.

*** Reproduced in this volume, part two, IV, B, below.

**** Reproduced in this volume, part two, IV, C, below.

[11] The Commission considered this subject at its 228th to 235th meetings, from 14 to 18 July 1980.

[12] Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 88 (Yearbook ... 1979, part one, II, A).

Paragraph (2)

36. The Commission considered a proposal that paragraph (2) should allow not only a modification of a rule but also its exclusion. In justification of the proposal it was stated that several rules placed certain obligations on the parties. However, the parties should be free to agree that a given obligation should not be imposed in conciliation proceedings between them. The Commission, after deliberation, was agreed to modify paragraph (2) accordingly.

37. It was further proposed that paragraph (2) should reflect that the parties could exclude or vary any of the Rules at any time, whether before, during or after the commencement of the conciliation proceedings. The Commission accepted this proposal.

New paragraph (3)

38. In the course of the discussions on other provisions of the revised UNCITRAL Conciliation Rules it was noted that in several instances the question arose of a possible conflict between a given rule and a provision of law. After discussion, the Commission was of the view that, rather than specifying in individual rules that a provision of law took precedence over the rule at issue, it would be more appropriate to include in the UNCITRAL Conciliation Rules a general provision on the lines of article 1, paragraph (2), of the UNCITRAL Arbitration Rules. The Commission requested the Drafting Party to draw up such provision.

39. The text of article 1 as reviewed by the Drafting Party was as follows:

"APPLICATION OF THE RULES

"Article 1

"(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

"(2) The parties may agree to exclude or vary any of these Rules at any time.

"(3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails."

* * *

"Commencement of conciliation proceedings

"Article 2

"(1) The party initiating conciliation sends to the other party a written invitation to conciliate, briefly identifying the subject of the dispute.

"(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate.

"(3) If the other party refuses conciliation, there will be no conciliation proceedings.

"(4) If the party initiating conciliation has not received a reply within thirty days from the date on which he sent the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly."

Paragraph (1)

40. The Commission, pursuant to its view taken with regard to the proposal that the reference to the application of the Rules should be in writing (see above, para. 34), decided to include in paragraph (1) of article 2 a reference to the UNCITRAL Conciliation Rules.

Paragraph (2)

41. The Commission considered, in the same context, whether the acceptance of the invitation to conciliate should be in writing. In favour of that requirement it was observed that it was desirable that the parties have a written record of their agreement on the application of the Rules for purposes of proof. On the other hand, it was thought that such requirement might unduly delay the commencement of the conciliation proceedings. The Commission, after deliberation, was agreed that the parties should be given the opportunity to commence conciliation proceedings even where the acceptance was made orally but that, in such a case, it was advisable to confirm the oral acceptance in writing.

Paragraph (3)

42. The Commission did not accept a proposal that paragraph (3) be deleted. While it was true that this paragraph stated the obvious, its retention seemed desirable for the sake of completeness: paragraph (3), together with paragraphs (2) and (4), stated the three possible reactions of the other party towards an invitation to conciliate. It also emphasized the voluntary nature of conciliation.

Paragraph (4)

43. The Commission considered various proposals relating to the time-period under paragraph (4). One proposal was that a reply should be considered as having been made in time if it had been dispatched, though not necessarily received, within the period of 30 days. However, it was felt that such a rule would not be appropriate since it would be contrary to the interest of the invitor not to know at the end of the period whether there would be conciliation and the other party was in a position to select the proper means of timely communication.

44. Another proposal was that the paragraph should emphasize that the invitor could specify the time-period within which he expected a reply by the other party. Such emphasis could be achieved by inversing the order of the two periods envisaged under paragraph (4). However, it was felt that the present text was in accordance with normal legal drafting and that the 30-day period provided a useful yardstick. There was also some concern about a possible abuse of the option to specify the time-period. To meet this concern, it was proposed to require that the time specified

by the invitor be reasonable. However, this further proposal was not adopted in view of its ambiguity and lack of certainty.

45. Yet another proposal was to delete paragraph (4) in view of the voluntary and flexible nature of conciliation. However, the provision in paragraph (4) was retained as a useful means of achieving, within a given period of time, certainty as to whether conciliation proceedings would take place.

46. The text of article 2 as reviewed by the Drafting Party was as follows:

"COMMENCEMENT OF CONCILIATION PROCEEDINGS

"Article 2

"(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

"(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.

"(3) If the other party rejects the invitation, there will be no conciliation proceedings.

"(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly."

* * *

"Number of conciliators

"Article 3

"There shall be one conciliator unless the parties have agreed that there shall be two or three conciliators."

47. In the course of the discussions of this and other articles, in particular article 7, the question was raised in what manner two or three conciliators would act. It was noted, for instance, that article 4, paragraph (1) (*c*), referred to a "presiding conciliator" where there were three conciliators though the Rules did not set forth any rule as to the powers of a presiding conciliator. Furthermore, it was not immediately clear whether conciliators in inviting parties to submit statements and documents or in making proposals for a settlement agreement would, in doing so, have to act jointly or whether they could also act individually.

48. The Commission, after deliberation, was of the view that the Rules should set forth the general principle that in conciliation proceedings with more than one conciliator, the conciliators should act jointly. The Commission requested the Drafting Party to draft appropriate additional wording in article 3.

49. The Commission adopted this article subject to the above amendment.

50. The text of article 3 as reviewed by the Drafting Party was as follows:

"NUMBER OF CONCILIATORS

"Article 3

"There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly."

* * *

"Appointment of conciliator(s)

"Article 4

"(1) (*a*) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

"(*b*) In conciliation proceedings with two conciliators, each party appoints one conciliator;

"(*c*) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the presiding conciliator.

"(2) Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. In particular,

"(*a*) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator;

"or

"(*b*) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

"In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or presiding conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties."

51. The Commission was in agreement with this provision but decided that, for the reasons stated under article 3 (see above, paras. 47 and 48), the words "presiding conciliator" in paragraph (1) (*c*) and the last sentence of paragraph (2) should be replaced by the words "third conciliator".

52. The text of article 4 as reviewed by the Drafting Party was as follows:

"APPOINTMENT OF CONCILIATOR(S)

"Article 4

"(1) (*a*) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

"(*b*) In conciliation proceedings with two conciliators, each party appoints one conciliator;

"(*c*) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.

"(2) Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. In particular,

"(*a*) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

"(*b*) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

"In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties."

* * *

"Submission of statements to conciliator

"Article 5

"(1) Upon the appointment of the conciliator,* each party submits to the conciliator a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

"(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.

"(3) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate."

"* In this and all following articles, the term 'conciliator' applies to either a sole conciliator, two or three conciliators, as the case may be."

Paragraph (1)

53. It was observed that paragraph (1) did not make it immediately clear at what point in time the parties were to submit their statements to the conciliator. While there would be no difficulty in this respect in conciliation proceedings with one conciliator, parties might not always know in conciliation proceedings with two or more conciliators whether the second or third conciliator had been appointed. The Commission was of the view that the paragraph could be drafted more clearly by providing that it would be the conciliator who, upon his appointment, would request each party to submit to him a brief written statement.

Paragraphs (2) and (3)

54. The Commission adopted the substance of these paragraphs.

55. The text of article 5 as reviewed by the Drafting Party was as follows:

"SUBMISSION OF STATEMENTS TO CONCILIATOR

"Article 5

"(1) The conciliator,* upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

"(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.

"(3) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate."

"* In this and all following articles, the term 'conciliator' applies to either a sole conciliator, two or three conciliators, as the case may be."

* * *

"Representation and assistance

"Article 6

"The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance."

56. The Commission adopted the substance of this article.

57. The text of the article as reviewed by the Drafting Party was as follows:

"REPRESENTATION AND ASSISTANCE

"Article 6

"The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance."

* * *

"Role of the conciliator

"Article 7

"(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

"(2) The conciliator will be guided by principles of fairness, equity and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices of the parties.

"(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may have expressed and the need for a speedy settlement of the dispute.

"(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor."

Paragraph (1)

58. It was observed that the word "assist" used in this paragraph had a different meaning from the word "assist" used in article 6. The general view was that, while this was so, it would not be necessary to use a different word in one or the other article since the different meaning of the word resulted clearly from the context.

Paragraph (2)

59. Various suggestions were made as to the principles that should guide the conciliator during the conciliation proceedings. These suggestions related to the order in which the guidelines should be set forth and to the inclusion of the criterion of the law applicable to the substance of the dispute. However, none of these suggestions received general support. In order to better harmonize the text in all languages, it was agreed in the English text to delete the word "equity" which was in any case thought to be embodied in the word "fairness", and to insert the word "objectivity". This was not considered to be a change in the substance.

60. It was observed that the reference to "any previous business practices of the parties" could suggest that the conciliator was to have regard not only to the previous dealings of the parties with each other but also to the previous dealings of the parties with others. It was suggested that this phrase referred only to the practices between the parties, more general practices being covered by the phrase "usages of the trade".

Paragraph (3)

61. The observation was made that there could well be cases where a party wished to submit evidence through witnesses. It was therefore proposed that appropriate wording should be added to paragraph (3) which would make it possible for a party to request the conciliator to hear witnesses whose evidence the party considered relevant. The Commission accepted this proposal. The Commission was of the view that, under article 17, in such a case the costs of calling a witness would have to be borne by the party making the request unless the other party had expressly agreed that the witness be heard by the conciliator.

Paragraph (4)

62. The Commission adopted the substance of this paragraph.

63. The text of article 7 as reviewed by the Drafting Party was as follows:

"ROLE OF CONCILIATOR

"Article 7

"(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

"(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

"(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

"(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor."

* * *

"Administrative assistance

"Article 8

"In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator after consultation with the parties, may arrange for administrative assistance by a suitable institution."

64. The Commission considered and adopted a proposal that the conciliator could arrange for administrative assistance only with the consent of the parties and that mere consultations with the parties would not suffice.

65. The Commission also accepted a proposal that administrative assistance could be provided not only by an institution but also by a person.

66. The text as reviewed by the Drafting Party was as follows:

"ADMINISTRATIVE ASSISTANCE

"Article 8

"In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person."

* * *

"Communication between conciliator and parties

"Article 9

"(1) The conciliator may invite the parties to meet with him, or may communicate orally or in writing with the parties, or with a party alone.

"(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings."

Paragraph (1)

67. The Commission, after deliberation, was of the view that it was in the interest of the procedure of conciliation that the conciliator, if he communicated or met with one party, should also communicate or meet with the other party. The Commission therefore requested the Drafting Party to redraft the paragraph accordingly.

Paragraph (2)

68. The Commission adopted the substance of this paragraph.

69. The text of article 9 as reviewed by the Drafting Party was as follows:

"COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

"Article 9

"(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

"(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings."

* * *

"Disclosure of information

"Article 10

"The conciliator, having regard to the procedures which he believes are most likely to lead to a settlement of the dispute, may determine the extent to which anything made known to him by a party will be disclosed to the other party; provided, however, that he shall not disclose to a party anything made known to him by the other party subject to the condition that it be kept confidential."

70. Different views were expressed as to the discretion of the conciliator to disclose to the other party information he had received from a party. Under one view it would be in the interest of conciliation proceedings that the conciliator be given such a discretion. Under another view it was important that a party knew about any information that had been given to the conciliator by the other party. There was, however, wide agreement that the conciliator was bound not to disclose information made known to him subject to the condition that it be kept confidential.

71. The Commission considered and adopted a new proposal drawn up in the light of the discussions, according to which factual information concerning the dispute received from a party by the conciliator should be disclosed to the other party but that any information made subject to the condition that it be kept confidential should not be disclosed.

72. The text of article 10 as reviewed by the Drafting Party was as follows:

"DISCLOSURE OF INFORMATION

"Article 10

"When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party."

* * *

"Party suggestions for settlement of dispute

"Article 11

"The conciliator may invite the parties, or a party, to submit to him suggestions for the settlement of the dispute. A party may do so upon his own initiative."

73. It was noted that this article provided, in the first place, for the invitation by the conciliator to the parties to submit to him suggestions for a settlement of the dispute and, then, for the parties themselves, on their own initiative, to submit such suggestions. It was suggested that the article should first state that a party could, if he so wished, submit suggestions and that, in second instance, he could be invited to do so by the conciliator. The Commission accepted this proposal.

74. The text of article 11 as reviewed by the Drafting Party was as follows (as to different numbering see below, para. 76):

"SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE

"Article 12

"Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute."

* * *

"Co-operation of parties with conciliator

"Article 12

"The parties will in good faith endeavour to comply with requests by the conciliator to submit written materials, provide evidence, attend meetings and otherwise co-operate with him."

75. It was suggested that the duty of the parties to co-operate with the conciliator should be stressed as the general rule and that, therefore, the article should be redrafted to make this clear. The Commission accepted this suggestion.

76. The Commission also accepted a proposal that the order of articles 11 and 12 be inverted on the ground that article 11 related to suggestions for the settlement of the dispute which was also the subject of article 13.

77. The text of article 12 as reviewed by the Drafting Party was as follows:

"CO-OPERATION OF PARTIES WITH CONCILIATOR

"Article 11

"The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings."

* * *

"Settlement agreement

"Article 13

"(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he may formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

"(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.* Upon request of the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

"(3) The parties by signing the settlement agreement accept it as a final and binding settlement of their dispute.

"* It is recommended that the settlement agreement contain a clause that any dispute arising out of or relating to the interpretation and performance of the settlement agreement shall be submitted to arbitration."

Paragraph (1)

78. It was noted that paragraph (1) gave the conciliator discretion to formulate the terms of a possible settlement even though elements of a settlement acceptable to the parties had emerged during the conciliation proceedings. The view was expressed that, in such a case, the conciliator should not have any discretion but that it was incumbent upon him to formulate a proposal for a settlement agreement. The Commission accepted this view and decided to replace the words "he may formulate" by the words "he formulates".

Paragraph (2)

79. The question was raised whether the footnote relating to the written settlement agreement between the parties should be retained. The Commission, after deliberation, was of the view that drawing the attention of the parties to an arbitration clause in the agreement served a useful purpose but that the footnote should be reworded as set forth below (para. 81).

Paragraph (3)

80. There was considerable discussion on the meaning of the word "final" as used in this paragraph. It was felt that this word could give rise to misinterpretation and that it was preferable to replace it by wording that would indicate that once a settlement agreement was signed by the parties there would no longer be a dispute between them in respect of the issues covered by the agreement and the parties should be contractually bound by the settlement. The Commission adopted the wording set forth below (para. 81).

81. The text as reviewed by the Drafting Party was as follows:

"SETTLEMENT AGREEMENT

"Article 13

"(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

"(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.* If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

"(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

"* The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration."

* * *

"Confidentiality

"Article 14

"Unless otherwise agreed by the parties or required by law, the conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement."

82. In accordance with the decision under article 1 (see para. 38 above), the Commission decided to strike out the words "or required by law" since that issue was now covered by article 1, paragraph (3). The Commission also decided that it was not necessary to retain the words "unless otherwise agreed by the parties" since under article 1, paragraph (2) the parties may agree to any modification of the Rules. Subject to these amendments, the Commission adopted the substance of article 14.

83. The text of article 14 as reviewed by the Drafting Party was as follows:

"CONFIDENTIALITY

"Article 14

"The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement."

* * *

"Termination of conciliation proceedings

"Article 15

"The conciliation proceedings are terminated:

"(*a*) By the signing of the settlement agreement by the parties, on the date of the agreement; or

"(*b*) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

"(*c*) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

"(*d*) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration."

84. It was suggested that the provisions on termination of conciliation proceedings include a provision according to which the proceedings would be terminated also if the conciliator resigned or died. According to another view it would not be possible to state every eventuality that could give rise to termination and that article 15 dealt with the situations in which conciliation proceedings were terminated by an express act (signing of settlement agreement or written declaration) of the parties or the conciliator.

85. The text of article 15 as reviewed by the Drafting Party was as follows:

"TERMINATION OF CONCILIATION PROCEEDINGS

"Article 15

"The conciliation proceedings are terminated:

"(*a*) By the signing of the settlement agreement by the parties, on the date of the agreement; or

"(*b*) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

"(*c*) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

"(*d*) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration."

* * *

"Resort to arbitral or judicial proceedings

"Article 16

"The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights."

86. While there was general support for the basic idea expressed in this article, different views were expressed as to the extent of the undertaking of the parties not to initiate arbitral or judicial proceedings during the conciliation proceedings. The Commission, after discussion, was of the view that the policy underlying article 16 was acceptable and should be retained.

87. In respect of the faculty of a party to initiate other proceedings where these are necessary for the preservation of his rights, it was suggested that article 16 should set forth a special rule according to which parties who agree to conciliation are considered to have also agreed to the extension of the period of prescription by a period of time equivalent to the duration of the conciliation proceedings. The Commission did not retain this suggestion on the ground that under some legal systems such a rule would probably not be operative.

88. The Commission expressed the view that it was self-evident that parties who were engaged in arbitral or judicial proceedings could at any time attempt to settle their dispute by conciliation and that article 16 should therefore not be interpreted as preventing this. There was nothing in the Rules that prevent parties from agreeing to initiate or continue conciliation, after commencing arbitration or judicial proceedings.

89. The text of article 16 as reviewed by the Drafting Party was as follows:

"RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

"Article 16

"The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the

conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights."

* * *

"Costs

"Article 17

"(1) Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term 'costs' includes only:

"(*a*) The fee of the conciliator which shall be reasonable in amount;

"(*b*) The travel and other expenses of the conciliator;

"(*c*) The travel and other expenses of any witnesses requested by the conciliator with the consent of the parties;

"(*d*) The cost, travel and other expenses of any expert advice requested by the conciliator with the consent of the parties;

"(*e*) The cost of any administrative assistance provided pursuant to article 8 of these Rules.

"(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party."

Paragraph (1)

90. It was noted that the costs fixed by the conciliator under article 17 were the "final" costs. Article 18, on the other hand, dealt with a pre-estimate of the types of costs referred to in article 17.

91. The Commission accepted an amendment to paragraph (1) (*e*) to add a reference to article 4, paragraph (2) (*b*) and, as a consequence, to delete the word "administrative".

Paragraph (2)

92. The Commission adopted the substance of paragraph (2).

93. The text of article 17 as reviewed by the Drafting Party was as follows:

"COSTS

"Article 17

"(1) Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term 'costs' includes only:

"(*a*) The fee of the conciliator which shall be reasonable in amount;

"(*b*) The travel and other expenses of the conciliator;

"(*c*) The travel and other expenses of any witnesses requested by the conciliator with the consent of the parties;

"(*d*) The cost of any expert advice requested by the conciliator with the consent of the parties;

"(*e*) The cost of any assistance provided pursuant to article 4, paragraph (2) (*b*), and 8 of these Rules.

"(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party."

* * *

"Deposits

"Article 18

"(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1).

"(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

"(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

"(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties."

Paragraph (1)

94. The Commission requested the Drafting Party to redraft the wording of paragraph (1) so as to make it clear that the amount of the deposit reflected the estimate of the conciliator of the costs referred to in article 17, paragraph (1).

Paragraphs (2), (3) and (4)

95. The Commission adopted the substance of these paragraphs.

96. The text of article 18 as reviewed by the Drafting Party was as follows:

"DEPOSITS

"Article 18

"(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1), which he expects will be incurred.

"(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

"(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

"(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties."

* * *

"Role of conciliator in subsequent proceedings

"Article 19

"Unless the parties have agreed otherwise, a conciliator may not act as an arbitrator in subsequent arbitral proceedings, or as a representative or counsel of a party, or be presented as a witness by a party, in any arbitral or judicial proceedings in respect of a dispute that was the subject of the conciliation proceedings."

97. The Commission, after deliberation, was agreed that article 19 should reflect an undertaking of the parties and of the conciliator. The Commission requested the Drafting Party to redraft the article accordingly.

98. The Commission decided that it was no longer necessary to retain the words "unless the parties have agreed otherwise" since under article 1, paragraph (2), the parties may agree on any modification of the Rules.

99. The text of article 19 as reviewed by the Drafting Party was as follows:

"ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

"Article 19

"The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings."

* * *

"Admissibility of evidence in other proceedings

"Article 20

"The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that was the subject of the conciliation proceedings:

"(*a*) Views expressed by the other party in respect of a possible solution of the dispute;

"(*b*) Admissions made by the other party in the course of the conciliation proceedings;

"(*c*) Proposals made by the conciliator;

"(*d*) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator."

100. The Commission expressed agreement with the policy underlying article 20. It was observed that under the Rules parties could not only express views in respect of a possible settlement of the dispute but could also under article 11 (now art. 12) make suggestions in that respect. It was therefore proposed that article 20 (*a*) should be redrafted and refer to such suggestions. The Commission accepted this proposal.

101. The text of article 20 as reviewed by the Drafting Party was as follows:

"ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

"Article 20

"The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that was the subject of the conciliation proceedings:

"(*a*) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

"(*b*) Admissions made by the other party in the course of the conciliation proceedings;

"(*c*) Proposals made by the conciliator;

"(*d*) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator."

* * *

Model conciliation clause[13]

102. The Commission considered the model conciliation clauses suggested in the revised draft UNCITRAL Conciliation Rules:

"MODEL CONCILIATION CLAUSE

"Variant A:

"Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

"Variant B:

"In the event of a dispute arising out of or relating to this contract, a party, before resorting to the courts or, if so provided for, to arbitration, shall invite the other party to seek an amicable settlement of that dispute by conciliation in accordance with the UNCITRAL Conciliation Rules as at present in force."

103. The opinion was expressed that it would not be necessary to set out model conciliation clauses in the UNCITRAL Conciliation Rules.

[13] The Commission considered this subject at its 241st meeting on 23 July 1980.

104. It was agreed, subject to the addition of the word "the" in the last clause, to retain variant A, which was non-committal and contained merely an agreement on the application of the UNCITRAL Conciliation Rules. The Commission did not accept proposals to draw the attention of the parties to the possibility of agreeing on a commitment to conciliate and then to specify the articles of the Conciliation Rules which would have to be modified. The view was expressed that this could possibly be interpreted as not corresponding to the voluntary concept underlying the Rules and that the general reference to articles to be modified might create difficulties and uncertainty. The Commission was agreed, however, that the following sentence be added after the model clause: "The parties may agree on other conciliation clauses."

Adoption of the Rules and decision of the Commission

105. The Commission unanimously adopted the UNCITRAL Conciliation Rules, as reviewed by the Drafting Party, in the Arabic, Chinese, English, French, Russian and Spanish language versions.

106. The Commission, at its 241st meeting, on 23 July 1980, adopted the following decision:

The United Nations Commission on International Trade Law,

Recognizing the value of conciliation as a method of amicably settling disputes arising in the context of international commercial relations,

Being convinced that the establishment of conciliation rules that are acceptable to countries with different legal, social and economic systems would contribute to the development of harmonious economic relations between peoples,

Having prepared the UNCITRAL Conciliation Rules after having considered the observations of Governments and interested organizations,

1. *Adopts* the UNCITRAL Conciliation Rules as set out hereinafter;

2. *Invites* the General Assembly to recommend the use of the UNCITRAL Conciliation Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

3. *Requests* the Secretary-General to arrange for the widest possible distribution of the UNCITRAL Conciliation Rules.

* * *

UNCITRAL CONCILIATION RULES

Application of the Rules

Article 1

(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

(2) The parties may agree to exclude or vary any of these Rules at any time.

(3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails.

Commencement of conciliation proceedings

Article 2

(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

Number of conciliators

Article 3

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

Appointment of conciliators

Article 4

(1) (*a*) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;

(*b*) In conciliation proceedings with two conciliators, each party appoints one conciliator;

(*c*) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.

(2) Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. In particular,

(*a*) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(*b*) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

Submission of statements to conciliator

Article 5

(1) The conciliator,* upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.

* In this and all following articles, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.

(3) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

REPRESENTATION AND ASSISTANCE

Article 6

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

ROLE OF CONCILIATOR

Article 7

(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

ADMINISTRATIVE ASSISTANCE

Article 8

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

Article 9

(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

DISCLOSURE OF INFORMATION

Article 10

When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party.

CO-OPERATION OF PARTIES WITH CONCILIATOR

Article 11

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE

Article 12

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

SETTLEMENT AGREEMENT

Article 13

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.* If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

CONFIDENTIALITY

Article 14

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

TERMINATION OF CONCILIATION PROCEEDINGS

Article 15

The conciliation proceedings are terminated:

(*a*) By the signing of the settlement agreement by the parties, on the date of the agreement; or

(*b*) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(*c*) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(*d*) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

Article 16

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

COSTS

Article 17

(1) Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term "costs" includes only:

* The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

(*a*) The fee of the conciliator which shall be reasonable in amount;

(*b*) The travel and other expenses of the conciliator;

(*c*) The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;

(*d*) The cost of any expert advice requested by the conciliator with the consent of the parties;

(*e*) The cost of any assistance provided pursuant to articles 4, paragraph (2) (*b*), and 8 of these Rules.

(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

DEPOSITS

Article 18

(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1) which he expects will be incurred.

(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

Article 19

The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

Article 20

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

(*a*) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(*b*) Admissions made by the other party in the course of the conciliation proceedings;

(*c*) Proposals made by the conciliator;

(*d*) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

MODEL CONCILIATON CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

(The parties may agree on other conciliation clauses.)

B. *UNCITRAL Arbitration Rules*

Introduction

107. The Commission, at its twelfth session, considered certain issues relevant in the context of the UNCITRAL Arbitration Rules.[14] One issue was whether the Commission should take steps to facilitate the use of the Rules in administered arbitration and seek to prevent disparity in their use by arbitral institutions. The other issue was whether it would be desirable and feasible to issue a list of arbitral and other institutions that have declared their willingness to serve, if so requested, as appointing authorities under the UNCITRAL Arbitration Rules.

108. The Commission, at that session, decided to request the Secretary-General:

"(*a*) To prepare for the next session, if possible in consultation with interested international organizations, guidelines for administering arbitration under the UNCITRAL Arbitration Rules, or a check-list of issues which may arise when the UNCITRAL Arbitration Rules are used in administered arbitration;

"(*b*) To consider further, in consultation with interested international organizations, including the International Council for Commercial Arbitration, the advantages and disadvantages in the preparation of a list of arbitral and other institutions that have declared their willingness to act as appointing authorities under the UNCITRAL Arbitration Rules, and to submit its report to the Commission at a future session;

"(*c*) To consider methods to promote and facilitate use of the UNCITRAL Arbitration Rules."[15]

109. The Commission, at its present session, had before it a note by the Secretary-General (A/CN.9/189)* which takes into account the views expresed by the Commission at its twelfth session and information obtained in consultative meetings with members of the International Council for Commercial Arbitration and representatives of the International Chamber of Commerce. As to the first issue, the note suggests, and sets forth, guidelines to be issued in order to assist arbitral institutions in formulating rules for administering arbitrations under the UNCITRAL Arbitration Rules and to encourage them to leave these Rules unchanged. As to the second issue, the note suggests that the publication by the United Nations of a list of arbitral institutions willing to act as appointing authorities would not be desirable but that it should be left to the institutions themselves to declare their willingness to act as such.

Discussion on the use of the UNCITRAL Arbitration Rules in administered arbitration[16]

110. The Commission held an exchange of views on the desirability of issuing guidelines for administered arbitra-

* Reproduced in this volume, part two, IV, D, below.

[14] See Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), paras 57–70 (Yearbook ... 1979, part one, II, A).

[15] *Ibid.*, para. 71 (Yearbook ... 1979, part one, II, A).

[16] The Commission considered this subject at its 236th meeting on 21 July 1980.

tion and on the draft guidelines prepared by the Secretariat. It was observed that such guidelines should be addressed not only to arbitral institutions but also to other relevant institutions, such as chambers of commerce.

111. There was support for the idea of preparing guidelines in the form of recommendations and for the approach taken in the draft guidelines. However, it was felt that, due to the late publication of the note, representatives had not had sufficient time to consult with interested circles. The Commission, therefore, decided not to discuss the contents of the draft guidelines in detail and to postpone consideration of the Secretary-General's proposal.

Discussion on the designation of an appointing authority[17]

112. The Commission, after deliberation, was agreed that it was not desirable to issue a list of arbitral and other institutions that have declared their willingness to serve, if so requested, as appointing authorities under the UNCITRAL Arbitration Rules. It was felt that such a list could never be complete and fully accurate. Furthermore, neither the Commission nor the Secretariat was in a position to judge whether an institution which applied for inclusion in the list was genuine and qualified. This was seen as particularly important since inclusion in a list published by the United Nations might be interpreted as carrying with it a stamp of approval or recommendation. It was, therefore, felt that it should be left to arbitral institutions themselves to declare that they are prepared to act as appointing authorities.

Decision of the Commission

113. The Commission, at its 236th meeting, on 21 July 1980, adopted the following decision:

The United Nations Commission on International Trade Law,

1. *Takes note* of the note by the Secretary-General on "issues relating to the use of the UNCITRAL Arbitration Rules and the designation of an appointing authority" (A/CN.9/189);

2. *Decides* to postpone the consideration of the draft guidelines for administering arbitrations under the UNCITRAL Arbitration Rules to its next session;

3. *Decides* not to issue a list of arbitral institutions that have declared their willingness to act as appointing authorities under the UNCITRAL Arbitration Rules.

C. *Model arbitration law*[18]

114. The Commission had before it a note by the Secretariat entitled "Progress report on the preparation of a model law on arbitral procedure" (A/CN.9/190). The note sets forth the initial work undertaken by the Secretariat pursuant to a request by the Commission, at its twelfth session, to prepare an analytical compilation of provisions of national laws pertaining to arbitration procedure and to prepare a preliminary draft of a model law on arbitral procedure.[19]

115. The note refers to difficulties in obtaining the materials necessary for the preparation of a complete and up-to-date compilation of national laws. In order to assist the Secretariat in that task, the Commission was agreed to invite the Governments of Member States of the United Nations, in particular those being members of the Commission, to provide the Secretariat with relevant materials on national legislation and case law, together with pertinent treatises where available.

116. The Commission, after deliberation, took note of the progress report and the suggestions therein as to the further work to be undertaken in that field.

Decision of the Commission

117. The Commission, at its 236th meeting, on 21 July 1980, adopted the following decision:

The United Nations Commission on International Trade Law,

1. *Takes note* of the progress report on the preparation of a model law on arbitral procedure (A/CN.9/190) and of the suggestions therein as to the further work to be undertaken in that field;

2. *Invites* Governments, in particular those that are members of the Commission, to provide the Secretariat with relevant materials on national legislation and case law, and pertinent treatises where available.

CHAPTER VI. NEW INTERNATIONAL ECONOMIC ORDER

Introduction

118. The United Nations Commission on International Trade Law, at its eleventh session, included in its work programme a topic entitled "The legal implications of the new international economic order" and accorded priority to the consideration of this subject. The Commission, on that occasion, also established a Working Group on the New International Economic Order, but deferred the designation of the States members of that Group until its twelfth session.[20]

119. At its twelfth session the Commission designated the following States as members of the Working Group: Argentina, Australia, Chile, Czechoslovakia, France, German Democratic Republic, Germany, Federal Republic of, Ghana, India, Indonesia, Japan, Kenya, Mexico, Nigeria, Union of Soviet Socialist Republics, United Kingdom of

[17] The Commission considered this subject at its 236th meeting on 21 July 1980.

[18] The Commission considered this subject at its 236th meeting on 21 July 1980.

[19] Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 81 (Yearbook ... 1979, part one, II, A).

[20] Report of the United Nations Commission on International Trade Law on the work of its eleventh session, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17), para. 71 (Yearbook ... 1978, part one, II, A).

Great Britain and Northern Ireland, and United States of America.[21]

120. At its twelfth session, the Commission had before it a report of the Secretary-General entitled "New international economic order: possible work programme of the Commission" (A/CN.9/171).* That report, submitted pursuant to a request by the Commission, reviewed subject-matters of possible relevance to international trade under the following headings: general principles of international economic development, commodities, trade, monetary system, industrialization, transfer of technology, transnational corporations, and permanent sovereignty of States over natural resources.

121. The Commission, at that session, requested its Working Group to examine the report of the Secretary-General taking into account the records of the discussions of UNCITRAL on its eleventh and twelfth sessions and to make recommendations as to specific topics which could appropriately form part of the programme of work of the Commission, and as to the steps that could usefully be taken by the Commission in respect of co-ordination in the field of international trade law.

122. The Working Group held its session at United Nations Headquarters in New York from 14 to 25 January 1980. At that session the Working Group reached consensus on a list of topics which it proposed to the Commission for possible inclusion in its programme of work.

123. At its present session, the Commission had before it the report of its Working Group on the work of its session (A/CN.9/176).** Among the recommendations which the Working Group submitted to the Commission for consideration were the following topics:

1. Legal aspects of multilateral commodity agreements;
2. Study aimed at identifying legal issues arising in the context of foreign investment that might be suitable for consideration by the Commission;
3. Study on intergovernmental bilateral agreements on industrial co-operation;
4. Harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development, such as contracts on research and development, consulting, engineering, supply and construction of large industrial works (including turn-key contracts or contracts *produit en main*), transfer of technology (including licensing), service and maintenance, technical assistance, leasing, joint venture, and industrial co-operation in general;
5. Identification of concrete legal problems arising from the activities of transnational corporations, having regard to, in particular, the need for co-ordination of work with other competent bodies in this field;
6. Study on concession agreements and other agreements in the field of natural resources taking into account the work carried out by other competent bodies in this field and the need for co-ordination.

124. The Commission noted that the Working Group had not discussed the order of priorities to be accorded to the topics proposed by it, but that the Working Group had expressed the opinion that item 4 was of special importance to developing countries and to the work of the Commission in the context of the new international economic order.

125. The Commission, at its present session, had before it a study on item 4, which had been prepared by the Secretary-General in response to a request by the Working Group (A/CN.9/191).* The study reviewed the various types of contract used in the context of industrialization, described their main characteristics and content and referred to the work carried out in this field by other organizations.

126. The Commission also had before it the reply of the United Nations Conference on Trade and Development concerning the legal aspects of international commodity agreements (A/CN.9/193)** and a resolution of the Asian-African Legal Consultative Committee (AALCC) concerning the work of UNCITRAL in respect of the new international economic order (A/CN.9/194).***

Discussion at the session

127. The Commission expressed its appreciation to the Working Group on the New International Economic Order for the work carried out by it. The recommendations submitted by the Working Group to the Commission showed that there were aspects of the new international economic order which could usefully be dealt with by the Commission. The Commission also expressed its appreciation to the Chairman of the Working Group, Professor Kazuaki Sono (Japan), for having guided the Working Group during its deliberations.

128. The Commission noted that the report of the Working Group had been the subject of discussions by the AALCC, and that the Group's recommendations had been favourably received by AALCC.

129. There was general agreement that the report of the Working Group was carefully worded, that its findings were well balanced and that the strength of its recommendations derived from the fact that they had been adopted by consensus. It was emphasized that the Commission, in dealing with the proposed topics, should bear in mind the objectives set forth in such documents as the Declaration on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States.

130. The Commission was agreed it should select certain subject-matters recommended by the Working Group for priority treatment. It was also noted that other work carried out by UNCITRAL constituted a significant contribution to the implementation of the new international economic order.

* Yearbook ... 1979, part two, IV.
** Reproduced in this volume, part two, V, A, below.
[21] Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 100 (Yearbook ... 1979, part one, II, A).

* Reproduced in this volume, part two, V, B, below.
** Reproduced in this volume, part two, V, C, below.
*** Reproduced in this volume, part two, V, D, below.

131. The Commission endorsed the view of the Working Group that item 4, referred to above, would be of special importance. The view was expressed that this item comprised many different types of contract in the area of industrial development and might, therefore, well absorb during the next few years most of the resources of the Secretariat.

132. The proposal was made that priority should also be given to the item "Intergovernmental agreements on industrial co-operation", since such agreements frequently included provisions which were relevant to contractual relationships between enterprises. Moreover, intergovernmental agreements often constituted the basis for dealings between enterprises and could, therefore, not be disregarded.

133. Under another view, however, such agreements should not be given priority because they were in essence of a bilateral nature and because they concerned public law matters. Nevertheless, while no immediate substantive work should be commenced, it would be useful to establish a universal register of intergovernmental agreements on industrial co-operation, as suggested by the Working Group.

134. Various other proposals relating to matters included in the Working Group's list were made but not retained by the Commission as matters with priority. There was wide agreement, however, that all items were relevant in the context of the co-ordinating functions of the Commission.

135. Divergent views were expressed as to the sphere of competence of the Commission and whether or not matters of public international law could be included in the work programme of the Commission. It was stressed by some that the Commission was primarily, if not solely, concerned with matters of private law. Under another view, however, the participation of governmental agencies in international trade was considerable and public law relationships could therefore not be ignored. Moreover, the dividing line between private and public law was not always easily discernible.

136. In considering the different types of contract set forth in the report of the Secretary-General, there was wide agreement in the Commission to commence work on contractual provisions relating to contracts for the supply and construction of large industrial works (including turn-key contracts or contracts *produit en main*) and contracts on industrial co-operation in general. It was noted that these contracts were of a complex nature and included elements found also in other types of contract. It was thought that these contracts would, therefore, form a basis for possible future work in respect of other related contracts. It was also felt that the elaboration of model clauses, contracts or rules in regard to the supply of large industrial works was a logical sequence to the law of sales.

137. The view was expressed that work on contracts for the supply of plants and on industrial co-operation should take into account relevant intergovernmental agreements since contracts between enterprises did not exist in a vacuum and could not be treated in isolation. It was not possible to ignore the role of States in industrial development, and it was thus essential to study the impact of intergovernmental agreements relating to economic and industrial co-operation on the contracts between enterprises.

138. It was proposed in this connexion that the work of the Commission in the context of the new international economic order should include a study of the most-favoured-nation clause. This proposal was opposed on the ground that the General Assembly had currently before it the work on the most-favoured-nation clause carried out by the International Law Commission and thus the Commission should await the Assembly's decisions in this matter.

139. The Commission endorsed the suggestion by the Secretariat that its work in respect of the contracts selected by the Commission should comprise studies of the available literature and the relevant work, if any, of other organizations and should analyse international contract practices. It was noted that the work of the Secretariat would be facilitated if members of the Commission provided the Secretariat with copies of such contracts.

140. The view was also expressed that, in line with the recommendations of the Working Group, the Commission should consider the desirability of harmonizing and unifying contractual provisions or clauses commonly occurring in international contracts in the field of industrial development. Hence, the Secretariat should also review such clauses and establish a checklist of them.

141. It was generally agreed that the Secretariat in carrying out the preparatory work should have a certain measure of discretion. There was also agreement that decisions on the direction the work should ultimately take should be taken in stages and that it was not now feasible to determine the ultimate end-product.

142. The Commission was informed that the UNCITRAL budget contained an allocation for convening a small group of experts for the purpose of assisting the Secretariat in carrying out the preparatory work. The Commission was of the view that the decision to convene such a group of experts should be left to the Secretariat.

Decision of the Commission

143. The Commission, at its 242nd meeting, on 25 July 1980, adopted the following decision:

The United Nations Commission on International Trade Law,

1. *Takes note* with appreciation of the report of the Working Group on the New International Economic Order on the work of its session held at New York from 14 to 25 January 1980 and of the study by the Secretary-General on International Contracts in the Field of Industrial Development;

2. *Welcomes* the recommendations of the Working Group concerning subject-matters to be included in the work programme of the Commission;

3. *Agrees* to accord priority to work related to contracts in the field of industrial development;

4. *Requests* the Secretary-General:

(*a*) To carry out preparatory work in respect of contracts on supply and construction of large industrial works and on industrial co-operation;

(*b*) To submit a report to the Working Group on the New International Economic Order;

5. *Decides* that the Working Group on the New International Economic Order shall be composed of all States members of the Commission;

6. *Requests* the Working Group to submit a progress report to the fourteenth session of the Commission.

CHAPTER VII. CO-ORDINATION OF WORK

144. The Commission had before it General Assembly resolutions 34/142* and 34/150** and part of the report of the Working Group on the New International Economic Order.

145. The Commission expressed its appreciation that the General Assembly, on the recommendation of the Commission, had adopted resolution 34/142* of 17 December 1979 on co-ordination in the field of international trade law. The Commission awaits the actions to be taken by the Secretary-General in implementation of paragraph 5 of the resolution.

146. The Commission also noted with appreciation that the General Assembly, in resolution 34/150** of 17 December 1979 on consolidation and progressive development of the principles and norms of international economic law relating in particular to the legal aspects of the new international economic order, had requested the Secretary-General, in collaboration with the United Nations Institute for Training and Research and in co-ordination with the United Nations Commission on International Trade Law, to study the question of the consolidation and progressive development of the principles and norms of international economic law relating in particular to the legal aspects of the new international economic order, with a view to embodying them in one or more instruments as appropriate. The Commission expressed its willingness to co-operate in the field of co-ordination with the Secretary-General in the conduct of this study.

147. The Commission was informed of the work programme of the International Institute for the Unification of Private Law (UNIDROIT) in the field of international trade law as approved by the fifty-ninth session of the Governing Board, and noted with appreciation the quality of co-ordination in this regard between UNIDROIT and the Commission through their respective secretariats.

148. The Commission was also informed that it is intended to request the Fourteenth Session of the Hague Conference on Private International Law to change the procedures of the Conference, so that, when it is dealing with matters of universal interest, such as matters of international trade law, all States will be invited to participate.

149. The Commission was of the view that the co-ordination of the legal activities of United Nations bodies took on a particular importance at a time when these bodies were increasingly active in the elaboration and adoption of legal rules. This was particularly so in the area of the new international economic order in view of the fact that the General Assembly had on several occasions drawn the attention of United Nations organs to the need to participate in the implementation of General Assembly resolutions pertaining to the new international economic order. The Commission was agreed that the recommendations of its Working Group on the New International Economic Order, if fully implemented, would go a long way to improve the current lack of co-ordination. However, it was felt that more information was required about the programmes and terms of reference of the various United Nations organs before it would be possible to recommend a concrete course of action.

150. The Commission therefore requested its Secretariat to submit to it at its next annual session complete information on the activities of other organs and international organizations so as to enable the Commission to consider the question of co-ordination of work in full knowledge of the issues involved and to take such decisions as may be appropriate.

CHAPTER VIII. TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW[22]

Introduction

151. The Commission recalled that, at its tenth session, consequent upon the cancellation due to lack of funds of the second UNCITRAL symposium on international trade law planned in connexion with that session, it had recommended to the General Assembly that it "should consider the possibility of providing for the funding of the Commission's symposia on international trade law, in whole or in part, out of the regular budget of the United Nations".[23]

152. In response to this recommendation and after considering the report of the Secretary-General (A/33/177) submitted to it at its request, the General Assembly at its thirty-third session: (*a*) expressed the view that the United Nations Commission on International Trade Law should continue to hold symposia on international trade law; and (*b*) appealed to all Governments and to organizations, institutions and individuals to consider making financial and other contributions that would make possible the holding of a symposium on international trade law during 1980, as envisaged by the United Nations Commission on International Trade Law, and authorized the Secretary-General to apply towards the cost of the United Nations Commission on International Trade Law symposia, in whole or in part, as may be necessary to finance up to 15 fellowships for participants in the said symposia, voluntary contributions to the United Nations Programme of Assistance in the Teaching, Study, Dissemination and

* Reproduced in this volume, part one, I, C, above.

** Reproduced in this volume, part three, III, below.

[22] The Commission considered this item at its 239th and 240th meetings on 23 July 1980.

[23] *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17* (A/32/17), para. 45 (Yearbook ... 1977, part one, II, A, para. 45).

Wider Appreciation of International Law not specifically earmarked by the contributors to some other activity within the Programme.

153. The Commission was informed that to date no funds had been made available for the UNCITRAL symposia from the above Programme of Assistance.

Discussion at the session

154. There was general agreement that the UNCITRAL symposia corresponded to a need and should therefore be continued. It was suggested that the Secretariat should study the possibility of arranging for regional seminars. It was discussed whether future symposia should be held on the occasion of a session of the Commission as had been the first symposium in 1975 in Geneva, or whether regional seminars should be organized in Africa, Asia and Latin America.

155. In favour of holding future symposia on the occasion of a session of the Commission, it was pointed out that among the representatives to the Commission were a number of experts in various aspects of international trade law who could contribute to the symposium. This would have the advantage that the Commission would be immediately involved in the symposium and that there would be no additional expense in making this expertise available. Holding of the symposium on the occasion of a session of the Commission would also give the participants the opprotunity to become better acquainted with the work of the Commission itself.

156. On the other hand it was pointed out that the holding of regional seminars had the advantage that there would be less cost in respect of the participants than if they were brought from various developing countries to New York or Vienna. It would be possible to make use of local experts in international trade law if the seminars were held regionally. It was also suggested that the seminars would have a greater impact if held regionally, both because it would be possible for more participants to attend and because of the publicity which would be created in the region where the seminar was held.

157. The Commission was informed that the Government of Sweden had pledged a contribution to the Symposium. The representatives of Austria, Canada, the Federal Republic of Germany, Finland, the Netherlands and Yugoslavia expressed the willingness of their Governments to contribute to the holding of a symposium on the occasion of the fourteenth session of the Commission in 1981 at Vienna. The Commission expressed its appreciation to the Governments of these countries and noted that the sums thus pledged would be sufficient to finance the travel and subsistence of approximately 15 participants from developing countries, and expressed the hope that further contributions would be forthcoming.

158. There was general agreement that the subject-matter to be discussed at the symposium should cover those matters in which UNCITRAL is or had been active, in particular, arbitration and conciliation, sales, maritime law and the legal implications of the new international economic order.

159. It was suggested that the Commission should attempt to plan programmes of study in international trade law of a longer duration, perhaps of six months or more. In this connexion it was suggested that co-operative arrangements might be made with some universities or institutes.

Fellowships and internship arrangements

160. The representative of France informed the Commission that his Government had decided to make available under the auspices of UNCITRAL a fellowship to a candidate from a developing country for training in international trade law. The Commission took note with appreciation of this offer.

Assistance

161. It was suggested that the Commission might make available to the developing countries its help when they are planning to review their domestic commercial and international trade law. In such activities the Commission should co-operate with other organizations which are also engaged in such work.

Decision

162. At its 240th meeting, on 23 July 1980, the Commission unanimously adopted the following decision:

The United Nations Commission on International Trade Law,

1. *Decides* to hold the second UNCITRAL symposium on international trade law on the occasion of the fourteenth session of the Commission at Vienna in 1981;

2. *Expresses its appreciation* to the States which have offered to make contributions to the holding of the second UNCITRAL symposium on international trade law;

3. *Invites* other States to make similar contributions so that the number of participants from developing countries might be increased;

4. *Requests* the Secretary-General:

(*a*) To make the necessary arrangements for the holding of the Second UNCITRAL Symposium on International Trade Law on the occasion of its fourteenth session at Vienna in 1981;

(*b*) To report to it on the possibility of holding regional seminars.

CHAPTER IX. FUTURE WORK AND OTHER BUSINESS[24]

A. *Date and agenda of the fourteenth session of the Commission*

163. It was decided that the fourteenth session of the Commission would be held from 19 to 26 June 1981 at Vienna. As to the agenda of that session, the Commission was informed by its Secretary that, in regard to international contract practices, the Commission would have before it the report of the Working Group on International Contract Practices on the work of its second session, and

[24] The Commission considered this subject at its 239th, 240th and 241st meetings on 23 and 24 July 1980.

reports of the Secretary-General on termination clauses and *force majeure* clauses. In regard to international commercial arbitration, the Commission would examine the Guidelines for administering arbitration under the UNCITRAL Arbitration Rules. The Commission was also informed that the UNCITRAL Study Group on International Payments had considered the proposal made by France at the Commission's eleventh session regarding the establishment of a universal unit of account for international conventions, and that the Commission might appropriately consider the subject at the next session. The Commission was also informed about the progress of the work of the Study Group on International Payments in respect of the legal aspects of electronic funds transfers, and that in the view of the Study Group further work should focus on payment methods by non-negotiable paper. The Commission requested the Secretariat to submit to it at its next session a progress report on the matter, so that it might give directives on the scope of further work after having considered the Study Group's conclusions. However, work could continue within the Study Group. The Commission was also informed that it would have before it a report on co-ordination of work in the field of international trade law. The Commission also decided that it would consider, at each of its sessions, the status of conventions that were the outcome of work carried out by it.

B. *Composition and sessions of Working Groups*

164. It was decided that the future sessions of the Working Group on International Negotiable Instruments would be held as follows:

(*a*) Tenth session, from 5 to 16 January 1981, at Vienna;

(*b*) If a further session were required, eleventh session, at a date to be decided by the Working Group, in New York.

165. It was decided that the Working Group on the New International Economic Order would be comprised of all States members of the Commission and that the Working Group would meet from 9 to 18 June 1981 at Vienna.

166. It was decided that the second session of the Working Group on International Contract Practices would be held from 13 to 17 April 1981 in New York.

167. The Commission elected Guatemala and Trinidad and Tobago to the Working Group on International Contract Practices, to replace Brazil and Mexico which had ceased to be members of the Commission. The Commission also elected Chile to replace Mexico on the Working Group on International Negotiable Instruments.

C. *General Assembly resolution on the report of the Commission on the work of its twelfth session*

168. The Commission took note of General Assembly resolution 34/143* of 17 December 1979 on the report of the United Nations Commission on International Trade Law on the work of its twelfth session.

D. *Current activities of international organizations related to the harmonization and unification of international trade law*

169. The Commission took note of a report of the Secretary-General on the current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/192 and Add. 1 and 2).* It requested that future reports be more detailed in respect of matters of current interest to the Commission, so that they would give more information to Governments.

E. *United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)*

170. The Commission noted that, at the time of its present session, the United Nations Convention on the Carriage of Goods by Sea (concluded at Hamburg on 31 March 1978 and open for signature by all States until 30 April 1979) had been ratified or acceded to by only three States, whereas twenty-seven States had signed the Convention. Ratification by twenty States will be required in order to bring the Convention into force. The hope was expressed that those States which had signed the Convention would proceed to ratification in the near future and that other States would consider acceding to the Convention.

F. *UNCITRAL law library*

171. The Commission heard a statement by its Secretary on the UNCITRAL law library at the location of the International Trade Law Branch at Vienna, Austria. The Commission considered the means by which the Secretariat could further develop its library holdings within the budgetary resources allocated to it.

172. The Commission, after deliberation, unanimously adopted the following decision:

The United Nations Commission on International Trade Law,

Being of the view that the preparatory work carried out by the International Trade Law Branch of the Office of Legal Affairs, which functions as its Secretariat, is an essential element of its own work,

Invites Governments to place the UNCITRAL law library at Vienna on their mailing lists for legal materials such as official journals, gazettes, legislative texts and other relevant publications.

G. *Summary records*

173. The Commission took note of the General Assembly Resolution 34/50 on 23 November 1979, by virtue of which summary records for subsidiary organs of the General Assembly, with the exception of the International Law Commission and the Committee of the Whole established under General Assembly Resolution 32/174, are to be discontinued during the experimental period of one year.

* Reproduced in this volume, part one, I, C, above.

* Reproduced in this volume, part two, VI, A, B and C, below.

174. The Commission, whilst appreciating the concerns underlying that resolution draws the attention of the General Assembly to the relevance of summary records for the legislative history of United Nations treaties, conventions and other texts of a legal character. To date, three United Nations conventions based on draft texts prepared by the Commission, have been concluded, and the UNCITRAL Arbitration Rules, drawn up by the Commission and recommended by the General Assembly, are being applied world-wide in the settlement of international commercial disputes. In respect of all these texts, complete summary records, reflecting the preparatory stage of the work, are available to governments, academic scholars, lawyers and other interested persons. The Commission believes that it is in the interest of the legislative work of the work of the United Nations that this practice be continued.

175. For these reasons, the Commission requests the General Assembly to authorize that summary records be drawn up of those meetings of the Commission that are devoted to the discussion of legal texts.

ANNEX

List of documents before the Commission

[Annex not reproduced; see check list of UNCITRAL documents at the end of this volume.]