F. Report of the Secretary-General: analytical compilation of comments by Governments and international organizations on the draft Convention on the Formation of Contracts for the International Sale of Goods as adopted by the Working Group on the International Sale of Goods and on the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods prepared by the International Institute for the Unification of Private Law (A/CN.9/146 and Add.1-4)

I. Comments by Austria, Australia, Czechoslovakia, Finland, the Federal Republic of Germany, Ghana, the Netherlands, Sweden and the United Kingdom of Great Britain and Northern Ireland, as well as by the Economic Commission for Europe, the Economic and Social Commission for Asia and the Pacific, the Caribbean Community, the Hague Conference on Private International Law, the International Chamber of Shipping, the International Civil Aviation Organization and the Central Office for International Railway Transport (A/CN.9/146)*

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Introduction

1. The text of the draft Convention on the Formation of Contracts for the International Sale of Goods (hereafter referred to as the draft Convention)[1] adopted by the Working Group on the International Sale of Goods at its ninth session (Geneva, 19-30 September 1977) was transmitted to Governments and interested international organizations for their comments.[2]

2. The Working Group also requested the Secretary-General to circulate the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods prepared by the International Institute for the Unification of Private Law (UNIDROIT) (hereafter referred to as the UNIDROIT draft)[3] to Governments and interested international organizations for their comments as to whether any matters in that text which had not been included in the draft Convention should be included.[4]

3. As at 19 April 1978 comments have been received from the following States: Austria, Australia, Czechoslovakia, Finland, Germany, Federal Republic of, Ghana, Netherlands, Sweden and United Kingdom of Great Britain and Northern Ireland.

4. Comments have also been received from the following regional commissions of the United Nations and other international organizations: Economic Commission for Europe (ECE), Economic and Social Commission for Asia and the Pacific (ESCAP), Caribbean Community (CARICOM), Hague Conference on Private International Law, International Chamber of Shipping (ICS), International Civil Aviation Organization (ICAO) and the Central Office for International Railway Transport (OCTI).

5. This report contains an analytical compilation of these comments. Comments received after 19 April will be reproduced in an addendum to this report.

6. In preparing the analytical compilation, general comments on the draft Convention precede comments on the individual provisions of the draft. Comments on the provisions of the draft Convention have been arranged by articles and within each article by paragraphs or subparagraphs or, where appropriate, by subject matter. Where the comments concern the article as a whole, and not a particular paragraph of an article, they are analysed under the heading "article as a whole".

Analytical compilation of comments

A. *Comments on the draft Convention as a whole*

1. *General comments on the draft Convention*

7. Australia considers that the Working Group at its ninth session improved the draft Convention in several important respects, particularly by incorporating the concept of acceptance by conduct (art. 12) and by deleting article 7 (3) of the previous draft which dealt with confirmation of a prior contract of sale.[5]

8. Czechoslovakia notes with pleasure that the draft Convention supplies a good basis for preparation

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* 26 April 1978.

[1] The text of the draft Convention is to be found in document A/CN.9/142/Add.1 (reproduced in the present volume, part two, I, A, annex).

[2] Report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977), A/CN.9/142, para. 304 (reproduced in the present volume, part two, I, A).

[3] The text of the UNIDROIT draft is to be found in document A/CN.9/143 (reproduced in the present volume, part two, I, C).

[4] A/CN.9/142, para. 305.

[5] A/CN.9/128, annex I (Yearbook ... 1977, part two, I, B). The text of this provision was as follows:

"[(3) If a confirmation of a prior contract of sale is sent within a reasonable time after the conclusion of the contract, any additional or different terms in the confirmation [which are not printed] become part of the contract unless they materially alter it, or notification of objection to them is given without delay after receipt of the confirmation. [Printed terms in the confirmation form become part of the contract if they are expressly or impliedly accepted by the other party.]]"

Article 7 of the previous draft has been renumbered as article 13.

of a definitive draft which may result in uniform rules capable of achieving much wider acceptance than the Hague Uniform Law on Formation of Contracts for the International Sale of Goods of 1964.

9. Finland notes that the draft Convention forms a good basis for further work within UNCITRAL on the preparation of a new Convention.

10. The Federal Republic of Germany welcomes the efforts of UNCITRAL to standardize legislation relating to the international sale of goods also with regard to the formation of contracts of sale. It considers the draft Convention prepared by the Working Group to be a good basis for discussion at the forthcoming UNCITRAL session. It particularly welcomes the compromise on the question of revocability as embodied in article 10.

11. Ghana views the draft Convention as an acceptable framework for a Convention on the formation of international contracts of sale of goods.

12. Sweden welcomes the work currently being carried out within UNCITRAL with a view to framing an international set of rules on the sale of goods which could be more widely accepted by States than the 1964 Hague Conventions. Last year UNCITRAL concluded its work on the revision of the Uniform Law on the International Sale of Goods by adopting a new draft Convention on the International Sale of Goods. Sweden considers it logical that the Commission should pursue its work by taking up the question of formation of contracts for the international sale of goods. The text of the draft Convention which has been drawn up by a working group set up by the Commission provides, in the Swedish Government's view, a suitable basis for the Commission's continued work. Generally speaking, this draft text is based on the same principles as the Uniform Law on the Formation of Contracts for the International Sale of Goods. The compromises between the different systems of contract law reflected in the draft can, to a large extent, be accepted by Sweden.

13. All these respondents indicate that particular problems still exist which are not resolved in the draft in its present form, and suggest appropriate solutions to resolve these problems.[6]

14. The secretariat of CARICOM is in general agreement with the text "even though the usefulness of Article 5 may be questioned".

15. The Legal Bureau of ICAO notes that the draft Convention appears to deal with the subject matter of the formation of contracts for the international sale of goods in a satisfactory manner.

2. *Relationship to the draft Convention on the International Sale of Goods*

16. The secretariat of CARICOM states that there should be one convention covering not only the rights of contracting parties in international sale of goods but also dealing with formation and validity of contracts for the international sale of goods.

17. Finland notes that it would be of importance that the scope of application of the draft Convention is the same as the scope of application of the draft Convention on the International Sale of Goods. One way of achieving this would be to amalgamate these two draft Conventions but efforts to amalgamate the two drafts should be refrained from if that would render the amalgamated Convention less acceptable to States than the draft Convention on the International Sale of Goods as presently drafted.

18. The Federal Republic of Germany notes that the draft Convention settles only some of the legal issues that may arise in connexion with the international sale of goods, whilst other aspects of this area of law have already been covered by the conventions on the international sale of goods. With a view to establishing a world-wide standardized law on the sale of goods, it is urgently necessary to consider all these projects together and at all costs eliminate any contradictions betweem them. As far as the draft Convention and the draft Convention on the International Sale of Goods are concerned, it would seem necessary to deal with both projects at one and the same diplomatic conference in order to achieve the greatest possible measure of consistency.

19. Sweden states that the draft Convention on the International Sale of Goods and this draft Convention should be submitted to one conference of plenipotentiaries because it is most important that the various provisions be co-ordinated, especially as regards the scope of application. Sweden also states that it would be desirable for the rules regarding sale and the formation of contracts for sale to be combined in one and the same convention, thus achieving greater clarity and providing further guarantees that the scope of application would be identical. However, should it appear that certain States which would be prepared to accept a future Convention based on the draft Convention on the International Sale of Goods would be unable to accept a convention which also contains rules on formation of contracts, the idea of a single convention should be abandoned. The same applies if a merger would considerably delay the adoption of an international set of rules in this field.

3. *Relationship to the UNIDROIT draft*

20. Austria regrets that it was not possible to consider the rules on validity contained in the UNIDROIT draft because of the urgent need to obtain agreement on a text on formation to supplement the draft Convention on the International Sale of Goods.

21. The secretariat of CARICOM notes that the parts of the UNIDROIT draft dealing with mistake, fraud and threat should be incorporated into the text adopted by the Working Group on Sales.

22. Finland, Ghana, Sweden and the United Kingdom state that further provisions of the UNIDROIT draft should not be included in the draft Convention.

23. Finland notes that the UNIDROIT draft deals with an area in which unification of national law would seem hard to achieve. The draft as it stands would seem to be less mature for finalizing deliberations. It does not seem necessary to include any of the provisions of the UNIDROIT draft into the draft Convention.

24. Ghana does not consider it desirable to include in the draft Convention any rules of validity and consequently agrees with the decision of the Working Group

[6] These observations are noted below under the respective articles of the draft Convention.

to exclude from the draft Convention all the matters dealt with in the UNIDROIT draft.

25. Sweden does not think it advisable to examine further the question of rules relating to validity of contracts in this context. It would seem particularly difficult to achieve unification in this area and the existing material (the UNIDROIT draft) does not provide a satisfactory basis for the studies necessary.

26. The United Kingdom emphasizes that it would not wish to see the provisions in the UNIDROIT draft relating to mistake included in the draft Convention as these provisions are unacceptably broad.

27. The Hague Conference notes that it might be useful if the draft Convention contained provisions dealing with the consequences of the violation of the principles of fair dealing and the requirement of acting in good faith (art. 5) along the lines of articles 8 to 11 of the UNIDROIT draft. (See further the comments of the Hague Conference on art. 5 of para. 79 below.)

28. The Legal Bureau of ICAO notes that it would be possible to have a single convention (thus avoiding the present different scope of application provisions) dealing with both formation and validity even though, strictly speaking, the question of the validity of contracts appears to be separate from the question of formation of contracts.

29. The Netherlands, has no objection to the incorporation of rules governing validity, but would urge only the inclusion of articles 9 and 16. Article 9, in particular, would have a useful function similar to article 34 of ULIS, which has not been included in the draft Convention on the International Sale of Goods.[7]

30. OCTI states that it would be advisable to include certain provisions of the UNIDROIT draft regarding the legal consequences of errors, in particular the provisions of article 6 in order to avoid a settlement of this question by means of the national laws.

4. *Terminology*

The draft Convention

31. ESCAP recommends that, in the English text, the words "he", "his", and "him" which indicate the masculine form be replaced by words which are neutral as to gender. These suggestions are to the following effect:

Article 1(7)(*b*): replace the words "his habitual residence" by "that party's habitual residence".

Article 3(2), 12(4) and 18(3): replace the words "his place of business" by "a place of business".

Article 4(1): replace the words "his intent" by "that party's intent".

Article 13(2): replace the words "If he does not so object" by "If the offeror does not so object".

Article 15(2): replace the words "he considers his offer as having lapsed" by "the offer is considered to have lapsed".

The UNIDROIT draft

32. ESCAP recommends that, in the English text, the words "he", "his", "him" and "himself" which indicate the masculine form be replaced by words which are neutral as to gender.[8]

B. *Comments on specific provisions of the draft Convention*

Article 1

Paragraph (1), subparagraph (b)

33. Czechoslovakia notes that in order to achieve maximum acceptability of the draft Convention it is advisable to admit a possibility of any Contracting State to formulate at the time of signature, ratification or acceptance a reservation to the effect that the provisions of the Convention shall apply to the formation of contracts for the international sale of goods only between parties whose places of business are in different Contracting States. Contracting States should have a possibility to exclude in this way the application of subparagraph (*b*).

Paragraph (3)

34. The Secretariat of ECE notes that the wording of this paragraph may deserve further attention. The application of the draft Convention should not depend on the nationality of the parties: this is beyond dispute. However, the "character of the parties" as well as that of the proposed contract should be taken into consideration since international sales transactions cannot be effected by individuals who, under their national legislation, lack the capacity to conclude the relevant contract.

Paragraph (4), subparagraph (a)

35. Czechoslovakia proposes that this provision read as follows:

> "(*a*) Of goods bought for personal, family or household use, if the seller, at any time before or at the conclusion of the contract knew or ought to have known that the goods were bought for any such use."

It should thus follow that in case of doubt the Convention applies.

Paragraph (4) subparagraph (e)

36. ICS is pleased to note that contracts for the sale of ships, vessels or aircraft are not within the scope of the draft Convention.

Paragraph 6

37. The Secretariat of ECE notes that this provision is of particular importance because it correctly excludes subcontracting, i.e. all kinds of industrial co-

[7] Article 34 of the Uniform Law on the International Sale of Goods provides: "In the cases to which article 33 relates, the rights conferred on the buyer by the present Law exclude all other remedies based on lack of conformity of the goods". Article 33 sets out the circumstances where the seller has not fulfilled his obligation to deliver the goods.

[8] ESCAP notes that this suggestion affects arts. 1(2), 7(2), 9, 11, 14(3), 15(1) and 15(2).

operation contracts from the scope of the draft Convention, leaving the draft Convention to deal with straightforward commercial contracts.

Proposed alternate article 1

38. The United Kingdom proposes the reinstatement of the alternative text of this article as adopted by the Working Group at its eighth session. This was for use by those States which adopted the draft Convention on the International Sale of Goods and provided as follows:

> "This Convention applies to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Convention on the International Sale of Goods."[9]

Article 2

Article as a whole

39. ICS is pleased to note that the parties may agree to exclude the application of the Convention or derogate from or vary the effect of any of its provisions.

Unilateral variation or exclusion of Convention

40. Czechoslovakia, the secretariat of ECE, Finland, Sweden and the United Kingdom comment on the question whether one party should be able to unilaterally exclude the application of the draft Convention or vary or derogate from any of its provisions.

41. The secretariat of ECE favours the solution adopted by the Working Group, i.e. that agreement of the parties is necessary to vary or exclude the draft Convention.

42. Czechoslovakia, Finland, Sweden and the United Kingdom are, to varying degrees, opposed to the rule contained in article 2 that the draft Convention may be varied or excluded only by agreement of the parties.

43. Czechoslovakia states that the question of whether derogation from or variation of the provisions of the draft Convention might also be permitted on the basis of a unilateral act of one of the parties should be reconsidered. Czechoslovakia notes that difficulties may arise in connexion with the application of the present article 2, in particular in respect of the complicated question concerning the rules which are to be applied to the agreement on the exclusion or derogation from the provisions of the draft Convention. For instance, example 2A.3 in the commentary[10] may be interpreted in another way, namely, that a part of the offer was a condition requiring written form for the contract. If the other party purported to accept the offer by telephone, this oral form of reply meant modification of the conditions of the offer and could not be considered as an acceptance, taking into consideration article 13 of the draft Convention. The relationship between article 2 and article 13 should be clarified because the conclusion of paragraph 10 of the commentary relating to article 2 is not the only possible solution of the problem. The same difficulties arise in connexion with other examples used in the commentary.

44. Finland states that under paragraph (1) of this article the parties may agree to exclude the application of the Convention. The wording of the paragraph suggests that the offeror may not unilaterally exclude the application of the Convention. This might prove surprising to parties involved in international sale of goods. It might also be asked what happens if the offer contains a provision according to which the offer is not subject to the Convention, and the offeree does not react in any way. The result would seem to be, that a contract has been entered into according to the provisions of the Convention. It might, however, also be held, that the parties have not reached agreement on this point and that no contract has been made. Further, it might be asked how an agreement such as that envisaged in the paragraph should be made. It might be held that this is not an agreement for the international sale of goods and that the convention would not be applicable to such an agreement. Finland therefore proposes that paragraph (1) of article 2 be deleted and that a second sentence be added to the present paragraph (2) as follows:

> "A party is deemed to have accepted the rules in the offer or the reply to be followed in respect of the formation of the contract unless he objects to them without delay."

45. Sweden states that interpreted literally paragraph (1) of this article seems to require an express agreement to exclude application of the draft Convention completely. Sweden states that this requirement seems to be rather strict. Circumstances other than express agreement should also exclude application of the draft Convention in certain cases. For instance, should the parties in their prior relations have applied national rules, they should be regarded as having excluded application of the draft Convention when forming a subsequent contract.

46. The United Kingdom proposes that it should be possible for the draft Convention or any of its provisions to be excluded or varied by the unilateral act of a party, and not only by the agreement of both parties.

Paragraph (1)

47. The Hague Conference notes that this paragraph creates the impression that the right to exclude the draft Convention derives from the draft Convention. Howevr, it might be considered illogical to allow parties to rely on a provision of a convention which they exclude. A further problem is that the formation and validity of the exclusion agreement is not dealt with. These considerations lead to the question whether the provision is really needed.

Paragraph (2)

Derogation from provisions of Convention

48. The Netherlands states that paragraph (2) lays down that in principle the parties may agree to derogate from or vary the effect of the draft Convention's provisions. The commentary points out that such agreement must precede the conclusion of the contract of sale. The following example is given: A orders goods from B, stating that (in derogation from article 3, para. 1, of the

[9] A/CN.9/128, annex I.

[10] Report of the Secretary-General: commentary on the draft Convention on the Formation of Contracts for the International Sale of Goods (hereafter referred to as commentary), (A/CN.9/144 (reproduced in the present volume, part two, I, D).

draft Convention) acceptance must be in writing; B accepts by telephone. According to the commentary, the acceptance is effective in spite of any protest which A might make, since the parties had not agreed beforehand to derogate from article 3, paragraph (1).[11] The Netherlands has serious objections to this view, because the offeror must have the liberty to determine both the substance of his offer and such other modalities as the duration of its validity, the date on which it is to take effect and the manner in which it is to be accepted. The offeree must not be capable of accepting the offer without accepting these attendant conditions; if the offeree accepts the offer, it must be assumed that he also accepts any deviations from the draft Convention's basic provisions it may contain. The acceptance of an offer can therefore in itself involve deviating from the Convention, and prior acceptance of deviations proposed in the offer should not be demanded. The Netherlands notes that the other example given in the commentary must also be resolved in this manner.[12] If A states in his offer that B's written acceptance becomes effective at the moment it was sent instead of at the moment of receipt, as provided in article 12(2), and B then accepts the offer in writing, the moment of sending should then indeed be decisive. If A has, for example, set a period for acceptance, he cannot argue that the acceptance came too late if it was sent on time but received too late.

49. The Hague Conference states that paragraph (2) is possibly too wide as it gives a large scope to party autonomy although Contracting States may restrict this by virtue of the provisions of articles 3(2) and 7(2). It is noted that Contracting States which avail themselves of these provisions would probably not allow parties to exclude either the whole Convention or the mandatory provisions in those cases where the Convention applies. Similarly, it is noted that States which were of the view that the Convention should not apply to consumer sales (art. 1(4)(*a*)) may not wish to permit the parties to include consumer sales within the scope of the Convention. Moreover, the parties should not be permitted to waive article 5 of the draft Convention.

50. See also paragraphs 74 to 75 below on the desirability of making article 5 mandatory, paragraphs 121 to 125 below on the desirability of being able to derogate from article 18(2) and paragraphs 128 to 130 below on the operation of article (X).

Factors establishing agreement to derogate from provisions of Convention

51. Australia notes that as the words "agree to" have been retained in paragraph (2), the references to "offer" and "reply" seem to need modifying. An offer—and often also a reply—does not of itself manifest an agreement. The drafting would therefore be improved by substituting "the negotiations, including offer and reply" for "the negotiations, the offer or the reply".

52. Czechoslovakia notes that should the principle of an agreement be accepted as the basis for derogation from or exclusion of the draft Convention, "usages" mentioned at the end of paragraph (2) should be deleted as mere usages cannot be considered to constitute an agreement between the parties. In any case, it is doubtful whether any usages apply in international trade in connexion with general questions concerning formation of contracts to which the scope of the draft Convention is limited.

53. The Netherlands objects to the wording of paragraph (2) which states that agreement "may appear from the negotiations, the offer or the reply, from the practices which the parties have established between themselves or from usage". Agreement cannot be apparent from an order alone, but only from the order and the reply taken together. Finally, the summary appears too limited: agreement can also be apparent from legal transactions other than offer and reply, such as an earlier agreement or a company's articles of association. Such transactions will sometimes but not always be covered by the expression "practices which the parties have established between themselves".

Paragraph (3)

54. ESCAP notes that, in the interest of prudent business practice, there are some matters to which undue attention should not be drawn or which should not be encouraged. One of these is the practice of acceptance of offers by remaining silent. However, article 2(3) stresses that a term of the offer stipulating that silence shall amount to acceptance is not effective unless the parties have previously agreed otherwise. ESCAP considers that article 12(1) would provide sufficient coverage of the point in question, i.e., "Silence shall not in itself amount to acceptance" without belabouring the point of the possibility that the parties might previously agree otherwise.

55. The Netherlands notes that paragraph (3) lays down that "a term of the offer stipulating that silence shall amount to acceptance is not effective, unless the parties have previously agreed otherwise"; the wording of this exception is too restrictive: practices customary between the parties and usage can also lead to the other party being bound by silence and allow the offeror to stipulate this in his offer. Strikingly, article 12, paragraph (1), also includes a regulation to the effect that silence in itself does not amount to the acceptance of an offer. Perhaps the outcome advocated above can be achieved with the help of the latter regulation. However, the relationship between the two regulations is unclear, and it would be better to cover the matter of acceptance by silence in a single provision.

Article 3

Paragraph (2)

56. Austria regrets the existence of this provision because the substantive rule in article 3(1) is contained in article 11 of the draft Convention on the International Sale of Goods. Furthermore, the possibility of making a reservation may affect the trust in the validity of agreements made by parties whose places of business are in States where article 3(1) is applicable and those parties do not know whether the other Contracting State has made a reservation under paragraph (2).

57. Australia has no strong objections to this provision but proposes an amendment to article (X) to pre-

[11] Commentary A/CN.9/144, example 2A.3.
[12] *Ibid.*, example 2A.4.

vent that provision from operating unfairly (see the observations of Australia on article (X) at para. 128 below).

58. The comments of the Federal Republic of Germany on article (X) at paragraph 130 below refer to this provision.

Article 4

Scope of article

59. Sweden notes that it appears from the commentary that the interpretation rule in this article only relates to questions connected with the formation of the contract. No rules regarding the interpretation of contracts already concluded are contained either in this Convention or in the draft Convention on the International Sale of Goods (except that relevance of usage is stressed). Should article 4 be accepted, the result would therefore be that the law on international sale would have to distinguish between the interpretation of communications at the time of the formation of the contract and interpretation of the contract itself. It is doubtful whether a distinction of this kind can really be made. In any event, it would seem to be very difficult and there is a risk that the interpretation rule in article 4 would also be applied to the contract as such. Sweden therefore suggests that article 4 be deleted. Sweden makes an alternate proposal which is discussed under "Nature of test for determining intent" below.

Nature of test for determining intent

60. Finland, Sweden and the United Kingdom note that this article, as presently drafted, places too much emphasis on the subjective intent of one of the parties where the other party knew or ought to have known what that intent was, i.e. the rule in paragraph (1).

61. Finland proposes that the order of the paragraphs should be altered to (2), (3) and (1). Finland also proposes that the expression "ought to have known" in the present paragraph (1) be replaced by the expression "could not have been unaware of".

62. Sweden suggests first and foremost that article 4 be deleted (see para. 59 above). Alternatively, Sweden proposes that the subjective interpretation rule referred to in this article should be modified and made more objective. The expression "ought to have known" might, for instance, be replaced by "must have known".

63. The United Kingdom states that it would be preferable to start with the objective approach laid down in paragraphs (2) and (3) and to make that subject to exceptions where account would be taken of a person's actual intent.

Article 5

Article as a whole

64. The Netherlands is pleased to see the inclusion in article 5 of a rule concerning good faith, and would welcome a similar provision in the draft Convention on the International Sale of Goods.

65. Austria notes that the article could eventually be dispensed with although there are no objections to maintaining it in its present formulation.

66. The secretariat of CARICOM questions the usefulness of this provision.

67. Finland and Sweden propose that article 5 be deleted or reformulated to indicate the consequences of a party breaching its provisions. The proposals of Finland and Sweden relating to reformulation of the article are set out below at paragraphs 77 and 78.

68. Australia proposes the deletion of article 5 if it is not possible to define more specifically the concepts of fair dealing and good faith (see the observations of Australia at para. 70 below).

69. The United Kingdom considers that it is undesirable to include in the draft Convention a provision which is so vague and unclear in its effect as this article is.

The concepts of fair dealing and good faith

70. Australia notes that although the principles of good faith and fair dealing are highly desirable principles in international commerce it considers that these concepts are so broad and lacking in precision that they will give rise to widely differing interpretations in the courts of different countries. The article is likely therefore to give rise to uncertainty in the application of the Convention, and to excessive litigation. It is noted that no corresponding provision exists in the draft Convention on the International Sale of Goods to which this draft Convention is in fact subsidiary. For these reasons, Australia prefers that the concepts be redrafted in a much more specific fashion. If this is not possible, Australia proposes that the article be deleted.

71. The Hague Conference notes that article 5 may be considered to encompass cases where a party was induced to conclude a contract because of the fraud of the other party (art. 10 of the UNIDROIT draft) or because of an unjustifiable, imminent and serious threat (art. 11 of the UNIDROIT draft). However, it is doubtful whether the provisions of the UNIDROIT draft dealing with mistake are encompassed by article 5.

72. The Netherlands notes that while it is true that such vague concepts as "good faith" and "principles of fair dealing" may cause some uncertainty in the legal application of the draft Convention, this drawback is more than outweighed by the advantage that they enable fairer results to be achieved. The following point should nonetheless be noted. It is common knowledge that different legal systems accord very different functions to "good faith": sometimes it has only the effect of supplementing the rules of law governing relations between the parties. In other systems, "good faith" has a derogatory effect, and can therefore set aside the rules prevailing between the parties as a result of the contract. A distinction is conceivable in systems of the latter kind: the "good faith" concept may be allowed only to limit what has been agreed between the parties; on the other hand it may permit departures from custom, from non-peremptory law or even from peremptory law. Certain legal systems recognize the competence of the court to amend or dissolve contracts on grounds of "good faith". On the basis of "good faith", it is possible to declare unenforceable contracts not entered into freely (e.g. under coercion) or unwittingly entered into because of some mistake, misunderstanding or deceit; this is interesting, in view of the fact that the draft Convention contains no rules concerning the validity of the contracts of sale.

73. The Netherlands also notes that considering the theoretically very broad applicability of the "good faith" concept mentioned in article 5 (or as might be included in the draft Convention on the International Sale of Goods), the question arises as to the desirability of precisely delimiting the concept's sphere of application. If this is not done, it is to be feared that its interpretation will vary greatly from country to country, especially since the present draft Convention lacks a provision on the lines of article 13 of the draft Convention on the International Sale of Goods.[13]

Mandatory nature of article 5

74. Czechoslovakia notes that the mandatory character of this article follows only from using the expression "must".

75. Czechoslovakia and the Hague Conference are of the view that the parties should not be permitted to waive or derogate from this provision. Czechoslovakia proposes that the following sentence be added to article 5:

"The parties may not derogate from or vary the effect of this article."

Consequences of failure to comply with article 5

76. Finland, Sweden and the Hague Conference comment on the fact that the draft Convention does not deal with the consequences of a party's failure to comply with article 5.

77. Finland notes that the article as drafted seems to contain only a declaration of principle to which no consequences have been attached. If a party is not in good faith concerning a matter of relevance, a rule stating that he must observe the principles of fair dealing and act in good faith would seem to make national law on the consequences of the lack of good faith applicable. No unification would thus be achieved. Finland proposes that the provision be either deleted or reformulated by substituting the word "principles" by the word "requirements" and attaching a provision on the consequences. It might, however, be asked whether such a redrafted provision should not be placed in a future convention on validity of contracts.

78. Sweden states that there is no objection to the principle embodied in this article. However, the article does not include any provisions regarding the consequences for someone who acts in a manner that does not conform to that indicated. The provision is therefore devoid of any real substance and thus is hardly likely to contribute to unification in this matter. Sweden suggests that this article should be deleted from the draft Convention. On the other hand, an article of this kind specifying the consequences referred to above might suitably be incorporated in a possible convention on the validity of contracts.

79. The Hague Conference notes that although this provision does not indicate the consequences if a party violates its principles, the UNIDROIT draft in dealing with cases of fraud and threat gives the injured party the right to avoid the contract. However, under the draft Convention it is not clear whether the sanction is nullity or merely that violation is a ground for annulment. The Hague Conference notes that this latter alternative creates a period of uncertainty which would only be terminated when annulment was requested. The Hague Conference concludes that failure to provide for the consequences of a breach of article 5 leaves a more or less serious gap in the text and accordingly suggests that it might be preferable to include a provision in the draft Convention which sets out the consequences of a violation of article 5.

Article 7

Paragraph (2)

80. Australia has no strong objections to this provision but proposes an amendment to article (X) to prevent that provision from operating unfairly (see the observations of Australia on article (X) at para. 178 below).

81. The comments of the Federal Republic of Germany on article (X) at paragraph 130 below refer to this provision.

Article 8

Article as a whole

82. Finland states that paragraph (3) contains an additional explanation to paragraph (1) and accordingly Finland suggests that the paragraphs be presented in the order (1), (3) and (2).

Paragraph 2

Public offers

83. Finland notes that under paragraph (2) so-called public offers are to be considered as offers under the draft Convention if it is clearly indicated that they are intended to be regarded as such. This provision is in itself acceptable. However, it might cause difficulties in connexion with article 10 as the offeror cannot know whom such an offer has reached. It might thus be impossible to revoke a public offer.

84. The Netherlands states that there would seem to be no reason for according special treatment to public offers. Public offers also constitute offers if they meet the criteria set out in paragraph (1).

85. Sweden notes that under paragraph (2) advertisements and other public offers are to be considered as offers if they are clearly indicated as such. Sweden notes that this point of view can be accepted, but that it does not seem clear whether such offers can be withdrawn or revoked and, if so, under which circumstances. Sweden states that this question should be clarified if possible.

86. The United Kingdom notes that no specific provision is made for the withdrawal or revocation of public offers. The proposals of the United Kingdom to deal with these problems are set out under articles 9 and 10 at paragraphs 94 and 99 below.

[13] Article 13 provides: "In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity". (Report of the United Nations Commission on International Trade Law on the work of its tenth session, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17* (A/32/17), para. 35 (Yearbook... 1977, part one, II, A).)

Paragraph (3)

Definition of offer

87. Australia notes that paragraph (3) would more accurately reflect the fact that it is not possible completely to enumerate positively what is necessary to make an offer definite, if the paragraph were framed in a negative fashion so as to state the minimum requirements for an offer to be sufficiently definite. It is suggested that the article begin with the phrase "A proposal is not sufficiently definite unless..." instead of the present formulation "A proposal is sufficiently definite if...".

Failure to make provision for the determination of the price

88. Ghana notes that it expressed a formal reservation to the second sentence of paragraph (3) at the ninth session of the Working Group which adopted this text.

89. Ghana opposes the inclusion of the second sentence of paragraph (3) because it accepted the inclusion of a similar provision in the draft Convention on the International Sale of Goods only on the understanding that national legal systems were to be free to determine whether contracts could be validly formed without agreement on price. The present provision contained in the second sentence of article 8 (3) would make invalid in all the legal systems of Contracting States the formation of contracts which do not state a price or make provision for its determination, even though the national rules of particular legal systems may refuse recognition to such contracts. The Ghana Government deprecates this position. Another reason why Ghana favours the deletion of the second sentence of article 8 (3) is that its formula for the determination of price, where no price has been fixed in the contract, is too one-sided and seller-oriented. It creates the danger of sellers' prices being imposed on buyers after vague negotiations. Even if the second sentence is to be retained in the draft Convention, Ghana prefers more neutral measures, such as the prevailing "market" price or a "reasonable" price.

90. The Hague Conference states that the second sentence of paragraph (3) does not state what one would expect it to say viz., that even if no provision for determining the price is made, a proposal may still be considered as definite, whenever the price may be fixed in accordance with the second sentence. The actual text, however, is nearer a rule of substantive law on the determining of the price and would seem to belong to the scope of the draft Convention on the International Sale of Goods. Moreover, this rule may not apply in all cases, for instance where individual products or objects are sold, so that the rule in the second sentence will leave open cases where the proposal is not definite if no provision for the determination of the price is made.

91. The Hague Conference notes that paragraph (3) also refers to the time of the conclusion of the contract. This seems to confer a certain advantage on the offeree, particularly in the case of irrevocable offers. In a time of fluctuating market prices he can delay his acceptance, delaying thereby the moment of conclusion of the contract and obtaining a more favourable price. It suggests that this effect of fluctuation should be eliminated by fixing a moment (and thereby a price) which is invariable. The moment to which reference should be made is that of the dispatch of the offer. This does not work to the disadvantage of the offeree because he will always have the option of refusing the offer if the market price has gone in an unfavourable direction.

Article 9

92. Finland notes that, in view of its comments in relation to article 8, article 9 should apply only to offers to one or more specific persons. Finland proposes that words to that effect should be inserted in article 9.

93. Sweden accepts the compromise achieved between the theories of general revocability of offers and general irrevocability of offers. However, Sweden states that the distinction between withdrawal and revocation of an offer may be somewhat difficult to understand. Consequently, the possibility should be considered of redrafting articles 9 and 10 so that the necessity of using both these concepts is avoided.

94. The United Kingdom proposes that article 9 make provision for the withdrawal of public offers by providing that the withdrawal of such offers may be communicated by taking reasonable steps to bring the withdrawal to the attention of those to whom the offer was addressed.

Article 10

Article as a whole

95. The Federal Republic of Germany particularly welcomes the compromise on the question of revocability embodied in article 10.

96. Sweden states that the possibility of redrafting articles 9 and 10 to avoid using both the concepts of withdrawal and revocation should be considered (see the comments of Sweden under article 9 at paragraph 93 above).

Public offers

97. Finland notes that, in its comments in relation to article 8, it stated that since an offeror of a public offer cannot know whom such an offer has reached, it might be impossible to revoke such an offer.[14] Therefore, it states that article 10 should apply only to offers to one or more specific persons. Finland proposes that words to that effect should be inserted in article 10.

98. On the other hand, the Netherlands points out that article 10 fails to take into account the possibility of revoking a public offer as referred to in the final words of article 8 (2).

99. The United Kingdom proposes that article 10 make provision for the revocation of public offers by providing that the revocation of such offers may be communicated by taking reasonable steps to bring the revocation to the attention of those to whom the offer was addressed.

Revocation of revocable offers where acceptance is by conduct

100. Australia states that paragraph (1), read to-

[14] See para. 83 above.

gether with paragraph (2), makes provision for the revocation of a revocable offer "if the revocation reaches the offeree before he has dispatched his acceptance". However, in the light of article 12 (1), which now provides that acceptance is constituted either by "A declaration or other conduct indicating assent to an offer", paragraph (1) is expressed too narrowly. It is only appropriate to the case where acceptance is constituted by a declaration. It would appear to have the surprising effect that although it prevents an offeror from revoking a revocable offer after an acceptor has dispatched his acceptance, it does not prevent him from doing so where an acceptor has indicated consent to the offer in any other way—even orally. To rectify this omission it is suggested that the words "dispatched his acceptance" in paragraph (1) be replaced with the words "indicated his assent to the offer".

Paragraph (1)

101. The Netherlands notes that paragraph (1) lays down that "the offer is revoked if the revocation reaches the offeree before he has dispatched his acceptance". This wording takes no account of (*a*) oral acceptance, (*b*) acceptance by "other conduct indicating assent" which comes to the knowledge of the offeror (art. 12, paras. (1) and (2)), or (*c*) acceptance as a result of an act as referred to in paragraph (3) of article 12 which need not come to the knowledge of the offeror. It is explained in the Commentary that no rule is necessary to cover these cases, but the Netherlands none the less considers clarification desirable and therefore proposes for paragraph (1) some such wording as: "the offer may be revoked as long as it has not been accepted and notice of acceptance has not been dispatched".

Paragraph (2)

102. Australia does not object to paragraph (2) of this article, but draws attention to the fact that the combined effect of its three subparagraphs will be, in practice, for good or ill, virtually to eliminate the concept of the revocable offer—having regard to the fact that the overwhelming number of offers indicate that they are "firm".

Paragraph (2) subparagraph (b)

103. The United Kingdom is concerned about the provision in paragraph (2) (*b*) to the effect that an offer cannot be revoked if it states a fixed period of time for acceptance. It is feared that this may constitute a trap for offerors in those countries whose systems differentiate between fixing a time for acceptance (i.e. a time on the expiration of which the offer will lapse) and fixing a time within which an offer may not be revoked.

Paragraph (2) subparagraph (c)

104. The Netherlands observes that subparagraph (2) (*c*) uses the phrase "has acted in reliance on", while article 18, paragraph (2), uses "has relied on". The Netherlands would favour linguistic uniformity on this point, preferring the expression used in article 18, since it must be possible to cover both an action and failure to act. One could imagine a case in which a person to whom an offer is made trusts that it is being held open and therefore does not respond to an offer from a third party.

Article 12

Article as a whole

105. Australia considers that the draft Convention has been improved in several important respects one of which is the incorporation of acceptance by conduct in article 12.

Offers stipulating no time for acceptance

106. Australia notes that under article 15 if an offer stipulates no time for acceptance, that is, if the time for acceptance is a "reasonable time" under article 12 (2), an acceptor who hears nothing from the offeror after despatching his notice of acceptance, can never be sure whether the offeror regards his acceptance as:

(i) Effective, because in time, or
(ii) Ineffective because out of time.

In Australia's view, a provision to the effect that such an acceptance is always effective unless the offeror notifies the offeree to the contrary, would be fairer and simpler. Accordingly, Australia suggests that:

(i) Article 15 be confined to acceptances of offers that fix a period of time for acceptance, and be re-entitled "Acceptance outside time fixed".

(ii) A new paragraph (3) be inserted in Article 12, following paragraph (2), along the following lines:

"Where an offer does not fix a period of time for acceptance, an acceptance is effective if the indication of the offeree's assent:

(*a*) Reaches the offeror within a reasonable time, or

(*b*) Reaches the offeror at a later time and the offeror does not, without delay, inform the offeree orally that he considers his offer as having lapsed or dispatch a notice to that effect."

(iii) Paragraph (2) of article 12 be amended by substituting a reference to paragraph (4) for the present reference to paragraph (3) in the first line, and deleting the words in the second sentence commencing "or if no time is fixed", to the end of the sentence, and

(iv) Paragraph (3) of article 12—which would become paragraph (4)—be amended by deleting the introductory word "However".

Paragraph (1)

Acceptance by silence

107. See the comments of ESCAP and the Netherlands set out under article 2 (3) at paragraphs 54 and 55 above.

108. The Federal Republic of Germany states that the second sentence of article 12 (1) is a source of misgiving. It is acceptable in so far as in legal relationships silence is, in principle, to be taken as a rejection because it cannot be given a positive interpretation. However, there are cases conceivable in which, under the prevailing circumstances, the offeree would be violating the principle of good faith if he did not notify the offerer of his rejection. In such cases it would appear appropriate, by way of exception, to regard silence as acceptance. Article 12 (1), second sentence, does not permit of any such interpretation and can therefore lead

to unreasonable decisions. This provision should therefore be deleted.

Paragraph (2)

109. Finland doubts whether any distinction can be made between the acceptance becoming effective and the conclusion of the contract. Finland states that if no distinction is intended it might be more clear to substitute the words "acceptance of an offer becomes effective" with the words "the contract is concluded".[15]

Paragraph (3)

110. Australia observes that although the factual situations which led to the inclusion of paragraph (3) are recognized,[16] it is considered that the inclusion of this paragraph unduly and unnecessarily confuses the main rule contained in paragraph (2) that acceptance by conduct should not be effective until the offeror learns of it. Australia also notes that there is unavoidable uncertainty about the scope of paragraph (3), and hardship may result to an offeror who, in ignorance of the offeree's action and on too narrow an interpretation of paragraph (3), may mistakenly assume the offer has lapsed and make other arrangements accordingly. Australia states that this uncertainty seems unjustifiable having regard to the fact that the provisions of article 2 (2) are available to the parties, under which they clearly may agree to a derogation from the strict requirements of article 12 (2).

Paragraph (4)

111. Australia has no strong objections to this provision but proposes an amendment to article (X) to prevent that article from operating unfairly (see the observations of Australia on article (X) at para. 128 below).

112. The comments of the Federal Republic of Germany on article (X) at paragraph 130 below refer to this provision.

Article 13

Article as a whole

113. Australia considers that the draft Convention has been improved in several important respects particularly be deleting the paragraph of the previous draft of this article which dealt with confirmation of a prior contract of sale (see the observations of Australia at para. 7 above).

Paragraph (1)

114. The Netherlands notes that this paragraph lays down that "a reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer". In the Commentary[17] on articles 11 and 13 it is pointed out that "a reply that makes inquiries or suggests the possibility of additional terms" should not too soon be regarded as a reply in the sense of this article, since the offeree would then run the risk of the offer being terminated (article 11). In this light the question arises whether the term "reply" in paragraph (1) is not too vague. It would be better to state that paragraph (1) relates only to a reply which is clearly intended as an acceptance of the offer. The word "reply" could perhaps be replaced with "purported acceptance" or even "acceptance" (see para. (2), which already has the term).

115. Sweden states that to avoid misunderstanding it should be indicated in paragraph (1), as has been done in paragraph (2), that the provision concerns a reply to an offer which purports to be an acceptance. In other words, it should be made clear that paragraph (1) does not refer to communications intended to explore the willingness of the offeror to accept different terms while leaving open the possibility of later acceptance of the offer.

Paragraph (2)

116. Australia states that it is in complete agreement with the policy underlying paragraph (2) that a party to a contract formed under the draft Convention should not be able to avoid that contract by relying only on immaterial differences between the offer and acceptance in the well-known "battle of the forms" situation in international commerce. However, by requiring the offeror to make a quick decision whether a reply to his offer contains such modifications as to make it a counter-offer or whether the reply is an acceptance with immaterial alterations, the paragraph places a burden on the offeror. He is left at major risk if he treats as a counter-offer a reply which a court subsequently decides constituted an acceptance. Australia considers that the present wording of paragraph 2 makes this burden unduly heavy. The problem could be alleviated by specifying more precisely the kind of additions on differences to which the paragraph is intended to apply. Australia suggests the additions to the paragraph of a sentence along the following lines:

> "Additional or different terms contained in a reply do not materially alter the terms of the offer if, but only if, they deal with insignificant matters such as grammatical changes, typographical errors or the specification of detail implicit in the offer."

Australia notes that a further problem with paragraph (2) is that it gives carte blanche to an offeror to repudiate an agreement on the basis only of immaterial differences between offer and acceptance.

117. Czechoslovakia proposes that paragraph (2) be revised as follows:

> "(2) However, a reply to an offer which purports to be an acceptance but which contains a different wording of the terms of the contract without modifying its contents constitutes an acceptance."

Czechoslovakia points out that it should be accepted that the principle that a reply containing any additional or different terms of the contract is not considered to be an acceptance. Czechoslovakia notes that the words "which do not materially alter the terms of the offer" are too vague and may be interpreted in different ways by courts of different countries.

[15] The concept of an acceptance being effective is also used in articles 12 (3), 15 (1), 15 (2), 16 and 17.

[16] See the report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977), A/CN.9/142, at paras. 242-249 (reproduced in the present volume, part two, I, A,).

[17] A/CN.9/144 (reproduced in the present volume, part two, I, D).

Article 15

Scope of article 15

118. Australia suggests that article 15 be confined to acceptances of offers that fix a period of time for acceptance, and that the article be re-entitled "Acceptance outside time fixed". This proposal is discussed at paragraph 106 above.

Time of conclusion of contract in cases of late acceptance

119. Finland notes that it is not quite clear when a contract is concluded under this article. Finland suggests that the contract is concluded when the late acceptance reaches the offeror.

120. The Netherlands points out that article 15 (1) lays down that "a late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or despatches a notice to that effect". The Netherlands states that if the offeror gives any such notice, the contract becomes effective when the late acceptance has reached the offeror, and not—as the Commentary appears to imply[18]—when the offeror despatches his notice. Consequently, the Netherlands states that there is no difference between paragraphs (1) and (2) regarding the date on which the contract becomes effective.[19]

Article 18

Paragraph (2)

121. Czechoslovakia states that the main purpose of an agreement in a contract to the effect that such a contract may be modified or rescinded only in writing is a wish of the parties to be safeguarded against tendencies to construe a modification or rescission of the contract only on the basis of negotiations relating to such possibilities. The purpose of paragraph (2) is to grant such a protection. This aim cannot, however, be achieved if it is possible on the basis of article 2, paragraph (2), to derogate from or to vary the effect of article 18, paragraph (2), by an oral agreement as well. Paragraph (2) of article 18 should be, therefore, of mandatory character.

122. The Federal Republic of Germany expresses doubt with regard to the provisions of article 18 (2). The Federal Republic of Germany notes that speedy decisions by the parties to the contract would be impeded. In any case there would appear to be no real need for such a provision. On the one hand it is not readily apparent why parties who, by virtue of article 2, can agree to exclude the application of the whole draft Convention should be bound by provisions which they have established themselves and which, consequently, merely serve their own interests and should, therefore, be subject to their own decision to a far greater degree. Again, article 18 (2) is not borne out by the only argument brought into the discussion, i.e. that contracts must be met (*pacta sunt servanda*), for "*pacta sunt servanda*" does not imply that contracts must for overriding reasons of legal principle always be fulfilled to the letter and that therefore the parties have no power to modify them. Accordingly, the Federal Republic of Germany proposes that article 18 (2) be deleted.

123. The Netherlands states that article 18 (2) lays down that "a written contract which contains a provision requiring any modifications or rescission to be in writing may not be otherwise modified or rescinded." The Netherlands would prefer that a written contract could be modified by mere agreement; this would be particularly important when general terms and conditions are involved. The other party is often unfamiliar with their substance, and therefore does not know if they contain a condition as referred to in paragraph (1). It is certainly in his interest that such conditions be capable of being derogated from by mere agreement.

124. The Netherlands notes that it prefers the expression "has relied on" to the expression "has acted in reliance on" used in article 10 (2) (*c*). This matter is discussed at paragraph 104 above.

125. Sweden notes that article 18 (2) provides that a written contract which contains a provision requiring any modification or rescission to be in writing may not be otherwise modified or rescinded. Under Swedish law such a provision is not unconditionally valid and the parties may agree to derogate from it. It is difficult to find any convincing reason for limiting the autonomy of the parties on this specific point. Sweden would therefore prefer article 18 (2) to be deleted.

Paragraph (3)

126. Australia has no strong objections to this provision but proposes an amendment to article (X) to prevent that provision from operating unfairly (see the observations of Australia on article (X) at para. 128 below).

127. The comments of the Federal Republic of Germany on article (X) at paragraph 130 below refer to this provision.

Article (X)

128. Australia states that although it has no strong objection to the inclusion of this article (and to the references thereto in arts. 3 (2), 7 (2), 12 (4) and 18) it is felt that the provision could operate unfairly against a party who negotiates a contract with a party having his place of business in a state which has made a declaration and who has no notice of that state having made a declaration under this article applicable to the subject contract. This objection would be overcome by the addition of a paragraph to the article along the following lines:

> "A party to the formation of a contract for sale under this Convention who has his place of business in a contracting state which has made a declaration under this article must before negotiations for formation are entered into notify the other party of the fact that a declaration under this article has been made and that it affects the formation of the contract between them."

129. ECE staff members servicing the Working Party on Facilitation of International Trade Procedures have also studied the draft Convention and note the possibilities offered by article (X) of the draft Convention which makes it possible to overcome the differ-

[18] Para. 3 of the commentary on article 15 (A/CN.9/144).

[19] Compare para. 4 of the commentary on article 15 (A/CN.9/144).

ences between national legal systems as to the form required for the conclusion of a contract and related matters. In the context of the facilitation of international trade procedures the article will, however, not solve the procedural and technical difficulties linked to the requirements referred to in the special declaration mentioned therein. The obligation to conclude a contract in writing, authenticated by signature, must now be considered as an obstacle to electronic and other automatic means of transmitting data for the conclusion of a contract or during the course of an international trade transaction. Certain transport contracts are already concluded by using such means and the rapid development of the market for mini-computers is expected to influence strongly also other trade procedures having legal implications. If UNCITRAL—in view of these developments—were to initiate studies of the legal consequences of the use of electronic and other automatic means of data transmission in international trade, the Working Party on Facilitation of International Trade Procedures would be most interested to follow this work and to provide a link with national trade facilitation bodies which are familiar with the practical aspects of everyday international trade procedures. In an informal team set up by the Working Party to study the practical aspects of such problems, one of the questions raised was the possible need of an international Convention to harmonize national laws on the acceptance of computer printouts as evidence.

130. The Federal Republic of Germany notes that the wording of article 3 (2), 7 (2), 12 (4), 18 (2) and (3) and (X) appears to be somewhat formalistic. These provisions make it possible for Contracting States whose national law does not recognize verbal agreements to assert their stricter formal requirements in international trade by means of the reservation permissible under article (X). This raises doubts for several reasons. In the first place, the possibility of making a reservation in a relatively important area of law relating to the formation of contracts is an obstacle to real international standardization. Secondly, it is hard to see the need for any such reservation at all, since contracts of any economic significance would normally be concluded in writing in any case. And thirdly, if agreements made in connexion with the implementation of international contracts for the sale of goods had to be in writing, this would be an obstacle to quick decisions, which might be necessary due to changed circumstances, and thus raise unnecessary problems for international trade. The Federal Government therefore requests those countries who up to now have not been able to dispense with the reservation provided for in article (X) to reconsider and if possible modify their position.

II. Comments by Madagascar, Norway, the United States of America and Yugoslavia (A/CN.9/146/Add.1)*

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*3 May 1978.

Introduction

1. This report is an addendum to the analytical compilation of comments by Governments and international organizations on the draft Convention on the Formation of Contracts for the International Sale of Goods as adopted by the Working Group on the International Sale of Goods (hereafter referred to as the draft Convention) and on the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods prepared by the International Institute for the Unification of Private Law (hereafter referred to as the UNIDROIT draft). It contains an analytical compilation of comments received between 20 April and 2 May 1978 from Madagascar, Norway, the United States of America and Yugoslavia.

Analytical compilation of comments

A. *Comments on the draft Convention as a whole*

1. *General comments on the draft Convention*

2. Norway finds the draft Convention on the whole to be a good basis for further work within UNCITRAL on the preparation of a new convention. Norway states that the amendments it would like to suggest are not of a fundamental character.

3. The United States views the draft Convention with general approval. It is believed that, for the most part, the text will render the draft Convention more widely acceptable than its predecessor.

4. Yugoslavia notes that the draft Convention has certain advantages over the Uniform Law on the Formation of Contracts for the International Sale of Goods. However, even this text has not met fully the needs of international trade. The draft Convention, for example, does not mention standard contracts or general conditions, even though the largest number of international trade contracts is concluded by making reference to, or by making use of, such contracts and general conditions. It would be important also to regulate the situation in which each party makes reference to its own forms or general conditions (the so-called "battle of the forms"). The draft Convention does not treat the question of export and import permits and other forms of permission which are of importance at the time of concluding such contracts. In many standard contracts and general conditions formulated by the United Nations Economic Commission for Europe this question is reg-