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CO-ORDINATION OF WORK

Some recent developments in the field of
international transport of goods

Report of the Secretary-General

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INTRODUCTION

1. The Commission, at its eleventh session, decided to include the topic of transportation in its future work programme, and to accord priority to consideration of this subject. 1/ Also at the same session the Commission requested the Secretariat to prepare a study setting forth the work accomplished so far by international organizations in the fields of multimodal transport, charter parties, marine insurance, transport by container and the forwarding of goods. 2/ The Commission would decide on the scope of further work on these subjects and their possible allocation to Working Groups after having examined studies prepared by the Secretariat. 3/

2. The Commission, at its twelfth session, had before it the report which it requested at its eleventh session. 4/ After considering this report the Commission decided not to undertake work on multimodal transport or transport by container (it being noted that a draft Convention on International Multimodal Transport had been completed by an UNCTAD Intergovernmental Group 5/), on contracts for the forwarding of goods (because the need for uniform rules was not clearly established and the proposed Convention on International Multimodal Transport might resolve some of the difficulties which were experienced 6/), or on charter parties or marine insurance (which were under consideration by an UNCTAD Working Group 7/). The Commission also did not adopt a suggestion made at that session that it might undertake work on the subject of the warehousing contract. 8/ However, the Commission took note of the survey prepared by the Secretariat of the work of international organizations in the field of transport, and requested the Secretariat to continue to follow such work and to report developments in this field to the Commission. 9/

3. The Secretariat also prepared reports for the thirteenth and fourteenth sessions of the Commission, which up-dated the activities of some of the organizations referred to in the previous report in the fields, inter alia, of marine insurance, container standards, and freight forwarding. 10/

1/ 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), paras. 67(c)(vii), 68 and 69.

2/ Ibid., para. 67(c)(vii).

3/ Ibid., para. 67 (e).

4/ A/CN.9/172.

5/ 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. 104.

6/ Ibid.

7/ Ibid.

8/ Ibid., para. 105.

9/ Ibid., para. 106.

10/ A/CN.9/192/Add. 1; A/CN.9/202/Add.2. See, also, A/CN.9/225, in which the Secretariat reported to the fifteenth session of the Commission on developments in regard to international transport documents.

4. The present report will up-date some of the activities described in the reports referred to in the previous paragraphs, particularly in light of the adoption of the United Nations Convention on International Multimodal Transport of Goods 11/ on 24 May 1980. It will also examine more closely the work of the International Institute for the Unification of Private Law (UNIDROIT) on the liability of international terminal operators, which has now reached a final stage. 12/

I. MARINE INSURANCE 13/

5. At its ninth session, held in 1980, the UNCTAD Committee on Shipping endorsed the recommendation of the Working Group on International Shipping Legislation that a set of standard marine hull and cargo insurance clauses be drawn up for use as a non-mandatory international model.

6. The Working Group engaged in work on marine insurance clauses at its seventh (1980), eighth (1981), and ninth (1983) sessions, adopting, as to hull insurance, two composite texts, one on an "all risks minus exceptions" basis, and the other on a "named perils" basis, each presenting basic coverage clauses, including risk clauses, exclusion clauses, collision liability clauses and clauses on general average and sue and labour. 14/ As to cargo insurance, the Working Group adopted a composite text setting forth general coverage and exclusion clauses and it was agreed to incorporate into the report of the eighth session of the Working Group a text formulated on a general average and salvage clause. 15/

II. TRANSPORT BY CONTAINER 16/

7. Pursuant to a decision of the UNCTAD Trade and Development Board in 1980, the UNCTAD Committee on Shipping, at its ninth session (1980), decided to include the question of container standards for international multimodal transport in its work programme and to keep activities in this field under constant review in connexion with its work on multimodal transport.

8. An intergovernmental group will be convened under the auspices of UNCTAD to recommend principles for model rules for multimodal container tariffs.

11/ TD/MT/CONF/16.

12/ For other current activities of organizations in the field of international transport, see A/CN.9/237/ Add. 2.

13/ See A/CN.9/172, paras. 32-41; A/CN.9/192/Add.1, para. 2; and A/CN.9/202/ Add.2, paras. 5-10.

14/ TD/B/C.4/ISL/L.69.

15/ TD/B/C.4/ISL/37, annex II, and para. 10.

16/ See A/CN.9/172, paras. 42-53; A/CN.9/192/Add.1, paras. 13-14; A/CN.9/202/ Add.2, paras. 62-63.

9. The International Organization for Standardization (ISO) has informed the UNCTAD Secretariat that it has continued its policy of encouraging and welcoming the participation of developing countries in the work of its Technical Committee 10⁴, which is responsible for freight container standards, and that it has also continued the policy of maintaining a high degree of stability of container standards and avoiding frequent changes which may affect compatibility, intermodality or modularity of ISO containers. ISO has also adopted the policy that whenever proposals are put forward for revisions to the basic freight container standards which affect the compatibility, intermodality and modularity of ISO containers, there should be a wider circulation of the proposals, i.e. to include all ISO members and competent United Nations bodies, in addition to the normal circulation to members of Technical Committee 10⁴, in order to permit the widest possible consultation. 17/

10. Recent revisions to ISO container standards have reduced the number of approved sizes of containers. 18/ Refinements and revisions to other ISO standards have been made, and additional standards have been published. 19/ Other revisions and additions are under consideration. 20/

11. The Maritime Safety Committee of IMCO (now the International Maritime Organization (IMO)) in 1981 unanimously adopted proposals for the amendment of the International Convention for Safe Containers. The principal amendments allow more time for the completion of the work of plating existing containers and new containers not approved and plated at the time of manufacture. The amendments were adopted under the simple procedure included in the Convention for the amendment of its technical annexes. 21/ The IMCO Sub-Committee on Containers and Cargoes, at its twenty-third session held in 1982, considered other amendments to the Convention.

12. Recommendations on the Harmonized Interpretation and Implementation of the Convention, as amended and adopted by the Maritime Safety Committee in the Spring of 1981, are to be found in IMCO document MSC XLIY/21, annex, 35.

III. FREIGHT FORWARDING 22/

13. The International Federation of Freight Forwarders' Association (FIATA) has issued a Combined Transport Bill of Lading. This document, in its revised form, was approved in 1978 by the ICC Joint Committee on Intermodal Transport as conforming with the ICC Uniform Rules for a Combined Transport Document. The FIATA document is therefore subject to the ICC Uniform Rules. A number of freight forwarders who act as multimodal transport operators are issuing the FIATA document.

17/ TD/B/C.4/195, paras. 22, 26; TD/B/C.4/235, para. 8.

18/ TD/B/C.4/235, para. 9.

19/ Ibid., paras. 15-17.

20/ Ibid., paras. 18-23.

21/ Ibid., paras. 39-44.

22/ See A/CN.9/172, paras. 54-63; A/CN.9/192/Add.1, para. 15; A/CN.9/202/Add.2, para. 18; A/CN.9/225, paras. 19, 57.

14. In a report issued in March, 1982 (TD/B/C.4/243), the UNCTAD Secretariat noted that the terms and conditions for multimodal transport services provided by freight forwarders are governed by standard conditions for freight forwarding adopted by their national associations (in addition to the FIATA Combined Transport Bill of Lading). It noted that it would not be appropriate to apply the standard conditions adopted by national associations, which are designed for segmented transport arrangements, to multimodal transport in which a freight forwarder acts as a principal. The UNCTAD Secretariat recommended that consultations among shippers' organizations, freight forwarders' associations, appropriate authorities and other relevant organizations should be encouraged so that standard conditions for multimodal transport services which have not been provided for in the United Nations Convention on Multimodal Transport of Goods can be elaborated.

IV. LIABILITY OF INTERNATIONAL TERMINAL OPERATORS 23/

15. A study group of UNIDROIT has drawn up a preliminary draft Convention on the Liability of International Terminal Operators 24/ in connexion with work within UNIDROIT on the subject of warehousing contracts, which has been on the general work programme of UNIDROIT since 1960.

16. The subject of warehousing contracts was accorded priority by the Governing Council of UNIDROIT at its fifty-third session, held in 1974. It occurred at a time of a growing awareness, prompted in part by the work of UNCITRAL in the area of carriage of goods by sea, of the lack of uniform rules for the liability of persons entrusted with the custody of goods before, during and after transport. The UNIDROIT Governing Council, at its fifty-sixth session (1977), set up a Study Group on the Warehousing Contract, and gave it the task of drawing up such uniform rules. In October, 1981, the Study Group approved the preliminary draft Convention. 25/

17. At its sixty-first session (1982), the Governing Council of UNIDROIT requested the UNIDROIT Secretariat to co-operate with interested international organizations in the taking of initiatives for the purpose of giving wide publicity to the preliminary draft Convention. As noted in the report on international transport documents submitted to the fifteenth session of the Commission, the Council was informed by the Secretary of the Commission of the interest of the Commission in the subject, which might perhaps at some time in the future be translated into positive action, given its close relationship with the international conventions relating to the carriage of goods and in particular the Hamburg Rules, as well as its relevance to the needs of a number of developing countries. 26/

23/ See A/CN.9/202/Add.2, paras. 46-58; A/CN.9/225, paras. 22-23, 30, 32, 40.

24/ UNIDROIT 1982, Study XLIV-Doc. 14.

25/ It is expected that the Governing Council of UNIDROIT, at its next session, to be held in the first week of May, 1983, will adopt the text as a draft Convention.

26/ A/CN.9/225, footnote 10.

18. At the fifteenth session of the Commission, the observer from UNIDROIT stated that his organization was interested in co-operating with the Commission in future work leading to the preparation of a draft convention on the liability of international terminal operators. 27/

A. Some relevant characteristics of storage of goods in transit 28/ and terminal operators 29/

19. The storage of goods is only one element of non-carriage operations which are typically performed in connexion with the transport of goods in international trade. Other elements include freight forwarding, and handling operations such as loading and unloading the goods on the transport vessel or vehicle, securing the goods on the vessel or vehicle ("stowage"), and moving goods on the wharf prior to loading or after unloading ("wharfage").

20. The storage of goods in transit is sometimes performed by an enterprise as an independent activity, separate from other non-carriage operations. However, it is often performed in combination with other operations mentioned in the previous paragraph by the carrier, by a freight forwarder or by a terminal operator. Thus, a freight forwarder or, in certain modes of carriage, the carrier itself, may perform loading, stowage and unloading operations, as well as the temporary storage of goods in transit. Similarly, a terminal operator may provide loading, stowage or wharfage services ancilliary to the storage of goods. Practices in this regard vary depending upon the location of the operation and the type of trade or carriage involved.

21. The advent of containerization has resulted in the merging of transit storage with other services in one overall operation, since the container can be stored in an area of the depot which serves as a wharf, transit warehouse, and reception and delivery area.

B. Liability of terminal operators under national legal systems

22. The rules governing the liability of terminal operators under national legal systems are widely disparate, both as to the source and to the substantive content of the rules.

27/ Report of the United Nations Commission on International Trade Law on the work of its fifteenth session, Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17 (A/37/17), para. 105.

28/ This discussion deals with the storage of goods in connexion with the transport of goods, rather than storage unconnected with transport. Much of the discussion is derived from a Preliminary Report on the Warehousing Contract prepared by D. Hill for UNIDROIT in 1976 (UNIDROIT 1976, Study XLIV-Doc. 2).

29/ The UNIDROIT Preliminary draft Convention on the Liability of International Terminal Operators uses the term "terminal operators" in preference to "warehousemen". The UNIDROIT Study Group believed that the latter term, with its implication of shelter, is becoming outmoded due to the development of new techniques in the storage of goods and due to the fact that such operators now perform services that the traditional warehouseman would not have provided (see para.20). The discussion in the present document adopts this terminology, and "terminal operator" refers herein to an operator whose primary function is the safekeeping of goods, but who may also perform other non-carriage services in connexion with the transport of goods. See UNIDROIT 1982, Study XLIV-Doc.14, para. 22.

23. Rules governing the liability of terminal operators may be contained in civil or commercial codes or rules of common law governing the deposit or bailment of goods generally. Particular categories of operations may be governed by special laws. However, in several legal systems, the legal liability of terminal operators may be restricted or modified contractually, through the use of general conditions. The extent to which this is possible varies from one legal system to another, and this further contributes to the disparities in the liability of terminal operators.

24. The standards of liability of terminal operators as established by these different sources of rules vary substantially. Disparities also exist within some legal systems, due to the application of different standards of liability to different categories of terminal operators.

25. The standards of liability applicable under various legal systems to terminal operators in respect of the storage of goods range from strict liability (e.g. liability unless the terminal operator proves the existence of certain narrow exonerating circumstances), to negligence (e.g. failure to take reasonable care of the goods), to the exclusion of most forms of liability (e.g. by general conditions). Moreover, although under many legal systems the burden is on the terminal operator to prove that he is not liable, in some systems the burden is on the claimant. In the latter systems, however, the claimant is often aided by a presumption that the terminal operator is liable which may be overcome if the terminal operator produces a certain quantum of evidence.

26. Disparities also exist among legal systems in respect of prescription periods and financial limits of liability. With respect to the latter, it has been observed that the financial limits of liability contained in general conditions of contract are often excessively low, with the result that even in cases where the standard of liability is relatively high, the real effect of this standard may be reduced by the low financial limits of liability. 30/

27. The disparities in the liability of terminal operators are further complicated by the facts that terminal operators under the same legal system may be subject to different rules concerning liability depending upon the nature of services rendered (e.g. storage or handling), and that the same services may be performed within a given locality by different types of operators who use different conditions of contract, resulting in varying rules concerning liability in respect of such services.

C. Terminal operators and international transport conventions

28. The transportation of goods involves operations falling within two distinct categories - the actual carriage of the goods, and the storage and handling of the goods before, during and after transit. While the rules governing the liabilities of various modes of international carriers (e.g. by sea, air, road, rail and inland waterway) have become increasingly harmonized through international conventions, the rules governing the operations of non-carrying intermediaries such as terminal operators have not. The work of UNIDROIT on the liability of international terminal operators has been based in part on the

belief that an attempt should be made to unify the rules in this area in order to fill in the gaps in the liability regimes left by existing international transport conventions. 31/

29. These gaps exist in respect of the storage of goods during periods of time before, during and after transport which are not covered by the harmonized regimes established by international transport conventions. During these periods the storage will be subject to the disparate legal regimes and usually lower standards and limits of liability described in paragraphs 23 through 27, above.

30. Shippers and consignees (hereinafter referred to as "cargo interests") whose goods are stored or handled by terminal operators are directly affected by gaps in the legal regime relating to the liability of terminal operators in respect of their claims against terminal operators for loss of or damage to the goods. Carriers and others (such as freight forwarders 32/) using the services of terminal operators are directly affected in respect of their recourse actions against terminal operators to recover damages for which the carriers or others are liable to cargo interests for loss of or damage to goods while in the hands of the terminal operators.

31. Recently adopted international transport conventions will, when they enter into force, reduce some of the adverse consequences to cargo interests from the existence of gaps in the legal regime relating to the liability of terminal operators. In doing so, however, they may in some cases increase the adverse consequences upon carriers. These results may occur because the liability regimes to which a carrier 33/ will be subject under the conventions will extend over periods of time when the goods may be stored, and because under these regimes the standard of the carrier's liability to the cargo interest will often be higher, and will often be subject to higher financial limits of liability, than the standards and limits of liability which would otherwise have applied to the storage. For example, under the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) 34/, the Convention Concerning International Carriage by Rail (COTIF), and the United Nations Convention on International Multimodal Transport of Goods, a carrier will be responsible for the goods and subject to a single liability regime from the time that the goods are taken over until the time they are delivered. 35/ Under the Hamburg Rules and the Multimodal Convention the carrier will be liable for loss of or damage to the goods caused by an occurrence taking place during his period of responsibility, unless

31/ Explanatory report on the preliminary draft Convention on the Liability of International Terminal Operators (hereinafter referred to as "Explanatory Report") (UNIDROIT 1982, Study XLIV-Doc. 14), para. 9.

32/ E.g. when the forwarder acts as a principal; see A/CN.9/172, paras. 59-63.

33/ In the following discussion the word "carrier" will, when reference is made to the Multimodal Convention, include multimodal transport operators.

34/ A/CONF.89/13, Annex I, (Official Records of the United Nations Conference on the Carriage of Goods by Sea, United Nations Publication, Sales No. E.80.VIII.1).

35/ Hamburg Rules, art. 4 (but see art. 11); COTIF, Appendix B, arts. 35 and 36; Multimodal Convention, art. 14. The Multimodal Convention also specifies that the multimodal transport operator shall be liable for the acts and omissions of persons whose services he uses for the performance of the multimodal transport contract (art. 15).

he proves that he took all reasonable measures to avoid the occurrence and its consequences. 36/ Moreover, the standard and limits of liability established by these conventions cannot be reduced by contractual stipulations. 37/ Under COTIF the carrier will be liable for loss of or damage to the goods during his period of responsibility unless he could not avoid the circumstances causing the damage and prevent their consequences, or unless they result from specified perils. 38/ The ability to derogate contractually from this standard is restricted. 39/

32. Even under these international conventions, however, there will remain gaps which directly affect cargo interests. The periods of responsibility of carriers may not cover all times when goods may be in the hands of a terminal operator. For example, under the Hamburg Rules and the Multimodal Convention, if the consignee does not receive the goods from the carrier the responsibility of the carrier under the Conventions ends when he places them at the disposal of the consignee, 40/ which in many cases will involve placing them in storage. Moreover under the Hamburg Rules the carrier's responsibility covers only the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge. 41/ This Convention, therefore, will not cover transit storage outside the ports of loading or discharge.

D. The UNIDROIT preliminary draft Convention

33. The major characteristics of the UNIDROIT preliminary draft Convention on the Liability of International Terminal Operators parallel those of the Hamburg Rules and the Multimodal Convention. Thus, the terminal operator would be liable for loss of or damage to goods from the time he takes them in charge until delivery, unless he proves that he took all measures that could reasonably be required to avoid the occurrence which caused the loss and its consequences. 42/ Liability would be limited to 2.75 units of account 43/ per kilogramme, 44/

36/ Hamburg Rules, art. 5(1); Multimodal Convention, art. 16(1).

37/ Hamburg Rules, art. 23; Multimodal Convention, art. 28.

38/ COTIF, appendix B, art. 36.

39/ COTIF, appendix B, art. 6 (2), (3) and (4).

40/ Hamburg Rules, art. 4(2)(b)(ii); Multimodal Convention, art. 14(2)(b)(ii).

41/ Hamburg Rules, art. 4(1).

42/ Arts. 3(1), 6(1); comparable to article 5 of Hamburg Rules and article 16 of the Multimodal Convention.

43/ The per-kilogramme limit in the Hamburg Rules (art. 6(1)(a)) is 2.5 units of account and in the Multimodal Convention (art. 18) 2.75 units of account. Under the UNIDROIT preliminary draft Convention (art. 13) the unit of account would be converted to a national currency in a manner comparable to the method in the Hamburg Rules (art. 26) and the Multimodal Convention (art. 31). The limits of liability may be revised under the preliminary draft Convention (art. 21) in a manner comparable to the revision mechanism in art. 33 of the Hamburg Rules. The UNIDROIT Secretariat has been informed of the desirability to take into account General Assembly Resolution 37/107 of 16 December 1982. In that Resolution the General Assembly recommended that in the preparation of international conventions containing limitation of liability provisions, the unit of account provision and one of the two alternative provisions for adjustment of the limitation of liability adopted by the Commission at its fifteenth session should be used. Report of the United Nations Commission on International Trade Law on the work of its fifteenth session, Official Records of the General Assembly. Thirtieth Session. Supplement No. 17 (A/37/17). para. 63.

44/ Art. 7.

unless the loss or damage results from an act or omission of the terminal operator with the intent to cause the loss or damage, or recklessly and with knowledge that the loss or damage would probably result. 45/

34. The preliminary draft Convention would require the terminal operator, at the request of the customer, to issue a dated document acknowledging receipt of the goods. The document would constitute prima facie evidence of the terminal operator's taking charge of the goods described therein. However, its negotiability would depend upon the agreement of the parties and applicable law. 46/

35. The terminal operator would have a right of retention over and sale of the goods to satisfy his fees and other claims relating to the goods. 47/ The text would also uphold contractual provisions for a general lien insofar as they are not contrary to applicable law. 48/

36. Comparably to the Hamburg Rules 49/ and the Multimodal Convention 50/, the preliminary draft Convention provides that the obligations and responsibilities imposed on the international terminal operator would not be able to be diminished by contractual stipulations. 51/ Moreover, the preliminary draft Convention would be supplementary to international transport conventions in that it would not modify the rights or duties of a carrier which arise under any such convention. 52/

37. The rules contained in the preliminary draft Convention would in principle be of a mandatory character and would be applied by a contracting State to all international terminal operators in its territory. However, States would be able to declare that the rules will apply only to international terminal operators who agree to be bound by it. 53/

38. During the work leading to the preliminary draft Convention questions were raised as to whether the existing disparities in the liability of terminal operators created such problems in practice as to justify an effort to unify and harmonize the law in this area. It was also noted that the magnitude of the disparities may make it difficult to unify the law in a manner which would receive wide acceptance. Moreover, terminal operators may well oppose the creation of a legal regime which imposes standards and limits of liability on them exceeding those to which they have become accustomed, and which cannot be reduced by general conditions. However, within the UNIDROIT Study Group on the Warehousing Contract views were expressed that the following features could make the preliminary draft text more acceptable: (a) realistic standards and

45/ Art. 9(1); comparable to art. 8 of the Hamburg Rules and art. 21 of the Multimodal Convention.

46/ Art. 4.

47/ Art. 5.

48/ Explanatory Report on the preliminary draft Convention, footnote 31, above, para. 57.

49/ Art. 23.

50/ Art. 28.

51/ Art. 12.

52/ Art. 14.

53/ Art. 18

limits of liability which, as part of national law, would not be interfered with judicially; (b) financial limits to liability which would be difficult for a claimant to break; (c) the ability of States to apply the Convention only to terminal operators which accept the regime established by it; (d) a short prescription period; (e) the right of retention over and sale of the goods by the terminal operator, which might not otherwise be available in some legal systems.

39. The preliminary draft Convention is intended to establish a minimum set of rules governing the liability of international terminal operators. It does not deal with a number of issues, such as the obligations of the customer. The UNIDROIT Study Group on the Warehousing Contract has stated that matters not covered by the preliminary draft Convention might be dealt with at a later stage, or, alternatively, might be regulated by standard conditions which might be prepared by interested commercial organizations.^{54/} In this connexion the Comité Maritime International (CMI) informed the Study Group in 1981 that the CMI had decided to elaborate standard conditions governing operations performed by international terminal operators, on the understanding that such conditions would be fully compatible with the provisions of the draft Convention.^{55/}

V. CONCLUSION

40. The Commission may wish to take note of the work of other organizations in the various fields described in this report, and request the Secretariat to keep it informed of developments in these fields.

41. With respect to the liability of international terminal operators, if the Commission is favourably disposed to the harmonization of law in this field, it could, pursuant to its co-ordinating function and its position as the core legal body of the United Nations system in the field of international trade law, direct a request to UNIDROIT that UNIDROIT transmit its draft convention to UNCITRAL for its consideration. At the same time, the Commission could request the Secretariat to prepare a study of the issues involved in the topic.

42. Thereafter, there may be various ways in which the Commission could proceed. For example, after examining the draft convention at a future session, it could prepare comments on it and perhaps recommendations which would then be communicated to UNIDROIT. The Commission could also undertake its own elaboration of a text in an appropriate form (e.g. convention, model law or general conditions), perhaps using the UNIDROIT draft as a basis. Any such work might be assigned to an UNCITRAL Working Group.

43. On the other hand, if the Commission does not consider it opportune to proceed with work on the topic at this time, it may wish to request the Secretariat to keep it informed of developments in this field together with developments in other fields discussed in this report.

^{54/} Explanatory report on the preliminary draft Convention, footnote 31, above, para. 18.

^{55/} Report of the Secretariat of UNIDROIT on the third session of the Study Group on the Warehousing Contract held in Rome from 19 to 21 October 1981 (UNIDROIT 1982, Study XLIV-Doc. 13), para. 5.