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Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.[1] The Working Group commenced its deliberations on a draft instrument on the carriage of goods [wholly or partly] [by sea] at its ninth session in 2002. The most recent compilation of historical references regarding the legislative history of the draft instrument can be found in document A/CN.9/WG.III/WP.35.

2. Working Group III (Transport Law), which was composed of all States members of the Commission, held its thirteenth session in New York from 3 to 14 May 2004. The session was attended by representatives of the following States members of the Working Group: Austria, Benin, Brazil, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, India, Iran (Islamic Republic of) Italy, Japan, Kenya, Lithuania, Mexico, Russian Federation, Singapore, Spain, Sudan, Sweden, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

3. The session was also attended by observers from the following States: Argentina, Australia, Belarus, Brunei Darussalam, Chile, Cuba, Czech Republic, Denmark, Ecuador, Finland, Greece, Kuwait, Mongolia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Peru, Philippines, Qatar, Republic of Korea, Senegal, Switzerland, Turkey and Venezuela.

4. The session was also attended by observers from the following international organizations:

(a) **Intergovernmental organizations invited by the Commission**: Asian-African Legal Consultative Organization, Intergovernmental Organisation for International Carriage by Rail (OTIF);

(b) **International non-governmental organizations invited by the Commission**: Association of American Railroads (AAR), *Comité Maritime International* (CMI), *Instituto Iberoamericano de Derecho Marítimo*, International Chamber of Commerce (ICC), International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity (P&I) Clubs, International Multimodal Transport Association (IMMTA), International Union of Marine Insurance (IUMI), The Baltic and International Maritime Council (BIMCO) and Transportation Intermediaries Association (TIA).

5. The Working Group elected the following officers:

Chairman: Mr. Rafael Illescas (Spain)
Rapporteur: Mr. Walter De Sá Leitão (Brazil)

6. The Working Group had before it the following new documents:

(a) Provisional agenda (A/CN.9/WG.III/WP.35);

(b) Provisional redraft of the articles of the draft instrument considered by the Working Group at its twelfth session (A/CN.9/WG.III/WP.36);

(c) Proposal by China on Chapter 19 of the Draft Instrument and the Issue of Freedom of Contract (A/CN.9/WG.III/WP.37).

7. The Working Group adopted the following agenda:

1. Election of officers;
2. Adoption of the agenda;
3. Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea];
4. Other business;
5. Adoption of the report.

I. Deliberations and decisions

8. The Working Group continued its review of the draft instrument on the carriage of goods [wholly or partly] [by sea] on the basis of:

- The text contained in the annex to a note by the Secretariat (A/CN.9/WG.III/WP.32);
- A provisional redraft of the articles considered by the Working Group at its twelfth session contained in a note by the Secretariat (A/CN.9/WG.III/WP.36);
- A proposal of the United States of America (A/CN.9/WG.III/WP.34) regarding ten aspects of the draft instrument.

9. The Secretariat was requested to prepare a revised draft of a number of provisions, based on the deliberations and conclusions of the Working Group. Those deliberations and conclusions are reflected in section II below.

II. Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea]

Chapter 5: Liability of the carrier (continued)

Draft article 15. Liability of performing parties

10. The Working Group was reminded that it had not had sufficient time during its twelfth session to discuss the last paragraph of draft article 15 of the draft instrument (see A/CN.9/544, para. 181).

Paragraph 6

11. The Working Group considered the text of paragraph 6 of draft article 15 as contained in document A/CN.9/WG.III/WP.36 (previously, paragraph 7 of draft article 15 as contained in document A/CN.9/WG.III/WP.32).

Joint and several liability

12. Questions were raised regarding the relationship between paragraph 6 and paragraph 5 (which expressed the principle that, where more than one maritime performing party was liable, such liability was joint and several). With respect to paragraph 5, the view was expressed that the common law concept of “joint and several liability” might not be interpreted as strictly equivalent to such civil law concepts as “*responsabilité solidaire*” or “*responsabilidad solidaria*” which, in turn, differed from such notions as “*responsabilité conjointe*” or “*responsabilidad mancomunada*”. It was widely felt that further elaboration might be necessary to make it clear in all languages that, where several parties were held liable under paragraph 5, each party was individually responsible for compensating the total loss, subject to any statutory limit applicable and also subject to the recourse action that party might exercise against other liable parties.

Aggregate liability

13. There was general agreement with the principle expressed in paragraph 6 that, where all of the defendants to a claim were entitled to benefit from the limited liability provisions of the draft instrument, a claimant should be precluded from claiming from the contracting carrier and/or the maritime performing parties an aggregate amount greater than the total limits of liability provided for in the draft instrument.

Set-off—exclusion of non-maritime performing parties

14. The issue of the set-off of damages amongst defendants to a claim was discussed, and several possible scenarios envisaged. Concerns were raised as to how the principle of aggregate liability would operate in cases of interplay between various liability regimes, which might result in the combination in one claim of defendants who could claim the aggregate limitation on liability and defendants who could not. For example, where both maritime and non-maritime performing parties were liable and the non-maritime parties were subject to higher limits of liability under applicable law, the effect of paragraph 6 should not be to create a lower limit of liability for such non-maritime parties. However, where compensation would be paid under another liability regime because the claimant had sought compensation in a claim directly against a non-maritime performing party and thereafter claimed against the contracting carrier, the compensation payable by the non-maritime performing party should be set off against the amount claimed from the carrier. Another example was envisaged where the limit of liability was broken in respect of one of the defendants for reasons of wilful misconduct but that limit should still be available to other defendants. With a view to alleviating some of these concerns, the Working Group generally agreed that paragraph 6 should apply to both the contracting carrier and maritime performing parties but that it should clarify that it was not intended to apply to non-maritime performing parties.

15. Regarding the possible formulation of paragraph 6, it was suggested that the words “all such persons” should be replaced by a reference to the contractual carrier and to maritime performing parties. Alternatively, it was suggested that paragraph 6 should read along the following lines: “Without prejudice to article 19, the aggregate liability of all such persons shall, as far as the liability of the contracting carrier and any maritime performing party, not exceed the overall limits of liability

under this instrument". A suggestion was also made that the issue of set-off should be left to applicable domestic law. A further suggestion was that, in preparing a revised draft of paragraph 6, the text of article 10 of the Hamburg Rules might be of assistance.

Placement of paragraphs 5 and 6

16. It was suggested that paragraphs 5 and 6 should be merged and that, since they should apply to both contracting carriers and maritime performing parties, they should be moved out of article 15, possibly into the provision dealing with limitation of liability.

Conclusions reached by the Working Group on paragraph 6

17. After discussion, the Working Group decided that:

- Appropriate clarification should be introduced in the draft provision to reflect the consensus reached regarding the meaning of "joint and several liability";
- The general principle on aggregate claims expressed in paragraph 6 was appropriate;
- Paragraphs 5 and 6 should apply to both contracting carriers and maritime performing parties;
- Paragraphs 5 and 6 should be moved out of draft article 15 into a provision of their own;
- Further discussion would be needed regarding the feasibility of preparing a uniform rule on the issue of set-off, in the absence of which the issue might need to be left to applicable domestic law;
- The Secretariat should prepare a revised draft taking into account various possible solutions for the issue of set-off, based on the views and suggestions mentioned above.

Draft article 16. Delay

18. The Working Group considered the text of draft article 16 as contained in document A/CN.9/WG.III/WP.32.

General discussion

19. Doubts were expressed as to whether the issue of delay in delivery should be addressed at all in the draft instrument. In support of deletion of draft article 16, the view was expressed that the issue was purely commercial in nature and should thus be left for interested parties to deal with in the context of their contractual arrangements. It was explained that, consistent with that view, the issue of delay in delivery was not dealt with in the Hague Rules. Examples were given of situations where a regulation placing too much emphasis on delay in delivery might disregard certain established usages and contractual practices, or even result in compromising the safety of maritime transport. The prevailing view, however, was that the issue of delay in delivery required regulatory treatment and, consistent with other existing

liability regimes, including a maritime regime such as the Hamburg Rules, could appropriately be dealt with in the draft instrument.

Paragraph 1

Delay where the parties have expressly agreed upon the time for delivery

20. There was general support for the notion that the carrier might be liable for breach of its obligation to deliver within a time it had expressly agreed upon. As a matter of drafting, it was suggested that the words “the time expressly agreed upon” used in article 5 (2) of the Hamburg Rules was more accurate than the current formulation of the draft provision.

Delay where the parties have not expressly agreed upon the time for delivery

21. The discussion focused on whether, in such a case, the carrier should be held liable for delivery after “the time it would be reasonable to expect of a diligent carrier”. The reference to “reasonable time” was objected to on the grounds that it was too subjective, imprecise, open to extensive interpretation by local courts and thus likely increase disharmony in international jurisprudence. In the same line of thought, it was stated that creating an obligation for the carrier to deliver the goods within “reasonable time” would further upset the balance of obligations between carriers and shippers, a balance that was already altered to the detriment of carriers by the deletion of the navigational error exception (see A/CN.9/544, para. 127). In response, it was pointed out that, while paragraph 1 might establish an obligation for the carrier, it should be borne in mind that paragraph 2 provided considerable relief by limiting the carrier’s liability for consequential damages in case of delayed delivery.

22. The prevailing view was that a default rule along the lines of the bracketed text at the end of paragraph 1 was necessary to reflect the general principle that delivery should occur without undue delay. It was pointed out that the reference to “the characteristics of the transport” or “the circumstances of the voyage” provided ample safeguards for established commercial practices that were said to tolerate a degree of imprecision in the application of that principle. It was explained that the default rule was also necessary to avoid exempting the carrier from liability in situations where a time for delivery was implied, although not expressly agreed upon by the parties. It was also pointed out that, should the default rule contained in paragraph 1 be deleted, the issue would need to be covered by domestic law, a solution that would unnecessarily derogate from the general objective to promote uniform law.

23. With respect to the circumstances listed at the end of paragraph 1, a suggestion was made that “the characteristics of the goods” should be added. Another suggestion was that the end of the paragraph should be simplified to read along the lines of article 5 (2) of the Hamburg Rules, which only referred to “the circumstances of the case”. Yet another suggestion was that, in any event, the reference to “the terms of the contract” should be maintained as essential. With respect to consistency in terminology, a question was raised regarding the expression “place of destination”. It was also suggested that the draft instrument should be checked to avoid unnecessary distinctions between “place” and “location” of delivery, and dispel ambiguity as to whether such location referred to the contractual place of delivery or the actual place of delivery. As a matter of drafting,

it was suggested that the words “in the absence of such agreement” should be deleted as superfluous.

Conclusions reached by the Working Group on paragraph 1

24. After discussion, the Working Group decided that:

- The draft instrument should reflect the principle that the carrier should be liable for delay in delivery and that such liability should be based on the fault of the carrier;
- The default rule at the end of the paragraph would be retained without square brackets;
- The Working Group took note of the suggestions reflected above with respect to the detailed formulation of paragraph 1, and it was understood that the precise wording might need to be further discussed at a future session, based on a revised draft to be prepared by the Secretariat.

Paragraph 2

“loss not resulting from loss of or damage to the goods carried”

25. Wide support was expressed in favour of retaining in the draft instrument a provision limiting the liability of the carrier for consequential damages (also referred to as “pure economic loss”) resulting from delay in delivery. It was pointed out that such a provision was commonly encountered in international instruments regulating rail and road carriage. As to the formulation of that provision, it was widely felt that the situation where consequential damages were incurred should be described in clearer and less cumbersome wording than current paragraph 2 (“loss not resulting from loss of or damage to the goods carried”).

“[… times the freight payable on the goods delayed]”

26. A question was raised as to the reasons for a specific method (i.e. reference to the freight) to be used for determining the liability of the carrier for consequential damages (and the limitation of such liability) instead of using the general method (i.e., reference to the value of the goods) set forth in draft articles 17 and 18 to calculate compensation in cases of loss or damage to the goods. It was explained that the consequential damages were conceptually distinct from damages to the goods and had no necessary relationship with the value of the goods. As illustrations of that distinction, it was recalled that several existing transport laws and international instruments made reference to the freight for the calculation of the compensation for consequential damages. However, it was also pointed out that the amount of consequential damages might be considerably higher than the value of the goods, while the freight was typically a small fraction of that value. A suggestion that both methods might be combined along the lines of “[… times the freight payable on the goods delayed, or the limit of liability set forth in article 18, whichever is the highest]” received little support.

27. The discussion focused on the multiplier to be applied if the reference to the freight was to be used. Considerable support was expressed in favour of limiting at a low level the compensation owed by the carrier for consequential damages in case of delayed delivery. Accordingly, it was suggested that the limit should be no higher

than (one times) the amount of the freight payable on the goods delayed. Suggestions that alternative multipliers such as 2.5 or 4 should also be considered for continuation of the discussion did not receive considerable support. Strong concern was expressed regarding the possibility to break the limit of such compensation under draft article 19 (for continuation of the discussion, see below, paras. 52-62).

Contractual freedom

28. As a further way of limiting the effect of a provision establishing the liability of the carrier of delayed goods for consequential damages, it was suggested that paragraph 2 should be subject to contractual freedom of the parties. A view held by a considerable number of delegations was that such a reference to contractual freedom would defeat the general principle expressed as a matter of public policy in paragraph 1 (see above, para. 22). However, it was also agreed that the issue might need to be further considered under draft article 19 regarding the loss of the right to limit liability, and also in the context of the general discussion of party autonomy under chapter 19. In that context, it was recalled that a proposal for a revision of paragraph 2 based on freedom of contract had been made in document A/CN.9/WG.III/WP.34, paragraph 40.

Possible conversion to total loss

29. A proposal was made, based on article 20 (1) of the Convention on the Contract for the International Carriage of Gods by Road (CMR), to the effect that, after expiry of a fixed time period of 90 days from the time when the carrier took over the goods, the fact that goods had not been delivered would be conclusive evidence of the loss of the goods, and the person entitled to make a claim might choose to treat them as lost. While some support was expressed for the proposal, it was pointed out that a provision along those lines might make the draft instrument unnecessarily complex, particularly in view of the fact that additional rules might become necessary to avoid over-compensation if the goods were found after expiry of the 90-day period. Such issues as the passing of ownership of the goods to the carrier or the option to be provided to the shipper to choose between the goods and the compensation were generally found too complex and detailed to be needed in the draft instrument.

Placement of paragraph 2

30. The view was expressed that paragraph 2 might be better located as part of draft article 18. It was generally felt that the issue might need to be reconsidered at a future session.

Conclusions reached by the Working Group on paragraph 2

31. After discussion, the Working Group decided that:

- The limitation of the amount payable for consequential damages in case of delayed delivery should be calculated by reference to the freight;
- The words "[one times] the freight payable on the goods delayed" would be inserted in paragraph 2 for continuation of the discussion at a future session;

- The words "[Unless otherwise agreed]" would be inserted at the beginning of paragraph 2, together with a footnote indicating that the issue would need to be reassessed in the context of both draft article 19 and chapter 19. A provision along the lines of article 7 (1) of the United Nations Sales Convention should be introduced to promote uniformity in the interpretation of the draft instrument.

Draft article 17. Calculation of compensation

32. The Working Group considered the text of draft article 17 as contained in document A/CN.9/WG.III/WP.32.

Paragraph 1

General discussion

33. There was broad support in the Working Group for the contents of paragraph 1. However, some drafting concerns were expressed. There was support for the suggestion that the draft instrument should use consistent terminology such that "the place and time of delivery according to the contract of carriage" in paragraph 1 should be consistent with the text used in draft article 7, and a preference was expressed for the phrasing used in draft article 7. A further suggestion was made that, in light of the discussion in the Working Group regarding draft article 16, it might be advisable to consider a separate article on the calculation of damages due to delay.

Conclusions reached by the Working Group on paragraph 1

34. After discussion, the Working Group approved the substance of paragraph 1, subject to redrafting by the Secretariat to improve consistency with draft article 7.

Paragraph 2

Conclusions reached by the Working Group on paragraph 2

35. After discussion, the Working Group approved the substance of paragraph 2.

Paragraph 3

General discussion

36. It was explained that this paragraph was intended to clarify the Hague-Visby Rules, which were unclear as to whether or not claimants were entitled to consequential damages. The paragraph was intended to allow the parties to the contract of carriage to compensate for consequential damages when they made clear their intention to do so pursuant to draft article 88. Some concerns were expressed regarding the treatment of consequential damages and the apparent support of this paragraph for the one-sided mandatory nature of the draft instrument as currently stated in draft article 88, wherein a carrier or a performing party may agree to increase its responsibilities and its obligations.

Conclusions reached by the Working Group on paragraph 3

37. After discussion, the Working Group approved the substance of paragraph 3.

Draft article 18. Limits of liability

38. The Working Group considered the text of draft article 18 as contained in document A/CN.9/WG.III/WP.32.

Paragraph 1

Level of the limitation on liability

39. There was agreement in the Working Group that the time was not yet ripe for an exchange of views with respect to the appropriate level of limitation on liability to be inserted into paragraph 1. Views were expressed that an increase from the level in the Hague-Visby Rules would be favoured, and that some States would favour a low level of limitation. There was broad approval of a suggestion that a study should be prepared of the different limitation levels in different States, and with respect to different transport regimes. CMI offered to circulate to its members a questionnaire with respect to the limitation levels applicable to maritime claims and any available information on the value of cargo. In addition, member and observer States of the Working Group agreed to submit to the Secretariat information regarding the limits of liability in their various domestic transport regimes, as well as any available statistics on claims figures, in order to facilitate the proposed study. It was suggested that the Secretariat should request information from the International Maritime Organization (IMO) with respect to inflation rates and liability limits, for example in the context of the Athens Convention.

Amendment procedure

40. It was proposed that the draft instrument should include a rapid amendment procedure, so that the limitation level, once agreed upon, could be adjusted without reopening the negotiation on the entire instrument. It was noted that a rapid amendment procedure had been proposed in paragraphs 11 and 12 of A/CN.9/WG.III/WP.34. It was suggested that reference could also be had to the amendment procedure in the Athens Convention. There was broad support for the inclusion of an amendment procedure in the draft instrument.

Economic loss and "in connection with the goods"

41. It was stated that the words "in connection with the goods" were drawn from article IV.5.a of the Hague-Visby Rules, where the intent was to cover losses caused by a decrease in the market value of goods during a delay, but not to cover economic loss. It was suggested that if the draft instrument was to cover pure economic loss, a different formulation should be used, such as "the carrier's liability for loss of or damage to the goods or for delay in delivery". Some support was expressed for deletion of the words "or in connection with". In addition, the view was expressed that the exclusion of economic damages from paragraph 1 was achieved through the opening phrase, "[s]ubject to article 16 (2)".

42. Doubts were expressed as to the above interpretation of the phrase "in connection with the goods", and whether it would be prudent to delete it. It was suggested that the phrase was intended to include not only damage to the goods, but also damage caused by other circumstances, such as misdelivery or misrepresentation of the goods in the bill of lading. There was strong opposition to

the deletion of the phrase. The observation was made that if the phrase was intended to cover misrepresentation and misdelivery, it might be better to place it in a separate article with a different method for calculating compensation. Further, it was observed that if this latter interpretation of the phrase was accurate, it was possible that "in connection with the goods" should also be inserted into draft article 14 (A/CN.9/WG.III/WP.36). As noted in further discussions in the Working Group, the phrase "in connection with the goods" recurred in several other draft articles and it was recommended that its use should be examined by the Secretariat (see below, paras. 44, 58, 89 and 91).

Possible alternative text

43. Some support was expressed for replacing paragraph 1 with the alternative text reproduced in footnote 92 of A/CN.9/WG.III/WP.32.

Conclusions reached by the Working Group on paragraph 1

44. After discussion, the Working Group decided that:

- The text of paragraph 1 was generally acceptable;
- The phrase "in connection with" would be placed in square brackets in this and other draft articles for further examination and discussion;
- The CMI and the member and observer States of the working group would provide data to the secretariat for the preparation of a comparative study on the limitation levels for loss and delay of various transport regimes, including any available claims statistics;
- The Secretariat should seek to obtain information from the IMO on inflation rates of liability limits;
- The Secretariat would be requested to prepare draft provisions for a rapid amendment procedure for the limitation on liability, using existing models and proposals.

Paragraph 2

General discussion

45. It was recalled that paragraph 2 had been recently discussed at length (A/CN.9/544, paras. 43-50), and that the Working Group had been fairly evenly divided between those who favoured retaining the paragraph and those who favoured its deletion. It had been decided at that time to maintain the provision in square brackets pending the decision of the Working Group on the liability limit set out in paragraph 1.

Delay in delivery

46. It was suggested that delay in delivery should be treated in similar fashion to loss or damage to the goods in paragraph 2. However, it was noted that delays in delivery in intermodal transport would generally be well-documented as the goods changed between modes of transport, such that proving where the delay occurred would be less problematic than proving where concealed damage occurred. It was suggested in response that if the liability limit for damages for delay in draft

article 16 remained at a low level, the carrier might not have any incentive to establish where the delay occurred unless the carrier could otherwise be subject to a higher liability limit. However, the point was made that in fact it would be in the carrier's interest to establish where the delay occurred in order to bring a recourse action against the party who caused the delay. Questions were raised regarding whether a rule in this regard would be too favourable to cargo interests, since it was often difficult to decide what was the real cause of the delay, for example, a one-day delay caused by a rail carrier that ultimately resulted in the container missing its ship. Support was expressed both in favour of and against a provision similar to paragraph 2 regarding delays in delivery.

Conclusions reached by the Working Group on paragraph 2

47. After discussion, the Working Group decided that:

- The text of paragraph 2 would be maintained in square brackets;
- Reference to delay in delivery would be introduced in square brackets in the text of paragraph 2, for continuation of the discussion on that issue.

Paragraph 3

General discussion

48. This paragraph was described as the well-known container rule from the Hague-Visby Rules. There was broad support for the text of this paragraph, however, the question was raised regarding its interaction with the use of a qualifying clause. A suggestion was also made regarding the inclusion of pallets in this paragraph, and the suggestion was made to include pallets by way of the definition of "container" in draft article 1. It was also suggested that the option should be considered of including a separate limit for containers to replace the package limitation.

Conclusions reached by the Working Group on paragraph 3

49. After discussion, the Working Group approved the substance of paragraph 3 and noted that the definition of "container" in draft article 1 might need to be further considered to ensure that it covered pallets.

Paragraph 4

General discussion

50. General satisfaction was expressed by the Working Group with respect to paragraph 4. It was noted that the paragraph required that the currency be valued at the date of the judgement, so it would not be possible to take advantage of fluctuating currency values in applying this paragraph. A question was raised whether the last sentence of the paragraph could be deleted, since it was duplicated from other conventions and seemed to be mainly of historical interest. A suggestion was made to include in this paragraph a reference to "the date of the arbitral award" or "the date of the final arbitral award". However, caution was expressed regarding unintended consequences that could result from changes to this well-known text.

Conclusions reached by the Working Group on paragraph 4

51. After discussion, the Working Group approved the substance paragraph 4.

Draft article 19. Loss of the right to limit liability

52. The Working Group considered the text of draft article 19 as contained in document A/CN.9/WG.III/WP.32.

General discussion

53. General agreement was expressed for the policy expressed in draft article 19, under which the limit of liability could be broken in certain exceptional circumstances. How widely such circumstances should be recognized by the draft instrument was considered to be an issue that needed to be balanced against the decision to be made in respect of the amount specified for such limits, particularly under draft articles 18 and 16. It was stated that, should higher limits be specified, it would be justified to make those limits almost unbreakable in practice.

References to article 16 (2) and to "delay in delivery"

54. The view was expressed that it would be inappropriate to equate the intent to cause delay in delivery with intent to cause economic loss to the consignee. It was explained that, in certain transport practices, "slow steaming", "overbooking" or other intentional conduct of the carrier resulting in delay in delivery was customary. Delay might also result from an intentional navigational decision made in the interest of the cargo, for example to avoid a storm. Thus, the mere intent to cause delay (acceptable in certain circumstances) should be distinguished from intent to cause delay with knowledge that economic loss for the consignee would probably result (a situation where the limit of liability should be broken). It was suggested that, in dealing with the issue of delay, the same distinction might need to be made in draft article 19 and in draft article 16 (1) between delay where a time for delivery had been stipulated in the contract and unreasonable delay in the absence of such stipulation. Alternatively, the following was suggested as a possible additional paragraph dealing with the issue of delay in delivery:

> "Neither the carrier nor any of the persons mentioned in article … shall be entitled to limit their liability as provided in article 16 (2) of this instrument, or a higher limit as provided in the contract of carriage, if the claimant proves that the loss due to delay resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss due to delay or recklessly and with knowledge that such loss due to delay would probably result."

Possible reference to article 17

55. The view was expressed that a reference to article 17 should be added to the list of provisions creating a limit of liability, since article 17 had the same effect as a limit of liability. It was stated in response that the effect of the draft article was not to establish a limit but simply to provide a method for the calculation of compensation.

Freedom of contract

56. As regards the possibility that the limit of liability might be made totally unbreakable by contractual arrangement between the parties (possibly through a specific stipulation where the contract of carriage was freely negotiated or, in the case of a contract of adhesion, through a mention in any transport document), the general view was that, in cases of wilful misconduct or reckless behaviour of the carrier, such contractual arrangements should be regarded as contrary to public policy and should not be recognized by the draft instrument.

57. The view was expressed, however, that a reference to the terms of the contract of carriage might be necessary in article 19 to reflect the conditions under which a higher limit of liability stipulated by agreement of the parties (or, depending on decisions to be made in respect of chapter 19, a lower limit) might be broken in exceptional circumstances. In response, it was stated that the case where the parties agreed on a higher limit was already covered by article 18 and the case where a lower limit was stipulated in an Ocean Liner Service Agreement (OLSA), would probably be outside the scope of the draft instrument under chapter 19.

"damage to or in connection with the goods

58. It was widely agreed that the words "in connection with" should be treated as in draft article 18 (see above, paras. 42 and 44).

"[personal] act or omission"

59. It was observed that the obligation to prove the personal act or omission of the person claiming a right to limit its liability (for example, the contracting carrier) resulted in the limit of liability being close to unbreakable in practice. Strong support was expressed for extending the scope of draft article 19 to the situation where the intentional or reckless behaviour was that of a servant or agent of the contracting carrier. Another suggestion was that the words "act or omission of the carrier or any of the persons referred to in draft article 14 bis" should be used. A concern was also expressed as to how the "personal" act or omission of a corporate entity could be demonstrated.

60. Strong support was also expressed for maintaining the reference to the personal act or omission of the person claiming a right to limit its liability, to the exclusion of acts or omissions of the servants or agents of that person. It was stated that a virtually unbreakable limit might deter a lot of litigation. It was also stated that the aim of the draft instrument was not to create a vicarious liability regime that might entail serious difficulties regarding the possible interplay between the draft instrument and the liability regime applicable to a non-maritime subcontractor. It was conceivable that, under the liability regime applicable to the subcontractor, a limit of liability would apply where the limit would be broken under draft article 19 in respect of the contracting carrier. It was suggested that, for the case where such a situation would arise, a rule symmetrical to that contained in draft article 18 (2) would be necessary to ensure that, where a subcontractor whose behaviour caused the damage was protected by an unbreakable limit of liability under the law applicable outside the draft instrument, that limit would extend to the person liable under draft article 19. With respect to the concern expressed in respect of the "personal" act or omission of a corporate entity, it was pointed out that such a

"corporate entity" was normally established in the form of a legal person and that the notion of a "personal act or omission" was well established in maritime law and understood to encompass the managers of such a legal person. To alleviate that concern, it was suggested that the words "personal act or omission of" might be replaced by "act or omission within the privity or knowledge of".

"recklessly"

61. The view was expressed that the reference to the "reckless" behaviour of the person claiming a right to limit its liability was uncertain and open to subjective interpretation by national courts. It was suggested that the limit should be breakable only in cases of "intentional or fraudulent" behaviour.

Conclusions reached by the Working Group on draft article 19

62. After discussion, the Working Group decided that:

- The reference to "article 15 (3) and (4)" should be updated to read "article 14 bis";
- The words "[or as provided in the contract of carriage,]" should be maintained in square brackets pending further discussion on chapter 19;
- The issue of delay should be further discussed on the basis of a revised draft to be prepared by the Secretariat to reflect the above proposals;
- The word "personal" should be retained without square brackets;
- The suggestion to add a reference to article 17 might need to be further discussed in the context of chapter 19.

Draft article 20. Notice of loss, damage or delay

63. The Working Group considered the text of draft article 20 as contained in document A/CN.9/WG.III/WP.32.

Paragraph 1

Purpose of paragraph 1

64. The usefulness of the presumption created in paragraph 1 was widely acknowledged. It was noted that similar provisions had been a feature of maritime law since the presumption first appeared in article III.6 of the Hague Rules, and that its operation since had not created major difficulties. The Working Group heard that its inclusion in the Hague Rules was intended to remedy the situation where failure to provide notice of the loss within the prescribed time limit resulted in a total bar to a claim for that loss. The Hague Rules intended to make it clear that failure to provide such a notice resulted only in the claimant losing the benefit of the presumption that the damage to the cargo had occurred during the period of responsibility of the carrier, and prior to its delivery to the consignee. Further, the Working Group heard the following example regarding the operation of such a provision: the carrier delivered the goods to the consignee's agent, who then took them to the consignee, who failed to inspect them and to provide notice of damage

to the carrier within the prescribed time limit. The result would be that the consignee would then lose the benefit of the presumption, and would be required to prove that the damage to the goods occurred before delivery to the consignee's agent. It was observed that the presumption operated to the benefit of both the consignee, who received the benefit of the presumption and who was also protected from being subjected to very short notice periods that could be imposed in a contract of carriage, and the carrier, who received notice of damage in a timely fashion and could thus begin gathering evidence while it was still available.

65. However, the need for paragraph 1 was questioned given the apparent lack of legal consequences for failure to provide the required notice. Since the issuance of the notice, or the failure to provide such a notice, did not affect the respective burdens of proof of the carrier and of the claimant set out in the general liability regime in draft article 14, the question arose of whether paragraph 1 was necessary at all. In light of the Working Group's agreement on the general usefulness of the presumption created by paragraph 1, it was decided to attempt to improve the wording of paragraph 1 to clarify its operation and the consequences entailed by failure to provide the notice. It was also suggested that the attempted redraft should clarify the distinction between providing notice of the existence of damage or loss, which was the intent of paragraph 1, and providing proof of the damage or loss, which would only become necessary later to substantiate the claim.

66. With a view to reflecting some of the above views and suggestions, the following redrafted text of paragraph 1 was proposed to the Working Group:

> "1. Notice of loss of or damage to [or in connection with] the goods, indicating the general nature of such loss or damage, shall be given [by or on behalf of the consignee] to the carrier or the performing party who delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within [three working days] [a reasonable time] [___working days at the place of delivery] [___consecutive days] after the delivery of the goods. [A court [may] [shall] consider the failure to give such notice in deciding whether the claimant has carried its burden of proof under article 14 (1).] Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the consignee and the carrier or the performing party against whom liability is being asserted."

67. The redrafted text was welcomed by some as an improvement in that it deleted the presumption in the original version of paragraph 1, and reminded parties that failure to provide notice could make it more difficult to prove their case. It was observed that the bracketed text could also prevent courts from imposing some other sanction for failure to provide notice. There was also continuing support for the original text of paragraph 1, particularly in light of the fact that the text is well known, that it exists in several other transport regimes, and that it is thus familiar to judges in many jurisdictions. One reservation raised with respect to the redrafted text was regarding the clarity of the bracketed sentence, and also the reluctance to appear to be advising courts on how evidence should be assessed. In addition, there was some support for the deletion of paragraph 1 altogether.

Time for giving notice

68. The Working Group was generally of the view that if paragraph 1 was to be maintained, "a reasonable time" was an inappropriate time period in which to notify the carrier or the performing party of concealed damage, since it did not provide clear guidance to commercial parties. It was noted that the Hague and Hague-Visby Rules required that this notice be provided within three days. Various time periods were suggested, including 3, 7, 10 and 15 days. The suggestion was also made that, in any event, in the interests of fairness, the time chosen should refer to a certain number of working days rather than consecutive days, particularly if a brief notice period was chosen.

69. A question was raised as to whether the notice period should refer to "the place of delivery" or to "the place of final delivery". A suggestion was made that the text should read "___working days at the place of actual delivery". The view was expressed that there could be practical difficulties with expiry of the notice period if it was a short period that expired before a road carrier, who picked up the cargo at the dock, delivered it to the consignee, particularly since such a road carrier was unlikely to agree to act as the consignee's agent, and unlikely to unpack the goods in order to discover concealed damage. However, it was noted that this difficulty would only arise when the contract of carriage was on a port-to-port basis, rather than on a door-to-door basis, since the provision was intended to allocate the risk of any ambiguity about where the damage occurred. It was suggested that in a port-to-port contract of carriage, the consignee should bear the risk once its agent had control of the goods, but it was observed that since most contracts were now door-to-door, this issue would arise much less frequently. There was support for this reasoning, and it was observed that this was the reason why caution had been advised with respect to the inclusion in the draft instrument of mixed contracts of carriage and forwarding in draft article 9 of the draft instrument.

70. A further question was raised regarding the functioning of paragraph 1 in a number of ports where delivery must be made by the carrier to state-controlled parties, such as customs authorities, where neither the carrier nor the consignee could control the amount of time that might pass before such cargo would actually be delivered to the consignee. The suggestion was made that the notice period in paragraph 1 should thus begin to run only at the time that the consignee physically received the cargo.

71. The prevailing view was that seven days was an appropriate notice period.

Form of the notice

72. Concern was expressed that the form in which the notice must be provided was not specified in paragraph 1. While it was noted that parties would, in most cases, send written notice for evidentiary purposes regardless of a requirement to do so, a preference was expressed in the Working Group that it be made explicit that notice should be either in writing, as specified in article 19 (1) of the Hamburg Rules and in article III.6 of the Hague Rules, or that it may be made by electronic means. It was observed that draft article 5, which had not yet been considered by the Working Group, established that notice should be given in written or electronic form under the draft instrument.

Parties who must send and receive the notice

73. Concern was raised with respect to the phrase in square brackets that notice must be given "[by or on behalf of the consignee]". It was observed that this requirement, if accepted by the Working Group, might unnecessarily restrict the category of parties who could provide notice of loss or damage. In addition, it was suggested that the parties to whom notice could be provided should be expanded from "the carrier or the performing party" to include the agents of the carrier or performing party. There was some support for these suggestions.

74. It was observed that notice under paragraph 1 must be given to the carrier or the performing party, but that the network system in the draft instrument envisaged that rules other than those set forth in the draft instrument could apply for the notice of loss, damage or delay with respect to the land leg of a particular contract of carriage. It was proposed that it would thus be appropriate to include in draft article 20 a rule as follows: "The form and time limit prescribed for the notice of damage shall be deemed to have been observed as well if the corresponding provisions which would be applicable to a contract of carriage covering the last leg of the carriage have been complied with." There was some support in favour of that proposal. In opposition, it was stated that the issue of notice periods in inland transport conventions was linked to their liability systems and ought not be taken out of that context. Since paragraph 1 had limited legal consequences, it should not be unnecessarily complicated. In addition, it was noted that a seven-day notice period, if finally retained, would be helpful in avoiding confusion, since it would be similar to the notice period required in certain road transport instruments such as CMR.

Conclusions reached by the Working Group on paragraph 1

75. After discussion, the Working Group decided that:

- The original text and the proposed redraft of paragraph 1 should be placed in square brackets for future discussion;
- The words "a reasonable time" should be deleted from the original version of paragraph 1;
- Seven days was an appropriate notice period and should be inserted into the original version of paragraph 1, with the words "seven consecutive days" and "seven working days" appearing as alternatives in square brackets.

Paragraph 2

Differences between paragraphs 1 and 2

76. Concerns were expressed with respect to the difference in treatment accorded to failure to give notice under paragraph 1 and under paragraph 2. It was suggested that barring a claim for loss due to delay on the grounds of failure to give notice within 21 days was particularly harsh in light of the fact that the carrier would already benefit from the low limitation on damages for delay of one times the freight payable pursuant to paragraph 16 (2). It was also suggested that the draft convention already contained provisions on the time for suit, and that it would be unreasonable to bar a claim in the circumstances set out in paragraph 2. It was noted

in response that the approach in paragraph 1 was intended to deal with notice of non-apparent loss, which was discoverable upon examination of the goods, and which was in all parties' interest to be made in as short a delay as possible. However, in the situation covered by paragraph 2, all parties would know quickly of the delay, but the missing information was with respect to the consequential damages claimed as a result of the loss for delay. It was suggested that the longer notice period was reasonable in order to determine the existence of consequential damages, which could be difficult to ascertain, and to provide notice of them. In addition, it was noted that CMR accorded the same treatment for failure to notice of loss due to delay within the specified time limit.

"such loss"

77. It was suggested that the notice required should be notice of the delay rather than notice of the loss. However, it was noted that the fact of the delay would be known by the parties very quickly, and that the important factor for the carrier was to have some certainty regarding the legal consequences of the delay and the economic loss resulting therefrom for which it could be liable. It was suggested that it would be difficult for the claimant to ascertain the extent of its consequential loss due to delay, but it was noted that the notice required was notice of the loss rather than the details of the claim. A proposal was made to delete the word "such" from this phrase in order to clarify the contents of the notice, or to make specific reference to paragraph 16 (2) to clarify that reference was being made to economic loss. It was suggested that simply using the word "loss" would be insufficient to indicate that reference was being made to loss occasioned by delay. Support was expressed for substituting the phrase "loss due to delay" for the phrase "such loss".

"the person against whom liability is being asserted"

78. It was noted that paragraph 1 provided for notice to the carrier or to the performing party, while paragraph 2 required notice to "the person against whom liability is being asserted". It was suggested that this language was intended to encourage the claimant to decide at an early stage who to sue, keeping in mind that multiple parties could be notified, in order to provide certainty to the potential defendants to the claim. However, there was support for the view that this language could unfairly limit the claimant in pursuing a claim, since it was not clear whether it would be possible to sue a party to whom notice was not provided. There was support for the suggestion that the word "carrier" should be substituted for the phrase "the person against whom liability is being asserted".

Time period

79. It was noted that the Hamburg Rules provided in article 19 (5) a 60-day notice period for notice of loss resulting from delay. It was suggested that 21 days was a suitable period of time in which to require notice in order to both provide certainty for the carrier and allow an assessment of the extent of its potential liability. It was also noted that the 21 day time period in paragraph 2 was identical to the time period provided in the CMR for notice of loss due to delay.

"delivery"

80. It was suggested that it should be made clear in paragraph 2 that the "delivery" should be delivery pursuant to the contract.

Conclusions reached by the Working Group on paragraph 2

81. After discussion, the Working Group decided that:

- The phrase "the person against whom liability is being asserted" should be replaced by the words "the carrier";
- The phrase "loss due to delay" should be substituted for the phrase "such loss", taking care that there is consistency in the translation of the word "loss" in all language versions.

Paragraph 3

Drafting correction

82. It was agreed that the phrase in paragraph 3 "in this chapter" should be revised to "in this article".

"notice given to a performing party"

83. There was support for the suggestion that the second reference to "performing party" in the closing phrase of this paragraph should instead make reference to "maritime performing party" in order to take into account the agreement of the Working Group to limit the application of the draft instrument to maritime performing parties. It was thought that to do otherwise would impose upon performing parties the burden of receiving notice under the draft instrument. In response, the suggestion was made that it was clear that the paragraph was referring only to notice under the draft instrument, and not under some other transport convention. It was noted that if the change were made to maritime performing parties, the phrase should read "a" or "any" maritime performing party, and that the phrase "that delivered the goods" would likely no longer be necessary.

Conclusions reached by the Working Group on paragraph 3

84. After discussion, the Working Group decided that the Secretariat should prepare a revised draft of this paragraph, taking into consideration whether the change should be made to "maritime performing party" in the closing phrase of the paragraph, and whether further language adjustments should be made in that regard.

Paragraph 4

General discussion

85. It was suggested that paragraph 4 should be deleted and that arrangements for access and inspection should be left to cooperation between the parties or to national law. However, it was noted that this provision served an important purpose and was drawn from the Hague and Hague-Visby Rules, and support was expressed for maintaining the paragraph.

“[for][must provide]”

86. It was suggested that the word “[for]” should be deleted and the phrase “[must provide]” should be maintained, without square brackets.

Conclusions reached by the Working Group on paragraph 4

87. After discussion, the Working Group decided that paragraph 4 would be maintained, with the word “[for]” deleted and the phrase “must provide” maintained, without square brackets.

Draft article 21. Non-contractual claims

88. The Working Group considered the text of draft article 21 as contained in document A/CN.9/WG.III/WP.32.

Drafting matters

89. It was agreed that reference in this draft article to “performing party” should be revised to “maritime performing party”. Further, it was noted that the phrase “in connection with” (as discussed in paras. 42 and 58 above) also appeared in draft article 21.

Interaction with paragraph 15 (4)

90. It was suggested that this paragraph was a duplication of paragraph 15 (4) in A/CN.9/WG.III/WP.36, and that article 21 should be deleted as being repetitious. In response, it was noted that paragraph 15 (4) was intended to provide so-called Himalaya protection for servants and agents of the carrier, while draft article 21 extended the defences and limits of liability in the draft instrument to non-contractual claims.

Conclusions reached by the Working Group on paragraph 4

91. After discussion, the Working Group decided that:

- The word “maritime” should be added to the phrase “performing parties”;
- The Secretariat should consider whether paragraph 15 (4) and draft article 21 were repetitious and, if not, whether they should be consolidated, given their close relationship;
- The Secretariat should include this draft article in its consideration of the phrase “in connection with” throughout the draft instrument.

Chapter 6: Additional provisions relating to carriage by sea

Draft article 22. Liability of the carrier

92. The Working Group considered the text of draft article 22 as contained in document A/CN.9/WG.III/WP.32.

Placement

93. There was general agreement that the contents of draft article 22 might need to be moved to draft article 14 as a result of the deliberations of the Working Group at its twelfth session.

The fire exception

94. Strong support was expressed for the deletion of a specific fire exception. It was stated that no special treatment of the issue of fire was necessary in modern navigation. It was also pointed out that it would be particularly appropriate to deal with fire through the general rule set forth in draft article 14, since in most instances, the carrier would be better placed to identify the causes of the fire. However, strong support was also expressed for retaining the traditional fire exception to avoid altering the general balance of interests in the draft instrument. It was stated that the elimination of the exception drawn from the error in navigation had already compromised that balance. In that connection, it was suggested that the latter exception should be reinstated in the draft instrument, at least to cover the error in navigation made in the context of mandatory pilotage (see A/CN.9/WG.III/WP.28). That suggestion received little support.

95. As to how the fire exception might be formulated, it was suggested that the reference to the “fault or privity of the carrier” should be replaced by a reference to the “fault or privity of the carrier, its servants or agents”. It was observed that the issue might need to be further discussed in the context of draft article 14.

Salvage of property at sea

96. Doubts were expressed as to whether the salvage or attempted salvage of property at sea should be treated on the same footing as the salvage or attempted salvage of life at sea. Broad support was expressed for the introduction of a test of reasonableness along the lines of “reasonable measures to save or attempt to save property at sea”. It was pointed out that the salvage of property at sea might entail considerable remuneration for the carrier, with no direct or automatic impact on the damaged cargo.

Reasonable attempt to avoid damage to the environment

97. In the context of the discussion regarding the salvage or attempted salvage of property at sea, it was suggested that special mention should be made in the draft instrument of a cause of exoneration that should result from a reasonable attempt to avoid damage to the environment. Broad support was expressed for that suggestion.

Perils of the sea

98. The Working Group was generally in agreement with the substance of the rule on “perils, dangers and accidents of the sea or other navigable waters”.

Conclusions reached by the Working Group on draft article 22

99. After discussion, the Working Group decided that:

- The fire exception would be maintained in the draft instrument and further considered in the context of draft article 14;

- The words “saving or attempting to save property at sea” should be replaced by words along the lines of “reasonable measures to save or attempt to save property at sea”, possibly as a separate subparagraph;
- Words along the lines of “reasonable attempt to avoid damage to the environment” should be introduced in the draft instrument, possibly as a separate subparagraph;
- The Secretariat would be requested to prepare a revised draft merging draft article 22 with draft article 14 as amended at the twelfth session of the Working Group.

Draft article 23. Deviation

100. The Working Group considered the text of draft article 23 as contained in document A/CN.9/WG.III/WP.32.

General discussion

101. Doubts were expressed regarding the usefulness of draft article 23 in many legal systems. However, it was explained that under existing case law in certain countries, a provision along the lines of draft article 23 was necessary to avoid deviation being treated as a major breach of the carrier’s obligations. That explanation met with the general approval of the Working Group. With a view to providing a more complete treatment of the issue of deviation, the attention of the Working Group was drawn to a proposal for a revision of draft article 23 contained in document A/CN.9/WG.III/WP.34, paragraph 38. In particular, that proposal was intended to clarify that the only deviation for which the carrier could be held liable was an “unreasonable” deviation and that this concept would relate only to the routing of an ocean-going vessel (operated by the carrier or a performing party). While support was expressed with respect to both the current text of draft article 23 and the proposed revision, the view was expressed that further consultations were necessary before a formulation of the provision on deviation could be agreed upon.

Conclusions reached by the Working Group on draft article 23

102. After discussion, the Working Group decided that the current text of draft article 23, together with the alternative text proposed in document A/CN.9/WG.III/WP.34, paragraph 38 would be placed in square brackets in the draft instrument for continuation of the discussion at a future session.

Draft article 24. Deck cargo

103. The Working Group considered the text of draft article 24 as contained in document A/CN.9/WG.III/WP.32.

Paragraph 1

“(b) … containers on decks that are specially fitted to carry such containers”

104. It was suggested that subparagraph (b) specify that the containers for carriage on deck should be “closed containers” or “containers fitted to carry cargo on deck”

since the definition of container in draft article 1 (s) was very broad. It was pointed out in response that various types of semi-closed containers were used for on-deck carriage. A question was raised whether subparagraph (b) was necessary at all, since it would appear to be subsumed by the reference in subparagraph (c) to carriage on deck in compliance "with the customs, usages, and practices of the trade". It was suggested, however, that the two separate categories in subparagraphs (b) and (c) were necessary to reflect various industry practices that might entail different legal consequences.

"(c) ... in accordance with the contract of carriage"

105. Questions were raised concerning the agreement necessary to approve carriage on deck in the contract of carriage, specifically whether mention of it in the bill of lading was sufficient, or whether express agreement was necessary. It was suggested that this question could be more easily answered after the Working Group had had its discussion on freedom of contract issues.

Conclusions reached by the Working Group on paragraph 1

106. After discussion, the Working Group decided that:

- In subparagraph (b), the word "containers" should be replaced by the phrase "containers fitted to carry cargo on deck", to be placed between square brackets for continuation of the discussion;
- Square brackets should be inserted around the phrase "in cases not covered by paragraphs (a) or (b) of this article" in subparagraph (c);
- Square brackets should be inserted around the phrase "in accordance with the contract of carriage" in subparagraph (c).

Paragraph 2

General discussion

107. There was general agreement with the principle of the rule enunciated in paragraph 2. It was also agreed that the opening phrase of paragraph 2 should read "… in accordance with paragraphs 1 (a) or (c)", rather than "… in accordance with paragraphs 1 (a) and (c)".

Interaction with draft article 14 on burden of proof and concurrent causation

108. Questions were raised concerning the interaction of paragraph 2 with draft article 14 (A/CN.9/WG.III/WP.36). It was noted that paragraph 2 derogated from draft article 14 and placed the burden of proof of the damage on the carrier. Despite this derogation, it was stated that the liability of the carrier for loss, damage or delay "that are exclusively the consequence" of the carriage of the goods on deck, might raise a difficult question in connection with the rule on concurrent causation in draft article 14 (4).

Conclusions reached by the Working Group on paragraph 2

109. After discussion, the Working Group decided that:

- The text of paragraph 2 would be corrected by replacing the word “and” with the word “or” in its opening phrase;
- Paragraph 2 would be discussed in greater detail in conjunction with draft article 14 (4).

Paragraph 3

General remarks

110. While the thrust of paragraph 3 was generally acceptable, a widely shared view was that the issue of third party rights should be further discussed in the context of chapter 11 (right of control) and chapter 12 (transfer of rights). It was observed that the pending discussion on freedom of contract would also have a bearing on the issue of third party rights. A suggestion was made that paragraph 3 should also apply to the situation where a third party has relied on a non-negotiable transport document or electronic record, since the issue should be the reliance on the document or record rather than its legal contents.

Conclusions reached by the Working Group on paragraph 3

111. After discussion, the Working Group decided that it would reopen discussion of paragraph 3 generally, and of whether it should be expanded to cover third-party reliance on non-negotiable transport documents and electronic records after it had discussed the broader issues of third-party rights and freedom of contract under the draft instrument.

Paragraph 4

“if the carrier and shipper expressly have agreed”

112. A question was raised as to why express agreement between the shipper and the carrier to carry the goods below deck was necessary to break the liability limit for damage caused by on-deck carriage, when the general approach was that the goods should be carried below deck except in the situations outlined in paragraph 1. It was stated in response that only the breach of an express agreement to carry containers below deck should result in loss of the right to limit liability of the carrier under paragraph 4 for incurring the damage specifically intended to be avoided.

“that exclusively resulted from their carriage on deck”

113. It was suggested that when the carrier carried the goods above deck contrary to an express agreement to carry the goods below deck, any damage caused by the deck carriage was the result of a reckless act under draft article 19, and the carrier should thus lose the right to limit its liability. It was proposed that, therefore, the phrase “that exclusively resulted from their carriage on deck” should be deleted. There was support for that proposal.

114. However, several delegations expressed the view that the reckless or intentional behaviour dealt with under draft article 19 differed markedly from the situation covered in paragraph 4 in terms of the intent to cause loss or damage to the goods. An example was given that loss of an entire ship should not result in the loss by the carrier of its limitation regarding carriage on deck, since there was no causal

connection between the improper deck carriage and the loss of the cargo. There was some support for the suggestion that paragraph 4 be retained in its current form.

115. A third proposal was made to delete only the word “exclusively”. It was thought that this might broaden somewhat the potential liability of the carrier, thus recognizing the serious nature of the carrier’s failure to respect the express agreement to carry the goods below deck. Some support was also expressed for that proposal.

Deletion of paragraph 4

116. A fourth proposal was made to delete paragraph 4 in its entirety, particularly if draft article 19 could be said to cover the circumstances dealt with in paragraph 4. This proposal met with somewhat less support than the other three proposals with respect to this paragraph.

Conclusions reached by the Working Group on paragraph 4

117. After discussion, the Working Group decided that:

- The word “expressly” should be retained in square brackets;
- Square brackets should be placed around the phrase “that exclusively resulted from their carriage on deck”;
- Square brackets should also be placed around the word “exclusively”;
- Square brackets should be placed around paragraph 4 in its entirety;
- The discussion of paragraph 4 would need to be reopened at a future session and its relationship with draft article 19 should be further studied.

Chapter 7: Obligations of the shipper

Draft article 25

118. The Working Group considered the text of draft article 25 as contained in document A/CN.9/WG.III/WP.32.

“[Subject to the provisions of the contract of carriage,]”

119. It was widely felt that a reference to the contract of carriage should be made in draft article 25. However, the view was expressed that the current reference was misplaced. Under that view, the obligation of a shipper to deliver the goods ready for carriage could be deviated from by agreement between the shipper and the carrier, where, for example, the carrier agreed to use its equipment to position a shipper’s goods in order to ready them for carriage, but that a shipper should not be able to contract out of its obligation to prepare the goods to withstand the intended carriage. It was suggested that, therefore, the phrase in square brackets should be deleted, and the phrase “unless otherwise agreed, and” should be added after the phrase “the shipper shall deliver the goods ready for carriage”. There were no specific objections to this suggestion, provided that the intention of the language originally in the square brackets continued to be reflected in the draft article. A

further proposal in this vein was to delete the language in square brackets, but to insert after the opening phrase of draft article 25, "[t]he shipper shall", the phrase employed regarding the obligations of the carrier in draft article 10, "in accordance with the terms of the contract of carriage".

120. The suggestion was made that the phrase in square brackets could be deleted entirely from draft article 25 in order to avoid the possible inference that it would be possible to increase the obligations of the shipper through contractual agreement. However, there was strong support for the retention of the draft article and of the principle expressed in the phrase in square brackets.

Regulations concerning safety and the environment

121. It was suggested that draft article 25 should acknowledge existing regulations in place for the safety of the transport or carriage by including language such as "without prejudice to regulations regarding safety". A similar proposal was made with respect to the protection of the environment.

Second sentence of draft article 25

122. It was proposed that the second sentence of draft article 25 should be deleted as unnecessarily repetitious of the obligations of the shipper set out in the first sentence. However, concern was expressed that, while it might be desirable to improve the language in the second sentence, the container rule expressed therein was a separate obligation that should be maintained in the draft article. There was support for this position.

Conclusions reached by the Working Group on draft article 25

123. After discussion, the Working Group decided that:

- Draft article 25 should be retained in the draft instrument;
- The principle appearing in square brackets that the obligations of the shipper should be subject to the contract of carriage should be maintained, and the brackets deleted, but the Secretariat should consider redrafting this provision in appropriate language in light of the discussion in the Working Group and the suggested proposals;
- The Secretariat might consider possible improvements to the wording of the second sentence, while retaining its meaning.

Draft article 26

124. The Working Group considered the text of draft article 26 as contained in document A/CN.9/WG.III/WP.32.

General discussion

125. Suggestions were made for the deletion of draft article 26, with or without deletion of draft article 25. Another suggestion was that draft article 26 should be merged with draft article 28. The prevailing view was that the substance of draft

article 26 should be retained to balance the obligations set forth in draft article 25 in respect of the shipper.

Placement

126. For reasons already stated at the ninth session of the Working Group, doubts were expressed regarding the placement of draft article 26 in a chapter dealing with the obligations of the shipper (see A/CN.9/510, paras. 149-151). The prevailing view was that draft article 26 was appropriately located as a logical complement to draft article 25. To remedy the apparent inconsistency created by the presence of a provision dealing with an obligation of the carrier in a chapter dealing with the obligations of the shipper, it was generally agreed that titles should be given to the draft articles in chapter 7. A suggestion was made that the title of chapter 7 might also be revised along the lines of "Obligations of the shipper and ancillary matters".

"on its request"

127. While the view was expressed that the obligations set forth in draft article 26 were formulated too subjectively (for example, by referring to instructions "that are reasonably necessary or of importance to the shipper"), the discussion focused on whether the carrier should provide information "on request" by the shipper.

128. Several delegations expressed support for deletion of the words "on its request". It was explained that the carrier should be expected to take the initiative of providing the shipper with "reasonably necessary" information in view of the nature of the cargo. In response, it was pointed out that the nature of the cargo might not always be known to the carrier and that, in view of the onerous liability created by draft article 29 for failure to comply with draft article 26, the obligations of the carrier under the latter provision should only be triggered by a specific request of the shipper. As a possible alternative for the words "at its request", it was suggested that wording inspired from draft article 27 might be introduced in draft article 26 along the lines of "unless the carrier may reasonably assume that such information is already known to the shipper".

Conclusions reached by the Working Group on draft article 26

129. After discussion, the Working Group decided that:

- The Secretariat should make proposals for titles of the draft articles in chapter 7;
- The substance of draft article 26 should be retained in chapter 7, including the words "at its request" for continuation of the discussion at a future session;
- Further consideration might need to be given to the above-suggested alternative wording.

Draft article 27

130. The Working Group considered the text of draft article 27 as contained in document A/CN.9/WG.III/WP.32.

General discussion

131. Support was expressed for the deletion of subparagraph (c), which was said to have little in common with subparagraphs (a) and (b) or with the obligations of the shipper. In support of deletion, it was explained that the issues addressed in subparagraph (c) were sufficiently dealt with in chapters 8 (documentation) and 10 (designation of the consignee). However, the Working Group was urged to exercise utmost caution in deleting a provision that was inspired from the Hague Rules and might not be sufficiently covered in chapters 8 and 10. It was generally agreed that the possible relationship of subparagraph (c) with chapters 8 and 10 might require further consideration at a future session.

132. Support was also expressed for the view that the closing words of subparagraph (c) ("unless the shipper may reasonably assume that such information is already known to the carrier") should apply to subparagraphs (a) and (b). In respect of subparagraph (b), however, the prevailing view was that the obligation to provide accurate instructions and the documents necessary for compliance with regulations and other requirements of public authorities was distinct from the obligation to provide information under subparagraph (a), should avoid any ambiguity in view of the public policy considerations on which it was based, and, for those reasons, should not depend upon an assessment of what might or might not be known to the carrier.

Conclusions reached by the Working Group on draft article 27

133. After discussion, the Working Group decided that:

- The general structure of draft article 27 was acceptable;
- The current text of the draft article, including its three subparagraphs, should be maintained for continuation of the discussion at a future session;
- The words "unless the shipper may reasonably assume that such information is already known to the carrier" should be added at the end of subparagraph (a).

Draft article 28

134. The Working Group considered the text of draft article 28 as contained in document A/CN.9/WG.III/WP.32.

Deletion of draft article 28

135. With a view to simplifying the text of the draft instrument, it was suggested that draft article 28 should be deleted and its operative intent (that the information, instructions and documents provided by the shipper and the carrier to each other should be accurate and complete, and given in a timely manner) should be reflected directly in draft articles 26 and 27. While the view was expressed that the ideas of accuracy and completeness of the information were implicit in the obligation to provide information established by draft articles 26 and 27, it was widely felt that, for practical reasons and in view of the frequency of misrepresentation in transport information and documentation, it might be necessary to include express reference to "accuracy and completeness" in both draft articles 26 and 27.

136. Broad support was expressed in favour of the simpler draft that might result from the deletion of draft article 28. Doubts were expressed, however, regarding the substance of the obligation to provide "accurate and complete" information and instructions. It was explained that a possible conflict might exist, for example, between the subjective notion of instructions being "reasonably necessary or of importance to" the shipper or the carrier and the more objective notion of such instructions being "complete". It was generally agreed that the issue might need to be further discussed after the nature of the liabilities of the shipper and the carrier in draft articles 29 and 30 had been clarified.

Conclusions reached by the Working Group on draft article 28

137. After discussion, the Working Group decided that:

- Draft article 28 would be deleted and replaced by a mention in draft article 26 that the shipper should provide "in a timely manner" the information and instructions required and that "the information and instructions given must be accurate and complete"; similarly, draft article 27 should be amended to read that the shipper should provide to the carrier "in a timely manner, such accurate and complete information, instructions and documents …";
- The above amendments to draft articles 26 and 27 should be placed between square brackets for continuation of the discussion after liabilities of the shipper and the carrier under draft articles 29 and 30 had been considered.

Draft articles 29 and 30

138. The Working Group considered the text of draft articles 29 and 30 as contained in document A/CN.9/WG.III/WP.32.

Proposal for a revision of draft articles 29 and 30

139. A proposal was made for the replacement of draft articles 29 and 30 by a provision along the following lines:

> "1. Subject to articles 25, 27 and 28 the shipper is liable for damage or loss sustained by the carrier or a sub-carrier that the shipper has caused intentionally or by its fault or neglect."
>
> "2. If the shipper has delivered dangerous goods to the carrier or the sub-carrier without informing the carrier or sub-carrier of the dangerous nature of the goods and of necessary safety measures, and if the carrier did not otherwise have knowledge of the dangerous nature of the goods and the necessary safety measures to be taken, the shipper is responsible for the damage or loss sustained by the carrier."

140. By way of explanation, it was stated that the shipper should be liable for damages it had caused to the carrier through fault or negligence. The proposed text was said to introduce a balance between the carrier's and the shipper's liabilities. Paragraph 2 of the proposed text was intended to establish a strict (no-fault) liability of the shipper for not informing the carrier of the dangerous nature of certain goods. As to the liabilities of the shipper to the consignee and the controlling party, it was

suggested that these should be dealt with by reference to the contractual arrangements between the parties or to the law applicable outside the draft instrument, respectively. It was pointed out that the proposal was based on the assumption that any provision dealing with the liability of the carrier in the current text of draft articles 29 and 30 would need to be further considered in the context of (and possibly added to) the provisions of the draft instrument dealing more generally with the obligations of the carrier. The view was expressed that the sanction of a breach by the carrier of its obligation under article 26 should not be a liability but a loss of the carrier's right to invoke article 25.

141. While it was generally agreed that the text of the proposal might need to be improved, in particular to avoid ambiguities regarding the identity of "the sub-carrier", the Working Group based its deliberations on the principles reflected in the proposal.

Principle of the shipper's liability being based on fault

142. Strong support was expressed for the principle that the liability regime applied to the shipper should be generally based on fault, thus mirroring the liability regime established by the draft instrument in respect of the carrier. As to possible cases where it might be necessary to hold the shipper strictly liable, the following exceptions to the general principle were suggested:

- The cases covered by subparagraph (c) of draft article 27 (information necessary for the carrier to establish the transport documents), which were already dealt with by way of strict liability in article III.5 of the Hague-Visby Rules;
- The cases covered by subparagraph (b) of draft article 27 (information required to allow the carrier to comply with regulations or requirements of public authorities).

143. As to the formulation of the above exceptions, it was widely felt that the phrase "subject to articles 26, 27 and 28" in the proposal might need to be amended, not only to specify the individual exceptions but also to clarify that, to be held strictly liable under this provision, the shipper should be in breach of its obligation to provide the carrier with the necessary information, instructions or documents.

Shipper's liability to the consignee or the controlling party

144. For the reasons put forward by the proponents of the text intended for the replacement of draft articles 29 and 30, support was expressed for not dealing with the liability of the shipper to the consignee. The view was expressed, however, that the provisions dealing with the liability of the shipper should mirror the structure of the provisions dealing with the liability of the carrier, and the issue of liability to the consignee and the controlling party might need to be reconsidered at a later stage.

Joint liability

145. Support was expressed for retaining paragraph 3 of variant B of the initial text of article 29 for continuation of the discussion at a later stage on the issue of joint liability, which was not dealt with in the proposal. It was suggested that, should a

provision on joint liability be eventually retained in the draft instrument, a provision regulating the exercise of recourse actions might be needed.

Dangerous goods

146. As to the substance of the proposal under which the shipper should be held strictly liable to inform the carrier of the dangerous nature of the goods and of the necessary safety measures, a concern was expressed that the proposed rule might be unnecessary and its effect uncertain, unpredictable, and overly onerous for the shipper, particularly in view of existing case law in a number of countries, under which goods, although not identifiable as dangerous before the carriage could later be declared dangerous by courts adjudicating the claim, for the sole reason that they had caused damage. The view was expressed that the issue of dangerous goods was sufficiently covered in the draft instrument, for example in draft articles 27 and 12, which appropriately avoided using the notion of "dangerous goods" itself. Additional views were that the issue of dangerous goods might be dealt with by reference to article 13 (2) of the Hamburg Rules or through the insertion in draft article 27 of an obligation of the shipper to inform the carrier of the dangerous nature of the goods.

147. The discussion focused on the definition of dangerous goods. It was generally felt that, should a provision expressly referring to the notion of dangerous goods be retained, a definition should be provided in the draft instrument. The only possible reference was said to be the definition provided in the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (HNS) by Sea but considerable doubts were expressed regarding the appropriateness of introducing such a definition in an international trade law instrument. Support was expressed for addressing in the definition the issue of goods that became dangerous during the carriage.

Conclusions reached by the Working Group on draft articles 29 and 30

148. After discussion, the Working Group decided that:

- The aspects of draft articles 29 and 30 dealing with the liability of the carrier should be moved for continuation of the discussion under those provisions that dealt specifically with the obligations of the carrier;
- Draft articles 29 and 30 should be redrafted entirely to reflect the general principle that the liability of the shipper should be based on fault;
- Exceptions to that general principle should be made and a rule of strict liability retained in cases where the shipper failed to meet the requirements of subparagraphs (b) and (c) of draft article 27; such exceptions should be placed between square brackets;
- As a further option, a provision similar to article III.5 of the Hague Rules should also be introduced in square brackets;
- Paragraph 3 of Variant B of draft article 29 (A/CN.9/WG.III/WP.32) should be retained for continuation of the discussion at a future session;
- A specific provision should be inserted at an appropriate place in the draft instrument to deal with the issue of dangerous goods, based on the principle of

strict liability of the shipper for insufficient or defective information regarding the nature of the goods;

- A broad definition of the notion of "dangerous goods" should be provided; in drafting such a definition, the Secretariat was requested to bear in mind other existing international transport instruments and to address the issue of goods that became dangerous during the carriage.

Draft article 29 bis

149. The Working Group considered a proposal for the introduction of a draft article 29 bis in the draft instrument (A/CN.9/WG.III/WP.34, para. 43).

Causation

150. Questions were raised concerning the breadth of draft article 29 bis. It was suggested that the carrier should only be excused from liability for delay of, loss of, or damage to the goods that was caused by the material misstatement of the shipper. It was observed that lack of causality in the proposed draft article was not an innovation, and reference was made to the corresponding provision in article IV.5.h of the Hague-Visby Rules. The prevailing view was that draft article 29 bis contained a well-known provision that dealt with an important matter, and that it should be included in the text in square brackets in order to reflect the reservations expressed with respect to causation.

Delay

151. Questions were raised concerning the inclusion in draft article 29 bis of damages resulting from delay, particularly since the corresponding provision of the Hague-Visby Rules did not include damages for delay. The prevailing view was that the square brackets around the text would also reflect the reservations expressed with respect to the inclusion of damage for delay.

Placement

152. The view was expressed that consideration should be given to the possibility that draft article 14 might already govern situations of material misstatement by the shipper. It was agreed that the Secretariat would consider draft article 14 in deciding where best to locate draft article 29 bis in the draft instrument.

Conclusions reached by the Working Group on draft article 29 bis

153. After discussion, the Working Group decided that:

- The text of draft article 29 bis should be included in the draft instrument in square brackets;
- The issues of causation and the inclusion of damages for delay would be discussed at a future session;
- The Secretariat would consider placing draft article 29 bis in chapter 5 on the liability of the carrier.

Draft article 31

154. The Working Group considered the text of draft article 31 as contained in document A/CN.9/WG.III/WP.32.

General discussion

155. The Working Group was reminded that, of the three possible types of shippers, the documentary shipper, the contractual shipper and the actual shipper, draft article 31 was intended to deal with the position of the f.o.b. seller who was named as the shipper in the transport document (see A/CN.9/510, para. 164 and A/CN.9/WG.III/WP.21, paras. 118-122). Further, it was noted that, generally speaking, this provision was intended to mirror the identity of the carrier provision in paragraph 36 (3), and there was some suggestion that perhaps that paragraph and this provision should be aligned. It was generally agreed that the most common situation that was likely to arise under draft article 31 was where a request would be made to change the name of the shipper in the transport document. In addition, it was also agreed that further investigations should be conducted to determine whether the problem of failing to name any shipper in the transport document was sufficiently common to warrant consideration in this provision.

"subject to the responsibilities and liabilities imposed on the shipper"

156. Questions were raised whether the intention of draft article 31 was that the responsibilities and liabilities of the contractual shipper would pass to the actual or documentary shipper, or whether the intention was that there would be joint liability. In response, it was noted that the intention of draft article 31 was to impose the responsibilities and liabilities on the documentary shipper not instead of, but in addition to, the contractual shipper. Further concerns were raised regarding whether it was appropriate that the documentary shipper should be subject to all of the responsibilities and liabilities imposed on the contractual shipper. It was suggested that it might be preferable to apply draft article 31 only in cases where the identity of the contractual shipper was unknown, taking care to ensure that the documentary shipper should be liable for providing false or inaccurate information whether or not the contractual shipper was known. The prevailing view was that square brackets should be inserted around the phrase "subject to the responsibilities and liabilities" pending further consideration of the concerns raised in the context of this draft article.

"accepts the transport document or electronic record"

157. Concern was expressed that the use of the word "accepts" was imprecise and allowed too broad an interpretation of the draft provision. While it was noted that the word "accepts" accurately reflected the situation where the documentary shipper became the first holder in the case of negotiable instruments, it was suggested that another word, such as "receives" might be preferable in terms of raising fewer concerns. The prevailing view was that the words "accepts" and "receives" should be placed in square brackets in the text.

Conclusions reached by the Working Group on draft article 31

158. After discussion, the Working Group decided that:

- The general intention of draft article 31 was acceptable, but that further thought should be given to the precise ambit of the provision, and whether it should only be a default rule where the identity of the contractual shipper was not known;
- The phrase "subject to the responsibilities and liabilities" should be placed in square brackets;
- The word "accepts" should be placed in square brackets for future discussion, together with the word "receives".

Draft article 32

159. The Working Group considered the text of draft article 32 as contained in document A/CN.9/WG.III/WP.32.

General discussion

160. It was agreed that there was a need for a provision such as draft article 32 in the draft instrument. It was observed that draft article 32 was intended to mirror the text of paragraph 15 (3) (A/CN.9/WG.III/WP.36) regarding the liability of a performing party for the acts and omissions of any person to whom it had delegated the performance of any of the carrier's responsibilities under the contract of carriage, and that, in fact the two provisions used virtually identical language. Some concern was expressed regarding the persons who could be included in draft article 32, but it was suggested that the phrase "any person to which [the shipper] has delegated the performance of any of its responsibilities under this chapter" made the category of persons to whom it applied sufficiently clear. Concern was also expressed whether draft article 32 was sufficiently clear regarding the general rule that the liability of the shipper should be based on fault, but it was suggested that the phrase "as if such acts or omissions were its own" sufficiently clarified the basis on which liability would be assessed. The prevailing view was that the text of draft article 32 should be retained as drafted.

Conclusions reached by the Working Group on draft article 32

161. After discussion, the Working Group decided that:

- The general structure of draft article 32 was acceptable and the current text should be maintained for future discussion;
- Questions raised regarding the interaction of this provision with paragraph 11 (2) and draft article 29 bis should be considered at a future session.

Chapter 9: Freight

162. The Working Group considered the text of chapter 9 as contained in document A/CN.9/WG.III/WP.32.

General discussion

163. It was suggested that chapter 9 on freight was a non-mandatory regulation that dealt with purely commercial matters, and that it should be deleted. In response, it was observed that while chapter 9 was non-mandatory, its provisions could be helpful to fill gaps left by commercial parties in their agreements. It was further observed that some of the provisions contained in chapter 9 were not, strictly speaking, devoted solely to the issue of freight: paragraph 43 (2) dealt with the cessation of the shipper's liabilities and the transfer of rights; the "freight prepaid" provision in the opening two sentences of paragraph 44 (1) was intended to provide protection and clarity for third party holders of a transport document; and draft article 45 was an attempt to bring some uniformity to the subject of liens. It was suggested that given that these provisions contained important rules while only incidentally touching on freight, they should be retained for future consideration despite the general desire to delete the chapter on freight. There was general agreement with this approach, except with respect to draft article 45, which, it was suggested, was too complex and dealt with a subject matter too diverse to lend itself to uniform legislation, and should be left to applicable law. The prevailing view favoured deletion of chapter 9 in its entirety, but it was generally agreed that draft article 43 (2) and the first two sentences of draft article 44 (1) should be maintained (and placed elsewhere in the draft instrument) for future consideration by the Working Group.

Conclusions reached by the Working Group on chapter 9

164. After discussion, the Working Group decided that chapter 9 should be deleted. Draft article 43 (2) and the first two sentences of draft article 44 (1) should be retained in square brackets and placed by the Secretariat in an appropriate location in the draft instrument for further discussion at a future session.

III. Other business

Scheduling of fourteenth session

165. It was noted that, subject to approval by the Commission at its the thirty-seventh session (New York, 14-25 June 2004), the fourteenth session of the Working Group would be held in Vienna, at the Vienna International Centre, from 29 November to 10 December 2004.

Planning of future work

166. With a view to structuring the discussion on the remaining provisions of the draft instrument the Working Group adopted the following tentative agenda for completion of its second reading of the draft instrument:

- *Fourteenth session*

    Liability of the carrier (draft articles 14, 22 and 23);
    Freedom of contract (draft articles 2, 88 and 89);
    Jurisdiction and arbitration (draft articles 72-80 bis);

- *Fifteenth session (New York, Spring 2005)*

  Transport documents/electronic commerce (draft articles 3-6 and 33-40);
  Right of control and transfer of rights (draft articles 53-61);
  Delivery of goods (draft articles 46-52);
  Right and time for suit (draft articles 63-71).

Methods of work

167. The Working Group was informed that, with a view to accelerating the exchange of views, the formulation of proposals and the emergence of consensus in preparation for a third and final reading of the draft instrument, a number of delegations had taken the initiative of creating an informal consultation group for continuation of the discussion between sessions of the Working Group. It was explained that the informal consultation group would function by exchange of e-mails (and, as appropriate, meetings) and would be open to all interested delegations and observers. The Working Group welcomed the initiative. The hope was expressed that the operation of the informal consultation group would accommodate a degree of multilingualism. The Secretariat was requested to monitor the operation of the informal consultation group and to facilitate the presentation to the Working Group of proposals that interested Member States or observers might wish to make in respect of the draft instrument as a result of their informal consultations.

168. A number of delegations emphasized the importance of concluding work on the draft instrument within a reasonable time. Some delegations suggested 2005 or 2006 as reasonable targets. While no decision was made on a specific time frame, there was general agreement that, in continuation of the discussion at forthcoming sessions, the issue of overall timing should be constantly borne in mind and periodically reassessed by the Working Group.

Notes

[1] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), para. 345.