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# Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007)*

## Contents



* The waiver required due to the length of this document was requested within the deadline for submission of the document, and this report is submitted late pending approval of that waiver.

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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 convention 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 The most recent compilation of historical references regarding the legislative history of the draft convention can be found in document A/CN.9/WG.III/WP.80.

2. Working Group III (Transport Law), which was composed of all States members of the Commission, held its nineteenth session in New York from 16 to 27 April 2007. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Benin, Brazil, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Ecuador, France, Gabon, Germany, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lebanon, Mexico, Morocco, Nigeria, Pakistan, Republic of Korea, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Uganda, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.

3. The session was also attended by observers from the following States: Burkina Faso, Burundi, Congo, Costa Rica, Côte d'Ivoire, Cyprus, Democratic Republic of the Congo, Denmark, Dominican Republic, El Salvador, Finland, Ghana, Greece, Holy See, Indonesia, Kuwait, Latvia, Lesotho, Malaysia, the Republic of Moldova, Netherlands, New Zealand, Niger, Norway, Panama, Peru, Philippines, Romania, Saudi Arabia, Senegal, Ukraine and Yemen.

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

(a) **Intergovernmental organizations**: Asian-African Legal Consultative Organization, European Commission;

(b) **International non-governmental organizations invited by the Working Group**: Association of American Railroads (AAR), BIMCO, Comité Maritime International (CMI), European Shippers' Council (ESC), Ibero-American Institute of Maritime Law (IAIML), 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), Maritime Organization of West and Central Africa (MOWCA), The European Law Students' Association International (ELSA), and the World Maritime University (WMU).

5. The Working Group elected the following officers:

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

*Chairman*: Mr. Rafael Illescas (Spain)

*Rapporteur*: Mr. Walter de Sá Leitão (Brazil)

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

(a) Annotated provisional agenda and corrigendum (A/CN.9/WG.III/WP.80 and A/CN.9/WG.III/WP.80/Corr.1);

(b) The draft convention on the carriage of goods [wholly or partly] [by sea] and corrigendum (A/CN.9/WG.III/WP.81 and A/CN.9/WG.III/WP.81/Corr.1);

(c) A document outlining the position of the French National Committee of the International Chamber of Commerce (ICC France) (A/CN.9/WG.III/WP.82);

(d) A document describing the position of the European Shippers' Council (A/CN.9/WG.III/WP.83);

(e) A proposal of the Government of the United States of America on the definition of "maritime performing party" (A/CN.9/WG.III/WP.84);

(f) A drafting proposal by the Government of Sweden on shipper's obligations (A/CN.9/WG.III/WP.85);

(g) A proposal of the governments of Denmark, Norway and Finland on draft article 37 (1)(a) regarding contract particulars (A/CN.9/WG.III/WP.86);

(h) A document containing comments of the International Chamber of Shipping (ICS), BIMCO and the International Group of P&I Clubs on the draft convention (A/CN.9/WG.III/WP.87);

(i) A joint proposal of the governments of Australia and France concerning volume contracts (A/CN.9/WG.III/WP.88);

(j) A document containing proposals of the Government of France regarding the linkage between the draft convention on the carriage of goods wholly or partly by sea and the conventions applicable to land or air transport (A/CN.9/WG.III/WP.89);

(k) Proposals by the International Road Transport Union (IRU) concerning articles 1 (7), 26 and 90 of the draft convention (A/CN.9/WG.III/WP.90);

(l) A proposal of the Government of the United States of America on carrier and shipper delay (A/CN.9/WG.III/WP.91); and

(m) A joint proposal by Australia and France on freedom of contract under volume contracts (A/CN.9/612).

7. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a draft convention 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 convention on the carriage of goods [wholly or partly] [by sea] ("the draft convention") on the basis of the text contained in the annex to a note by the Secretariat (A/CN.9/WG.III/WP.81). The Working Group was reminded that the text contained in that note was the result of negotiations within the Working Group since 2002. The Working Group agreed that while the provisions of the draft convention could be further refined and clarified, to the extent that they reflected consensus already reached by the Working Group, the policy choices should only be revisited if there was a strong consensus to do so. Those deliberations and conclusions are reflected in section II below (see paras. 9 to 304 below). Note that all references to A/CN.9/WG.III/WP.81 in the following paragraphs are intended to indicate A/CN.9/WG.III/WP.81, as corrected by A/CN.9/WG.III/WP.81/Corr.1.

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

## Chapter 1 – General provisions

### Draft article 1. Definitions

9. The Working Group agreed to defer its discussions of article 1 until agreement had been reached on the substantive articles relating to the terms defined in draft article 1.

### Draft article 2. Interpretation of this Convention

10. The Working Group recalled that the text contained in draft article 2 corresponded to that contained in A/CN.9/WG.III/WP.56. Noting that the text represented standard text in many international conventions, the Working Group approved the substance of the text contained in draft article 2.

### Draft article 3. Form requirements

11. The Working Group considered the text in draft article 3 to be acceptable pending further examination as to the cross-references contained therein. The Working Group also agreed that it might be desirable to include within the final text an explanatory note to the effect that any notices contemplated in the draft convention that were not expressly mentioned in draft article 3 might be made by any means including orally or by exchange of data messages that did not meet the definition of "electronic communication".

### Draft article 4. Applicability of defences and limits of liability

12. Noting that draft article 4 referred to "maritime performing party", it was agreed that discussion of the term be deferred until draft articles 18 and 19, which dealt generally with performing parties, were considered.

13. It was questioned whether there was a need to include draft article 4 given that draft article 5 already set out the scope of application of the draft convention. It was

suggested that in many jurisdictions, courts might extend the defences and limits of liability provided by the draft convention to other parties acting on behalf of the carrier even without a provision such as draft article 4. In response, it was noted that the provision was useful in certain jurisdictions. It was further pointed out that the draft article corresponded to similar provisions contained in the Hague-Visby and Hamburg Rules. It was said that its deletion might be interpreted as a reversal of the rule contained in those earlier conventions.

14. Support was expressed for the structure and underlying policy of draft article 4 but it was noted that, as currently drafted, the draft article appeared to apply only in respect of actions against the carrier. It was suggested that draft article 4 be extended to apply to shippers insofar as shipper liability was covered by the draft convention. That proposal received support.

15. Secondly, a concern was expressed that, as drafted, draft article 4 referred only to "defences and limits of liability" which might be too narrow and fail to protect the right of the carrier to a proper forum under the draft convention. It was suggested that draft article 4 be reviewed to ensure that it had the same intended effect in all jurisdictions.

16. A question was raised as to the meaning of the term "or otherwise". It was suggested that those words were helpful to encompass claims other than contractual or tort claims such as claims in restitution or arising out of quasi-contract. It was agreed that the term should be retained to ensure that the draft article was broad enough to cover situations that might arise in different legal systems.

17. The Working Group adopted the definitions contained in paragraphs (5), (9) and (25) of draft article 1 in substance. Although it was deemed unnecessary in some legal systems, the Working Group agreed to retain draft article 4 and to extend its coverage to apply also to shippers to the extent that shipper liability was covered by the draft convention. In respect of the phrase, "or otherwise" the Working Group agreed to retain this phrase and requested the Secretariat to review its utility. In respect of procedural issues, the Working Group agreed that a review be undertaken as to the scope of defences and limits of liability after these terms had been settled.

## Chapter 2 – Scope of application

### Draft article 5. General scope of application

18. The Working Group noted that draft article 5 corresponded to the text contained in draft article 8 of the text contained in A/CN.9/WG.III/WP.56. The Working Group approved the definition of the term "contract of carriage" as contained in draft article 1, paragraph (1). The Working Group also approved the text contained in draft article 5 as set out in A/CN.9/WG.III/WP.81.

### Draft article 6. Specific exclusions

19. The Working Group noted that draft article 6 corresponded to draft article 9 of A/CN.9/WG.III/WP.56. A suggestion was made that as charterparties were not part of regularly scheduled transport, paragraph (1)(a) should be deleted and instead a reference should be made to wording such as "contract for the use of space on a vessel".

20. It was noted that draft article 6 represented a compromise text and caution was expressed about reopening matters settled in that provision. It was noted that, in general, there was a distinction between liner transportation and charterparties but that charterparties were occasionally used in liner carriage and thus the draft convention should address these new developments. As well, it was recalled that the Working Group had previously agreed that the coverage under the new convention should be at least as broad as what was already covered under the Hague and Hague-Visby Rules, which also applied to contracts of carriage under bills of lading in non-liner transportation.

21. For purposes of clarification, a number of drafting proposals were made. It was proposed to delete the term "contracts" in subparagraph (1)(b) of draft article 6 and replace it with "other contractual arrangements" and to delete the term "contract" in subparagraph (2)(a) of draft article 6 and replace it with "other contractual arrangement between the parties". As well it was proposed that the words after "thereon", namely "between the parties, whether such contract is a charterparty or not" be deleted. While there was support for these proposals, the Working Group agreed that the Secretariat should first ascertain whether they in fact merely clarified and did not have substantive effect on the scope of draft article 6. The Working Group accepted the provision, subject to drafting clarification.

**Draft article 7. Application to certain parties**

22. A question was raised as to whether the reference to consignors in draft article 7 was appropriate as it gave the impression that the draft convention regulated the relationship between the carrier and consignor. Even though it was agreed that the draft convention did not regulate the relationship between the carrier and consignor in all cases, the Working Group noted that the draft convention did regulate that relationship in some specific cases and therefore, it was important to mention the consignor in article 7. It was suggested that the draft article should be reviewed and possibly a cross reference to draft article 79 should be included to ensure that draft article 7 did not impact adversely on any arbitration agreement contained in a bill of lading held by a third party. That proposal was supported. The Working Group accepted the provision, subject to any necessary cross-reference.

## Chapter 3 – Electronic Transport Records

23. The Working Group was reminded that its most recent consideration of draft chapter 3 on electronic transport records was at its fifteenth session (see A/CN.9/576, paras. 180 to 210). The consideration by the Working Group of the provisions of chapter 3 was based on the text as found in A/CN.9/WG.III/WP.81.

**Draft article 1 definitions relevant to chapter 3**

24. The Working Group considered the text of the definitions in draft article 1 that were thought to be closely connected to the text of chapter 3: paragraph 16 on "transport document"; paragraph 17 on "negotiable transport document"; paragraph 18 on "non-negotiable transport document"; paragraph 20 on "electronic transport record"; paragraph 21 on "negotiable electronic transport record"; paragraph 22 on "non-negotiable electronic transport record"; and paragraph 23 on

the "issuance" and "transfer" of a negotiable electronic transport record. It was recalled by the Working Group that those definitions had been the result of expert consultations with Working Group IV on electronic commerce, and that, along with the entire chapter, those provisions were considered to be both carefully drafted and of a very technical nature. A view was expressed that the definition of "non-negotiable transport document" as found in draft article 1 (18) could possibly be deleted as redundant, but a preference was articulated for retaining the provision in order to maintain the goal of having an electronic equivalent for any paper document in the draft convention.

*Conclusions reached by the Working Group regarding draft article 1 definitions relevant to chapter 3*

25. The Working Group was in agreement that the definitions in draft article 1 set out in the paragraph above were acceptable as found in A/CN.9/WG.III/WP.81.

**Draft article 8. Use and effect of electronic transport records;**
**Draft article 9. Procedures for use of negotiable electronic transport records;**
**Draft article 10. Replacement of negotiable transport document or negotiable electronic transport record; Draft article 59 (2)**

26. The Working Group next considered the text of draft chapter 3, consisting of draft articles 8, 9 and 10, as well as the text of draft article 59 (2), which, it was recalled, had been discussed together as part of the group of provisions in the draft convention concerning electronic commerce when the Working Group had last considered the chapter. It was recalled that those provisions had also been the result of expert consultations with Working Group IV on electronic commerce, and that they were considered to be both carefully drafted and of a very technical nature.

*Conclusions reached by the Working Group regarding chapter 3 and draft article 59 (2)*

27. The Working Group was in agreement that the provisions of chapter 3 and of draft article 59 (2) were acceptable as set out in A/CN.9/WG.III/WP.81.

## Chapter 4 – Period of responsibility

**Draft article 11. Period of responsibility of the carrier**

28. The Working Group was reminded that its most recent consideration of draft article 11 on the period of responsibility of the carrier was at its sixteenth session (see A/CN.9/591, paras. 190 to 208). The Working Group proceeded to consider draft article 11 as contained in A/CN.9/WG.III/WP.81.

*Paragraph 1*

29. Clarification was requested regarding the different definitions of "carrier" (draft article 1 (5)) and of "performing party" (draft article 1 (6)) in the draft convention, such that the definition of "performing party" included employees, agents and subcontractors, while the definition of "carrier" did not. The question was raised whether this might cause ambiguity regarding when the period of

responsibility commenced if the goods were received by the employee or agent of the carrier, and not by the carrier itself. It was explained that the draft convention had specifically attempted to avoid agency issues, but that at times, it was thought to be important to stress that a particular provision was intended to include carriers acting through their agents, and thus the term "carrier or performing party" had been used, but that as a general matter, the employees of carriers would be included in the provision by virtue of their inclusion in the definition of performing parties.

*Paragraph 2*

30. Concern was expressed regarding the text of draft paragraph 2, since it was thought that the text as currently drafted confused the contractual time and location of receipt and delivery with the actual time and location of receipt and delivery. The view was expressed that, in any event, the location of delivery was irrelevant for the purposes of determining the period of responsibility of the carrier, and it was suggested that adjustments should be made to the text of draft paragraph 2 to reflect that view. However, there was support for the view that both the time and location of receipt for carriage and delivery were important to the definition of the period of responsibility, and that, in any event, setting the parameters of those terms was important for other provisions in the draft convention. It was further explained that draft paragraph 2 was intended as a further clarification of draft paragraph 1, and there was agreement that that relationship should be more clearly set out.

31. A question was also raised regarding whether the text of draft paragraph 2 (b) created a potential gap in the period of responsibility of the carrier, since unloading of the goods by the carrier to a warehouse owned by the carrier would signal the end of the period of responsibility of the carrier pursuant to draft paragraph 2 (b), but it was suggested that the period should extend to the time when the consignee actually collected the goods. In response, it was explained if there were storage by the carrier, it would likely be pursuant to an agreement between the shipper and the carrier, or pursuant to custom or usage, and that if there were no such agreement or custom, storage of the goods would fall within draft article 50 which was intended to work in conjunction with draft article 11 to avoid any gap in the responsibility of the carrier.

*Drafting suggestions*

32. In order to clarify the relationship between draft paragraphs 1 and 2, it was suggested that the phrase "For the purposes of paragraph 1 of this draft article" be added at the beginning of draft paragraph 2. Further, it was noted that draft article 2 (b) referred to "discharge or unloading", while draft article 4 (b) referred only to "discharge", and it was suggested that reference to "discharge" should be deleted, and that the term "unloading" should be used in both instances. Finally, clarification was requested regarding the consequences of a contract of carriage that violated draft paragraph 4, and modifications were suggested to the provision to the effect that a provision in the contract of carriage would be void to the extent that it violated the provisions of draft paragraph 4.

*Conclusions reached by the Working Group regarding draft article 11*

33. The Working Group was in agreement with the intended purpose of draft article 11 as set out in A/CN.9/WG.III/WP.81, and agreed with the drafting

suggestions set out in the paragraph above. In addition, the Secretariat was requested to consider possible improvements that could be made to draft paragraph 1, in order to clarify the relationship between draft paragraphs 1 and 2 of the provision, and to consider how to revise the text to ensure that the period of responsibility of the carrier would not commence if the shipper failed to deliver the goods to the carrier as stipulated in the contract of carriage.

**Draft article 12. Transport not covered by the contract of carriage**

34. The Working Group was reminded that its most recent consideration of draft article 12 on transport not covered by the contract of carriage was at its ninth session (see A/CN.9/510, paras. 41 to 42). The Working Group proceeded to consider draft article 12 as contained in A/CN.9/WG.III/WP.81.

35. The Working Group was reminded that two alternatives for the second sentence of the provision appeared in the text in square brackets, for consideration by the Working Group.

36. As a general remark, the view was expressed that the text of draft article 12 seemed unusual, since it seemed to suggest that the carrier was doing a favour for the shipper rather than providing a service, and that in so doing, the carrier could limit any potential liability it incurred in fulfilling that service. It was also suggested that draft article 12 appeared in general to allow carriers to offer additional services to shippers. However, it was said that the provision might give rise to abuses by carriers wishing to avoid responsibility for the proper provision of that service. In response, it was observed that draft article 12 was intended to cover the situation where the shipper specifically requested the additional service, in the form of a so called “mixed contract”, that is, partly one of carriage, and partly one of freight forwarding, that could be covered by a single transport document. In addition, it was clarified that the intention of the draft article was, in fact, to emphasize that the scope of the draft convention was limited to coverage of the contract of carriage, but through this specific provision the draft convention would accommodate the situation where the carrier performed additional services for the shipper beyond the contract of carriage, at the risk and for the account of the shipper. By including a provision such as draft article 12, the intention was not to eliminate the carrier’s obligation in the performance of the additional service, but to emphasize that any liability arising from it was not pursuant to the contract of carriage, and was thus necessarily outside the scope of the draft convention. However, such additional service as performed by the carrier would still be subject to liability under other applicable legal regimes.

37. Some strong views were expressed in support of the deletion of draft article 12. However, it was noted that the draft provision was intended to eradicate a form of abuse, where the carrier would include standard form clauses in the contract of carriage to the effect that the carrier was only liable if it carried the goods on its own vessel. While such provisions were said to be less common today, it was suggested that draft article 12 was intended to protect shippers from such abuse, and that its deletion could allow this abusive practice to persist, creating ambiguity and unfairness. The prevailing view in the Working Group was in favour of retaining the draft provision.

*The first variant of the second sentence*

38. Support was expressed for the approach taken in the first variant of the second sentence set out in square brackets, particularly since requests by shippers for through bills of lading were increasingly a part of modern maritime carriage and in keeping with industry practice, for example, in cases where the carrier could not perform the inland carriage or the shipper's own merchant haulage arrangements were required, but where a documentary credit required that the transport be covered by a single transport document. There was support in the Working Group for the approach taken in the first variant of the second sentence of the text, that when the carrier acted as agent of the shipper outside of the carrier's obligations in the contract of carriage, the carrier should only be responsible as agent, and should not be subject to the draft convention with respect to those additional services.

39. However, concern was expressed that the text of the first variant was not clear as drafted, and a number of modifications to it were suggested. One suggestion was that the carrier should be liable for the entire period for which it arranged the additional carriage on behalf of the shipper. The view was also expressed that the text was unclear regarding whether the carrier had any liability to a third party document holder, and it was suggested that this type of provision could create a problem regarding the identity of the carrier, which might be dealt with under draft article 38. There was agreement within the Working Group that the drafting of the provision should be improved and clarified. One suggestion to assist in the clarification of the provision was to make clear in the title that it concerned a "mixed contract." It was also noted that the provision used two different terms, "specified transport" and "additional transport", and it was suggested that a review should be had in order to make consistent use of terminology.

40. Additional concern was raised regarding the apparent creation of an additional obligation of the carrier, which could entitle it to limit its liability for a breach of an obligation "under this Convention" pursuant to text of draft article 62 (1), even though the breach of obligation did not arise from the contract of carriage. A solution proposed to remedy this problem was to adjust the first variant to read: "If the carrier arranges the additional transport as provided in such transport document or electronic transport record, the carrier is deemed to do so on behalf of the shipper." Support was expressed in the Working Group for this proposed adjustment to the text of the first variant as set out in the second sentence of draft article 12.

*The second variant of the second sentence*

41. Some support was expressed for the approach taken in the second variant of the second sentence set out in square brackets. However, some modifications to that text were suggested, such as including in it the phrase, "unless otherwise agreed" in order to ensure that the text was only a default provision. An additional view was expressed that certain aspects of the second variant could be retained and expressed in the text of the provision as redrafted from the first variant. However, the Working Group did not take up the second variant of the second sentence in draft article 12.

*Location of draft article 12 in the text*

42. It was suggested that draft article 12 should be moved to another location in the text, possibly for insertion in chapter 5 following draft article 18.

*Conclusions reached by the Working Group regarding draft article 12*

43. After discussion, the Working Group decided that:

- The text of draft article 12 should be retained in the draft convention, incorporating the approach taken in the first variant of the second sentence, but clarifying the text considerably in light of the concerns set out in paragraphs 34 to 41 above; and
- Consideration should be given to the proper placement of the provision in the text of the draft convention.

**Revised text of draft article 12**

44. In light of the decisions made by the Working Group with respect to the text of draft article 12 (see above, para. 43), the Working Group continued its deliberations on the following revised text of the provision:

> "Article 12. Transport not covered by the contract of carriage
>
> "On the request of the shipper, the carrier may agree to issue a single transport document or electronic transport record that includes specified transport [that is not covered by the contract of carriage] [in respect of which it is not the carrier]. In such event, the responsibility of the carrier covers only the period of the contract of carriage. If the carrier arranges the transport that is not covered by the contract of carriage as provided in such transport document or transport record, the carrier does so on behalf of the shipper."

45. It was explained that the revised text of draft article 12 contained alternative text in two sets of square brackets, and that the first set of square brackets contained text taken from draft article 12 as it appeared in A/CN.9/WG.III/WP.81, while the second set contained what was intended to express the same principles, but in clearer drafting. Further, the second sentence of the revised provision was said to be taken from the first variant of the text as it appeared in A/CN.9/WG.III/WP.81, as preferred by the Working Group, while the third sentence was included in order to describe, but not to regulate, the legal relationship between the carrier and the shipper, when the carrier arranged for additional carriage.

46. Support was expressed in the Working Group for the second variant in square brackets as being clearer than the first, and as being somewhat more in keeping with the text of the similar provision in article 11 of the Hamburg Rules, that referred to "a named person other than the carrier". While there remained some expressions of a preference to delete the draft provision from the text, the Working Group was reminded that it had already made the decision to retain the concept of the text of draft article 12, subject only to redrafting. Some support was also expressed in the Working Group in favour of the first alternative in square brackets.

47. A suggestion was made to include both phrases in square brackets in the text, joining them with the word "and", in order to make the meaning of the provision as clear as possible. There was broad support for this approach in the Working Group. Concern was raised that including both phrases might lead to confusion, since courts might conclude that the two phrases had different content or that both had to be satisfied in order to meet the requirements of the provision. There was some

sympathy for that concern, and it was suggested that greater clarity could be achieved by inserting text along the lines of "and in respect of which is therefore not the carrier" after the first variant.

48. By way of further clarification, it was noted that the third sentence of the revised text was intended to make clear that if the carrier arranged transport that was not covered by the contract of carriage, the carrier who entered into the contract for that particular additional carriage would be the carrier for that leg, and that that carrier would be liable for the carriage under applicable law.

*Conclusions reached by the Working Group regarding revised draft article 12*

49. After discussion, the Working Group decided that:

- The alternative phrases in square brackets should both be retained and made conjunctive, possibly using text such as "and in respect of which is therefore not the carrier", and the square brackets around them deleted;
- The text of revised draft article 12 was otherwise acceptable to the Working Group.

## Chapter 5 – Obligations of the carrier

### Draft article 13. Carriage and delivery of the goods

50. The Working Group proceeded to consider article 13 as set out in A/CN.9/WG.III/WP.81. It was questioned why the phrase "place of destination" was used rather than the phrase "place of delivery" which was used elsewhere in the draft convention, such as in subparagraph 1 (c) of draft article 5. Support was expressed for the principle that there should be consistency in the use of terminology in the draft convention unless the use of different terminology was justified. In response, it was said that the use of the term "place of destination" was appropriate in the current context to clarify the main obligations of the carrier and distinguish it from the place of unloading which was often erroneously seen as a synonym of the place of destination. That view was supported.

*Conclusions reached by the Working Group regarding draft article 13*

51. The Working Group was in agreement that the text in draft article 13 as contained in A/CN.9/WG.III/WP.81was acceptable.

### Draft article 14. Specific obligations

52. The Working Group considered draft article 14 as contained in A/CN.9/WG.III/WP.81. It was proposed to add the words "and is the responsibility of" following the words "is to be performed by" in paragraph 2. It was said that these words were necessary given that paragraph 2 provided a derogation from draft article 14, paragraph 1 and should extend to permitting such derogation when the parties agreed that it should be responsibility of the shipper. In response, it was said that the current wording of draft article 14 represented a compromise and that the inclusion of a reference to the responsibility of the shipper would be confusing, in

particular in the context of Chapter 8, which dealt with the obligations of the shipper to the carrier.

53. It was also said that the wording in paragraph 2 was overly broad and should be restricted so as to preclude carriers from routinely disclaiming liability for damage to the goods that occurred during the operations contemplated in the draft article. In response, it was said that the provision was not too broad, since it focused on very specific tasks, and was clearly restricted to loading, handling, stowage or discharge of the goods. It was suggested that draft article 14 should be read in the context of subparagraph 17 (3)(i) which provided an exoneration of the responsibility of the carrier for any loss or damage caused to the goods when the shipper carried out those tasks.

*Conclusions reached by the Working Group regarding draft article 14*

54. The Working Group was in agreement that the text in draft article 14, as set out in A/CN.9/WG.III/WP.81, was acceptable.

**Draft article 15. Goods that may become a danger**

55. The Working Group recalled that the concept of "an illegal or unacceptable danger" to the environment that appeared in the text in A/CN.9/WG.III/WP.56 had been changed to refer to a "danger to the environment" as an effort to introduce a more objective standard for the carrier to apply in respect of goods that might become a danger. However, it was said that that formulation might set a lower standard than the standard that applied under other international maritime conventions and might make it too easy for the carrier, for example, to find a justification for destroying the goods. Notwithstanding a suggestion to revert to the language contained in A/CN.9/WG.III/WP.56 by restoring the words "an illegal or unacceptable danger" to the environment, the Working Group recalled that that formulation had been rejected for the reason that it would be difficult for the carrier to judge when a danger to the environment was "illegal" or "unacceptable" under the laws of the various jurisdictions in which carriers operated. Instead, it was proposed that the word "reasonably" be inserted before the words "appear likely to" to introduce an objective standard against which a decision by the carrier to destroy allegedly dangerous goods could be measured.

56. A suggestion was made to add the words "and security of any country" at the end of draft article 15 to deal with matters that might not affect persons or goods but would nevertheless impact adversely on a country's general security. That proposal did not receive sufficient support.

*Conclusions reached by the Working Group regarding draft article 15*

57. The Working Group agreed that the word "reasonably" be added before the words "appear likely to" in the text in draft article 15 as set out in A/CN.9/WG.III/WP.81. Subject to that amendment, the Working Group was in agreement that the text of draft article 15 was acceptable.

**Draft article 16. Specific obligations applicable to the voyage by sea**

**Paragraph 1**

58. A proposal was made to delete subparagraphs (b) and (c) of draft article 16 (1) for the reason that the substance of both subparagraphs was already encompassed by subparagraph (a) which referred to making and keeping the ship seaworthy. However, support was expressed for maintaining separate subparagraphs. It was said that the formulation set out in subparagraphs (a), (b) and (c) represented the approach long taken in the Hague Rules and the Hague-Visby Rules. The only change that had been made was to render the carrier's obligation of a continuing nature, that is, one that applied throughout the voyage, rather than only before it started. It was cautioned that any departure from those well-known standards of due diligence could create problems in interpretation.

*Conclusions reached by the Working Group regarding paragraph 1 of draft article 16*

59. The Working Group agreed that the paragraph (1) of draft article 16 as set out in A/CN.9/WG.III/WP.81 was acceptable and should be retained.

**Paragraph 2**

60. The Working Group recalled that it had previously approved the substance of paragraph 2 but that the location of the paragraph was still to be determined. It was noted that the purpose of draft article 15, which focussed on destroying or rendering harmless dangerous goods, was entirely different from the purpose of draft article 16, paragraph 2, whereby goods not necessarily of a dangerous nature were sacrificed in the interests of common safety.

61. Some support was expressed for including paragraph 2 in chapter 17 on general average if that chapter were to be retained in the final text of the draft convention. A suggestion was made to place the paragraph in the article on deviation if the chapter on general average were ultimately not retained. It was pointed out that although the exercise of the rights under paragraph 2 by the carrier might give rise to claims in general average in some cases, it would not do so in all cases. Thus it was said that it might be more appropriate to place the text in paragraph 2 in a separate article. That proposal was supported.

*Conclusions reached by the Working Group regarding paragraph 2 of draft article 16*

62. The Working Group agreed that the text contained in paragraph 2 of draft article 16 and set out in A/CN.9/WG.III/WP.81 was acceptable, that the square brackets should be deleted and the text therein be retained in a separate article, possibly numbered as article 16 bis.

## Chapter 6 – Liability of the carrier for loss, damage or delay

**Draft article 17. Basis of liability**

63. The Working Group was reminded that its most recent consideration of draft article 17 on the basis of liability was at its fourteenth session (see A/CN.9/572, paras. 12 to 80). The Working Group proceeded to consider draft

article 17 as contained in A/CN.9/WG.III/WP.81. It was recalled that the text of draft article 17 as currently drafted was the result of a broad and carefully negotiated consensus that emerged from intense discussions in the Working Group over several sessions. It was suggested that the entire structure of the draft article should be kept in mind when considering particular paragraphs, and that caution should be exercised in suggesting any changes to the carefully balanced text.

**Paragraph 1**

64. The Working Group was in agreement that draft paragraph 1 should be approved as drafted.

**Paragraph 2**

65. The view was expressed that, while there was broad agreement on the text of draft article 17, certain changes should be made to paragraph 2 in order to remedy some perceived shortcomings. In particular, it was thought that the list set out in paragraph 3 of draft article 17 was exhaustive in terms of events that could relieve a carrier of liability, and that paragraph 6 covered the situation where the damage to the goods was caused only partly by the carrier, but that article 2 allowed the carrier to escape liability where two causes of the damage existed, either of which could have caused the entire loss, but only one of which was attributable to the carrier. It was suggested that to remedy this perceived shortcoming, the phrases “all or part of” and “or one of the causes” should be deleted from the text of paragraph 2.

66. While some sympathy was expressed for that position, it was pointed out that similar issues had been raised in the Working Group during its fourteenth session, and that the overwhelming view of the Working Group at that time was that it supported the text as currently drafted. Moreover, it was suggested that the apparent problem articulated would be properly solved through the application of the current text even though it did not precisely take the issue into account. Further, it was indicated that the draft convention had deliberately avoided the discussion of issues of causality, leaving it to national law, and that there was thus insufficient reason to disturb the complex series of compromises represented in the drafting of the current text. A suggestion was made for the insertion of a provision clarifying that causation and related matters, such as comparative negligence, were left to national law.

67. The Working Group was in agreement that draft paragraph 2 should be approved as drafted.

**Paragraph 3**

68. A number of delegations expressed support for the deletion of paragraph 3 of draft article 17, which was said to provide carriers with an excessively generous list of exonerations, while some other delegations suggested that the deletion of error of navigation from this paragraph during previous sessions of the Working Group should be reviewed, or at least borne in mind by the Working Group in assessing the overall balance of liabilities in the draft convention. The Working Group nevertheless expressed its strong support for the inclusion of paragraph 3 as drafted. In support of this position, a number of delegations cited the delicate balance and consensus that was reached by the Working Group in the negotiation of the entire draft article, and the support during past sessions for the inclusion of paragraph 3 in the draft convention.

*Bracketed text in subparagraphs (g), (h), (i) and (k)*

69. The Working Group next considered the text in paragraph 3 that remained in square brackets. With respect to subparagraph (h), it was suggested that the square brackets around the phrase "the consignor" should be lifted and the text retained since, although the draft convention did not concern itself with matters of agency, it was thought to be good policy that the carrier should not be held liable for acts of the consignor that caused damage to the goods. With respect to subparagraph (i), it was suggested that the square brackets around the phrase "or a performing party" should be removed and the text retained, and that in the case of subparagraph (k), that the square brackets around the text "or on behalf of" should be deleted and the text retained. While there was some support for the deletion of the text in square brackets as found in these subparagraphs, overall, these inclusions were thought to clarify the text of the various subparagraphs, and the Working Group supported the proposals to include them.

70. In the case of subparagraph (g), it was proposed that both of the variants that appeared in square brackets should be deleted along with the words "in the", thus leaving the text substantially as it appeared in article 4 (2)(p) of the Hague-Visby Rules. Concern was expressed that choosing the "ship" variant would unduly restrict the previously broader approach in the Hague-Visby Rules that included, for example, cranes, but that the alternative "means of transport" was too broad, even though the draft convention was intended to be a "maritime plus" convention. While some support was expressed for each of these two variants, the prevailing view was that the best approach was to retain the approach taken in the Hague-Visby Rules and delete both variants.

*Conclusions reached by the Working Group regarding draft paragraph 3*

71. After discussion, the Working Group decided that:

- The text of draft paragraph 3 should be retained in the draft convention as drafted;
- The text in both sets of square brackets in subparagraph (g) should be deleted along with the words "in the"; and
- The text in square brackets in subparagraphs (h), (i) and (k) should be retained and the brackets deleted.

**Paragraph 4**

72. A proposal to add the phrase "listed in paragraph 3" after the word "circumstance" in subparagraph (a) was not accepted, and the Working Group was in agreement that draft paragraph 4 should be adopted as drafted.

**Paragraph 5**

73. A proposal to shift the burden of proof in subparagraph (a) of the draft provision from the claimant to the carrier in order to reduce the burden of proof on the shipper was not accepted by the Working Group. In response to a question regarding the intention of subparagraph (b) of the text, it was clarified that the intended scheme of paragraph 5 was that the cargo claimant would have to prove the probable cause of the loss, damage or delay under subparagraph (a), and that

subparagraph (b) provided the carrier with the possibility of counterproof. It was observed that any ambiguity regarding this intention should be rectified. The Working Group was in agreement that draft paragraph 5 should be adopted as drafted, with any necessary clarification as noted above.

**Paragraph 6**

74. The Working Group was in agreement that draft paragraph 6 should be approved as drafted.

**Draft article 18. Liability of the carrier for other persons**

**Paragraph 1**

75. Noting that paragraph 1 (b) of draft article 19 and article 34 related to auxiliary persons to the maritime performing party and to the shipper, respectively, it was proposed that the language used in both the articles should be mirrored in paragraph 1 of draft article 18, which dealt with auxiliary persons to the carrier. It was proposed that paragraph 1 (b) be redrafted along the following lines, "any person to which the carrier has entrusted the performance of any of its obligations under the contract of carriage". It was said that that redraft would provide a simpler formulation that would better clarify that the carrier was not responsible for the acts of a person under its supervision or control if that person had not been entrusted with the performance of the carrier's obligations. That proposal was not supported.

*Conclusions reached by the Working Group regarding paragraph 1*

76. The Working Group agreed to retain the text of paragraph 1 as contained in A/CN.9/WG.III/WP.81.

**Paragraph 2**

77. Some support was expressed for retention of the text set out in paragraph 2, which was currently contained in square brackets. It was said that its retention would promote greater international uniformity. However, strong support was expressed for the deletion of the paragraph for the reason that determination of the scope of employment contracts or agency should be left to national law. In response, it was pointed out that, as drafted, paragraph 2 did not affect national law and that its application even relied on rules of national law. Furthermore, the provision was not concerned with the carrier's own employees but only with the carrier's vicarious liability for the acts of other parties. If an employee acted outside his or her employment contract, a carrier would probably not be relieved of liability given that that event would not be covered by the list contained in draft article 17 (3). Nevertheless strong support was expressed for the deletion of paragraph 2 in order to leave matters of the scope of employment contracts and agency to national law.

*Conclusions reached by the Working Group regarding paragraph 2*

78. The Working Group agreed to delete the text of paragraph 2 as contained in A/CN.9/WG.III/WP.81.

**Paragraph 3**

79. The Working Group proceeded to consider a proposal as contained in A/CN.9/WG.III/WP.85 (see para. 3) to clarify by adding a new paragraph 3 to article 18 that a carrier would not be liable for loss of or damage to the goods to the extent that it was attributable to an act or omission of another shipper. It was noted that the proposal was aimed at addressing the concern expressed at an earlier session that, under the draft convention, carriers might nevertheless be found liable to other shippers with goods on board that vessel for a delay caused by only one shipper (A/CN.9/616, para. 103).

80. Some support was expressed for the inclusion of the proposed text. It was suggested that, notwithstanding the Working Group's support for the exclusion of shipper liability for delay from the draft convention, a shipper could still cause delay and damage to other shippers. Nevertheless, if the Working Group agreed to include the proposed text, its placement and wording should still be considered. The proposed text might fit better in article 17, paragraph 3, which dealt with carrier liability. It was also said that the proposed additional language which referred to "another shipper" was ambiguous and should instead refer to "another shipper under another contract of carriage".

81. The Working Group, however, was of the view that the proposed text was unnecessary as its content was already adequately covered by the liability regime set out in draft article 17.

*Conclusions reached by the Working Group regarding proposal to add paragraph 3 of draft article 18*

82. The Working Group did not support the proposal to add paragraph 3 of draft article 18 as contained in A/CN.9/WG.III/WP.85.

**Draft article 19. Liability of maritime performing parties**

83. It was clarified that the language in the bracketed text in paragraph 1 of draft article 19 was intended to ensure that maritime performing parties would not be covered by the draft convention if they did not perform any of their activities in a Contracting State. Whilst there was some support for the deletion of the bracketed text, there was strong support for the retention of the language. In that respect, it was pointed out that the exclusion of maritime performing parties did not mean that carriers would not be liable for the acts of these performing parties. Rather, it meant that the shipper or consignee would not have a direct cause of action against the maritime performing party under the draft convention, and that such maritime performing party would not automatically enjoy the same exoneration and limits on liability that applied to the carrier under the draft convention.

*Conclusions reached by the Working Group regarding paragraph 1*

84. The Working Group agreed to retain the text of paragraph 1 of draft article 19 as contained in A/CN.9/WG.III/WP.81 and delete the brackets.

**Paragraph 2**

85. The Working Group proceeded to consider paragraph 2 of draft article 19 as set out in A/CN.9/WG.III/WP.81. The Working Group took the view that, in light of the decision taken to delete paragraph 2 of draft article 18, paragraph 2 of draft article 19 should also be deleted.

*Conclusions reached by the Working Group regarding paragraph 2*

86. The Working Group decided that the text in paragraph 2 of draft article 19 as found in A/CN.9/WG.III/WP.81 should be deleted.

**Paragraph 3**

87. Given the broad formulation of the definition of maritime performing party, a proposal was made to delete paragraph 3 for the reason that it would not be fair to the consignee to allow a carrier to enforce the limitation of liability with respect to additional obligations or to higher liability limits that it agreed to, but to refuse to bind the maritime performing party to those same limits absent express agreement. However, support was expressed for retention of that paragraph. It was said that if the contractual carrier agreed to increase liability beyond that provided for in the draft convention, it would be illogical to impose such liability on the maritime performing party who might not even be a party to that agreement.

*Conclusions reached by the Working Group regarding paragraph 3*

88. The Working Group was in agreement that the text in paragraph 3 of draft article 19 as found in A/CN.9/WG.III/WP.81 should be retained, subject to any changes to cross-references that might be necessary once the text of the draft convention was finalized.

**Paragraph 4**

*General comments and placement*

89. Support was expressed for the general policy behind paragraph 4, which was to afford employees, agents and sub-contractors of the carrier and maritime performing parties the full protection of the rights, defences and limits of liability available to the carrier under the draft convention for any breach of its contractual obligations or duties in the event that an action under the draft convention was made directly against it, a protection which was often sought through the insertion of so-called “Himalaya” clauses in transport documents. It was agreed that the term “defences and limits of liability” should be interpreted broadly, as had been agreed by the Working Group in connection with draft article 4.

90. A concern was expressed that it was not clear whether or not employees of the carrier were dealt with anywhere else than paragraph 4 in the draft convention. For example, subparagraph 1 (b) of draft article 18, which referred to persons that performed the carrier’s obligation, did not appear to encompass the carrier’s employees. It was suggested that a Himalaya clause should be extended to apply to any person who assisted the carrier in performing its duties. To that end, a proposal was made to expand paragraph 4 so as to encompass the full category of parties that performed the carrier’s obligations under the draft convention, including its

employees and agents. A suggestion was made that the master and crew of the ship should also be covered as well as independent contractors. A view was expressed that the existing definitions of performing party and maritime performing party were broad enough to include these persons. Given the different possible interpretations, it was agreed that these definitions should be clarified. In that respect, it was stated that, in the situation where crew members were not employees of the carrier but rather employees of the ship owner or of a crew company should also be taken into account.

91. It was proposed that, as paragraph 4 dealt with matters different from exemptions for maritime performing parties, it might be more appropriately located following article 4 in Chapter 1 of the draft convention which dealt with general provisions. Some support was expressed for that suggestion.

*Bracketed text*

92. The Working Group proceeded to consider the three alternative bracketed texts.

93. Some support was expressed for the retention of the first bracketed text. However, it was suggested that if the first bracketed text, which referred only to maritime performing parties, were retained, then paragraph 4 could be deleted as it was already covered by paragraph 1 of draft article 19.

94. Strong support was expressed for retaining the second bracketed text. In that respect, it was noted that article 4 bis (2) of the Hague-Visby Rules extended the protection of a Himalaya clause to servants or agents of the carrier, as such protection was not always valid in all jurisdictions.

95. Some support was expressed for the third bracketed text for the reason that it was said to better reflect that the draft convention applied to multimodal rather than traditional port-to-port transportation. It was suggested that the words "or subparagraph 1 (a) of this article," could also be deleted. However, concern was expressed that the third bracketed text appeared to bring agents and servants of inland carriers within the scope of Himalaya protection which would not be consistent with the Working Group's decision to exclude inland carriers from the scope of the draft convention.

*"if [it proves that] it acted within the scope of its contract, employment or agency"*

96. Although some support was expressed for its retention, there was a consensus to delete the entire phrase "if [it proves that] it acted within the scope of its contract, employment or agency".

*Conclusions reached by the Working Group regarding paragraph 4*

97. The Working Group was in agreement that:

- The second bracketed text in paragraph 4 of draft article 19 as found in A/CN.9/WG.III/WP.81 be retained without the brackets;
- Paragraph 4 and the definitions of "performing party" and "maritime performing party" be reconsidered and possibly redrafted to specify who precisely was covered by the Himalaya protection clause and consideration be

given as to whether the crew, master, independent contractors and employees of the carrier were also covered;

- The final part of paragraph 4, "if [it proves that] it acted within the scope of its contract, employment or agency" be deleted in accordance with the decision to delete paragraph 2 of article 18 and leave matters relating to the scope of employment contracts and agency to national law (see paras. 77 to 78 above); and
- That the location of paragraph 4 be reconsidered, taking account of the suggestions of the Working Group.

**Draft article 20. Joint and several liability and set-off**

**Paragraph 1**

98. The Working Group proceeded to consider paragraph 1 of draft article 20 as set out in A/CN.9/WG.III/WP.81 noting that it contained bracketed text which was intended to clarify what was meant by the term "joint and several liability". Support was expressed for retention of the bracketed text for those jurisdictions where joint and several liability was not well-recognized in order to assist in a harmonized interpretation of those terms. However, opposition was expressed to retaining the text in square brackets, since it was noted that a number of international conventions also used these terms but did not include definitions. Concerns were expressed that the inclusion of such definitions might thus have adverse interpretative consequences. It was also suggested that the definitions were overly simplistic and might not sufficiently capture the subtle differences in the use of the terms in different jurisdictions.

99. A suggestion was made to delete the references to articles 25, 62 and 63 given that these limits would apply regardless of whether or not they were listed. That proposal did not receive sufficient support.

*Conclusions reached by the Working Group regarding paragraph 1*

100. The Working Group agreed to the deletion of the bracketed text in paragraph 1.

**Paragraph 2**

101. It was agreed that the phrase "all such persons" was intended to cover all parties that were jointly or severally liable. It was questioned how paragraph 2 would operate in situations where a carrier had contracted out of the provisions of the draft convention, and had increased its liability limit. In response, it was suggested that the overall limit of liability referred to in this provision was intended to include a voluntary increase in the limitation on the carrier's liability, which would then become the amount referred to in draft paragraph 2.

*Conclusions reached by the Working Group regarding paragraph 2*

102. The Working Group agreed to retain the text of paragraph 2.

**Paragraph 3**

103. The Working Group proceeded to consider draft paragraph 3 as set out in A/CN.9/WG.III/WP.81. The Working Group was reminded that the aim of paragraphs 1 and 2 was that the overall limits of liability should not be circumvented by a claimant suing more than one party. Paragraph 3 was included to avoid the possibility that might arise in some jurisdictions that a court might find that a claimant who successfully sued a non-maritime performing party should not have the amount awarded set off against a claim made under the draft convention. It was suggested that paragraph 3, as drafted, was capable of two interpretations: either it operated to set off the amount recovered from suing outside of the draft convention against the total amount of the damage, or it operated to set off the amount recovered from the limitation on liability in the draft convention. There was support for the view that the first interpretation was acceptable, and would, in fact, be the conclusion reached in most jurisdictions, but that the second interpretation was not acceptable. It was clarified that the second interpretation had been the one sought in the original proposal for the inclusion of this paragraph in the draft convention.

104. Support was expressed for the deletion of paragraph 3 as being both unclear in its effect, and for the reason that it might introduce procedural difficulties such as determining who bore the onus of proving whether or not an action had been successfully brought against the non-maritime performing party.

*Conclusions reached by the Working Group regarding paragraph 3*

105. The Working Group agreed to delete the text of paragraph 3.

**Draft article 22. Calculation of compensation**

106. The Working Group was reminded that its most recent consideration of draft article 22 on the calculation of compensation was at its thirteenth session (see A/CN.9/552, paras. 32 to 37). The Working Group proceeded to consider draft article 22 as contained in A/CN.9/WG.III/WP.81.

**Paragraph 1**

107. Bearing in mind that the reference in draft paragraph 1 to draft article 11 might have to be revisited should any adjustments be made to the text of draft article 11, the Working Group was in agreement that draft paragraph 1 should be approved as drafted.

**Paragraph 2**

108. A suggestion was made that the order of factors to be used in determining the value of goods under draft paragraph 2 should be altered so that the market value would be taken into account before the commodity exchange price. However, that view received insufficient support and draft paragraph 2 was approved as drafted.

**Paragraph 3**

109. The Working Group was in agreement that draft paragraph 3 should be approved as drafted.

**Draft article 23. Notice of loss, damage or delay**

110. The Working Group was reminded that its most recent consideration of draft article 23 on notice of loss, damage or delay was at its thirteenth session (see A/CN.9/552, paras. 63 to 87). The Working Group proceeded to consider draft article 23 as contained in A/CN.9/WG.III/WP.81.

**Paragraph 1**

*Legal effect of draft paragraph 1*

111. Concern similar to that expressed during the thirteenth session of the Working Group (see A/CN.9/552, para. 65) was reiterated regarding the operation of draft paragraph 1. There was support for the view that paragraph 1 was unnecessary since the issuance of the notice to the carrier or the performing party, or the failure to provide such a notice, did not affect the respective burdens of proof of the carrier and of the claimant as set out in the general liability regime in draft article 17. Moreover, it was noted that in some jurisdictions, the provision on which this draft article was based, article 3 (6) of the Hague Rules, had caused confusion and had led some courts to conclude that failure to provide such a notice resulted in the loss of the right to claim for loss or damage pursuant to the instrument. As such, the Working Group was urged to delete draft paragraph 1, and, failing that, to make it clear that failure to provide the notice under the draft provision was not intended to have a special legal effect.

112. In response, it was noted that the draft paragraph was not intended to attach a specific legal effect to the failure to provide notice. Nevertheless, the draft provision was intended to have the positive practical effect of requiring notice of the loss or damage as early as possible to the carrier, so as to enable the carrier to conduct an inspection of the goods, assuming there had been no joint inspection. While there was no agreement in the Working Group to reverse its earlier decision to retain the draft paragraph, there was agreement that draft paragraph 1 was not intended to affect the rights of cargo interests to make claims under the draft convention, and that it was in particular not intended to affect the liability regime and burdens of proof set out in draft article 17.

*Time period*

113. There was some support in the Working Group for the selection of a notice period of three working days from the alternatives appearing in the draft text in square brackets, particularly in light of the purpose of the draft paragraph to encourage that inspections of the damaged goods should take place as early as possible. However, the Working Group expressed a preference that a notice period of seven working days at the place of delivery should be chosen from among the alternatives presented.

*Conclusions reached by the Working Group regarding draft paragraph 1*

114. After discussion, the Working Group decided that:

- The text of draft paragraph 1 should be retained in the draft convention as drafted;

- The text in square brackets “seven working days at the place of delivery” should be retained and the brackets removed, and all other alternative time periods in square brackets should be deleted; and
- It should be made clear that draft paragraph 1 was not intended to have any evidentiary effect nor was it intended to conflict with or affect the liability regime and burdens of proof set out in draft article 17 in any way.

**Paragraph 2**

115. It was agreed that the discussion of this paragraph would be postponed until the broader consideration by the Working Group of shipper and carrier delay.

**Paragraph 3**

116. It was observed that the phrase “same effect” in draft paragraph 3 referred to the notice referred to in draft paragraph 1, which was thought in that context to have no special legal effect (see above, para. 112). The Working Group was in agreement that draft paragraph 3 should be approved as drafted.

**Paragraph 4**

117. The Working Group agreed that draft paragraph 4 should be adopted as drafted.

## Chapter 7 – Additional provisions relating to particular stages of carriage

**Draft article 24. Deviation during sea carriage**

118. The Working Group was reminded that its most recent consideration of draft article 24 on deviation during sea carriage was at its thirteenth session (see A/CN.9/552, paras. 100 to 102). The Working Group proceeded to consider draft article 24 as contained in A/CN.9/WG.III/WP.81.

119. The Working Group agreed that draft article 24 should be approved as drafted.

**Draft article 25. Deck cargo on ships**

120. The Working Group was reminded that its most recent consideration of draft article 25 on deck cargo on ships was at its thirteenth session (see A/CN.9/552, paras. 103 to 117). The Working Group proceeded to consider draft article 25 as contained in A/CN.9/WG.III/WP.81. A general remark was made questioning whether chapter 7 was the appropriate placement for draft article 25.

**Paragraphs 1, 2, 3 and 4**

121. The Working Group agreed that draft paragraphs 1, 2, 3 and 4 should be approved as drafted.

**Paragraph 5**

122. It was noted that draft paragraph 5 appeared in the text in square brackets, and that the provision also contained four sets of square brackets in the text itself.

*Text of the entire paragraph and placement*

123. The view was expressed that draft paragraph 5 should be deleted in its entirety, and that in all cases under the draft convention, resort should be had to draft article 64 in the cases of loss of or damage to goods improperly carried as deck cargo. It was clarified, however, that the intention of draft paragraph 5 was not to lower the general threshold for the loss of the benefit of the limitation on liability in draft article 64, which should be kept as the general rule under the draft convention. It was appropriate, however, to treat a breach by the carrier to its express promise to carry goods under deck as a case warranting a special sanction.

124. There was broad agreement in the Working Group that the square brackets around the draft paragraph should be lifted and the text of the paragraph retained. A proposal was made that the draft paragraph should be moved to become a new subparagraph of draft article 24 but was not taken up. However, there was agreement to the drafting suggestion that the phrase "not entitled to limit its liability" in draft paragraph 5 should be adjusted to be consistent with the phrase used in draft article 64 "not entitled to the benefit of the limitation of liability".

*"[expressly]", "[[that solely][to the extent that such damage] resulted from their carriage on deck]"*

125. The Working Group next considered the text that appeared in square brackets in the draft provision. While there were some views expressed to the contrary, the Working Group agreed to retain the word "expressly" and to delete the square brackets surrounding it; to delete the phrase "that solely", including square brackets surrounding it; to retain the phrase "to the extent that such damage" and to delete the square brackets surrounding it; and to retain the phrase "resulted from their carriage on deck" and delete the square brackets surrounding the entire final phrase. It was felt that the requirement of an express agreement to trigger the loss of the benefit of the liability limits was important so as to make foreseeable for the carrier its exposure to that sanction. Furthermore, the phrase "to the extent that such damage" was to be preferred over the words "that solely", since it was in keeping with the general approach to causation in the draft convention.

*Conclusions reached by the Working Group regarding draft paragraph 5*

126. After discussion, the Working Group decided that:

- The text of draft paragraph 5 should be retained in the draft convention as drafted and the square brackets around it deleted;
- The phrase "not entitled to limit its liability" in draft paragraph 5 should be adjusted to be consistent with the phrase used in draft article 64 "not entitled to the benefit of the limitation of liability"; and
- The draft paragraph should reflect the text chosen by the Working Group from the alternatives presented, as set out in paragraph 125 above.

## Chapter 1 – General provisions

### Draft article 1. Definitions

127. In accordance with its earlier decision to consider definitions in keeping with the consideration of the substantive articles containing defined terms (see para. 9 above) the Working Group proceeded to consider the definitions of "performing party", "maritime performing party" and "non-maritime performing party" as contained in paragraphs 6, 7 and 8, respectively, of draft article 1 as contained in A/CN.9/WG.III/WP.81.

### Paragraphs 6 and 7 – "performing party" and "maritime performing party"

128. The Working Group noted that the definition of "performing party" contained two sentences: the first described a performing party, and the second extended that initial definition to include employees, agents and subcontractors. It was noted that the purpose of the definition of "performing party" was to regulate three different issues, which should not be confused. First, the definition was intended to govern parties that performed the carrier's activities under a contract of carriage, usually subcontractors, and their joint and several liability with the contracting carrier. Secondly, the definition was aimed at regulating the vicarious liability of the performing party for its employees or others working in its service. Finally, the definition, in conjunction with draft articles 4 and 19, was aimed at extending the protection of the so-called "Himalaya clause" to such employees, agents or subcontractors.

129. It was noted that the definition of "maritime performing party" referred back to the definition of "performing party" and thus it also included employees, agents and subcontractors. It was suggested that, as formulated, the definition could have the unintended effect that any possible contractual liability of a maritime performing party under the contract of carriage could be imposed directly on an employee, agent or subcontractor, and there was support for the view that the definition of "performing party" should be reconsidered to avoid such an unintended consequence. In that respect, it was noted that, as drafted, the unintended consequence of rendering employees directly contractually liable would be inconsistent with many national laws which protected employees from such liability.

130. In response, it was explained that the reason that the definition had been framed so broadly was in order to avoid the privity of contract problem that had arisen in the jurisprudence with respect to Himalaya clauses that allowed for such protection under the clause only for subcontractors, but not for those further down the chain of contracts. In addition, it was said that it was difficult to envisage from both a practical and, in some countries, a legal perspective, a situation where an individual employee would be held responsible as a maritime performing party, including all of the liabilities that would follow therefrom. It was suggested that, in practice, it would be unlikely that a cargo owner would sue an employee directly on the basis that litigants tended to sue those with the greatest financial means to satisfy a judgement. It was cautioned that, if the definition were to be reformulated, care should be taken to avoid the accidental removal of the vicarious liability of employers, and, since reference was made throughout the draft convention to

"performing parties" and "maritime performing parties", caution was also advised against changes that could have unintended consequences elsewhere in the text.

131. It was suggested that the reformulation of the definition should be considered by the Working Group. It was agreed that any reformulation should consider the substantive articles throughout the text that referred to the definition and should be based on the following guiding principles:

- Carriers and subcontractors should have joint and several liability;
- Carriers and employers should be vicariously liable for their employees; and
- The protection of the so-called "Himalaya clause" should apply to employees in the same way that it applied to employers and not be limited in operation by the principle of privity of contract.

*Proposal to exclude rail carriers*

132. The Working Group was reminded of its policy decision to exclude inland carriers from the draft convention.

133. As set out in A/CN.9/WG.III/WP.84, a proposal was made that rail carriers, even if performing services within a port, should be excluded from the definition of "maritime performing party." To that end, it was suggested that the following sentence be added at the end of draft article 1, paragraph 7 (the definition of "maritime performing party"): "A rail carrier, even if it performs services that are the carrier's responsibilities after arrival of the goods at the port of loading or prior to the departure of the goods from the port of discharge, is a non-maritime performing party."

134. In support of the proposal, it was suggested that such an exemption was warranted given the practical reality that although rail carriers might be somewhat similar to other inland carriers in that they collected cargo or delivered it for carriage within a port area, rail carriers differed dramatically from other inland carriers in that the ultimate purpose of their services was virtually exclusively to move goods great distances into or out of a port, and not simply to move goods from one place to another within a port.

135. It was questioned whether a specific exemption was necessary given that the existing text of the draft convention made it clear that such inland carriers were almost invariably classified as such and not covered by the definition of maritime performing party, thus falling outside of the scope of the draft convention. In response, it was said that without an express provision, courts would be required to undertake an analysis on a case-by-case basis to determine if a rail carrier was covered by the definition or not. It was said that an express exemption provided clarity and would reduce litigation on that question.

136. Concern was expressed that the consequences of a blanket exemption for rail carriers had not been fully considered. One issue raised was the problem that a catalogue of carriers of various types might seek to be similarly exempted from the scope of application of the draft convention. In addition, a view was expressed that a preferable approach to a blanket exemption might be to provide more clearly in the text that the draft convention did not apply if maritime transport was neither contemplated nor actually performed, since it was suggested that freight forwarders

needed the flexibility to perform contracts of carriage in the manner they saw fit, including the right to use the optimal modes of transport.

137. Further, it was questioned why such an exemption should be limited to rail carriers. Some support was expressed for the view that the proposed exemption should also extend to road carriers (as suggested in A/CN.9/WG.III/WP.90) and possibly to inland barges. In that respect it was said that, unlike rail carriers, truckers might perform purely inland carriage as well as services that were exclusively within the port area, and that therefore any exemption for road carriage might need to be formulated in different terms than that which applied to rail carriage. It was suggested that an exemption for both road and rail carriers might be drafted too broadly and thus exempt truckers who exclusively provided services in the port area and should be treated as "maritime performing parties". One suggestion to allow for a more nuanced approach to the problem was an exemption drafted along the following lines: "a rail carrier or road carrier is a maritime performing party only when it performs or undertakes to perform its services exclusively within the port area". That proposal received some support.

*Conclusions reached by the Working Group regarding draft paragraphs 6 and 7*

138. After discussion, the Working Group decided to postpone its decision on the definitions of "performing party" and "maritime performing party" pending an examination of redrafted provisions, including a possible exemption for rail and possibly other inland carriers from the definition of maritime performing party, taking into account the proposals made in the Working Group.

**Paragraph 8 – "non-maritime performing party"**

139. The Working Group noted that the term "non-maritime performing party" was only used in draft article 20, paragraph 3. In light of its earlier decision to delete that paragraph (see para. 105 above), the Working Group agreed that that definition be deleted.

*Conclusions reached by the Working Group regarding draft paragraph 8*

140. The Working Group agreed that the definition of "non-maritime performing party" contained in draft paragraph 8 be deleted.

**Revised text of draft articles 1 (6) and 1 (7) ("performing party" and "maritime performing party"); and draft articles 4, 18 and 19**

141. In accordance with its earlier decision to reconsider the reformulated definitions of "performing party" and "maritime performing party" as originally contained in paragraphs 6 and 7, respectively, of draft article 1 (see above, para. 138), the Working Group continued its deliberations on the following revised text of those provisions, as well as consequential changes to draft articles 4, 18 and 19:

"Article 1. Definitions

"6. (a) "Performing party" means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage,

carriage, care, discharge or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control. It includes agents or subcontractors of a performing party to the extent that they likewise perform or undertake to perform any of the carrier's obligations under a contract of carriage.

"(b) Performing party does not include:

"(i) an employee of the carrier or a performing party; or

"(ii) any person that is retained, either directly or indirectly, by a shipper, by a documentary shipper, by the consignor, by the controlling party or by the consignee instead of by the carrier.

"7. "Maritime performing party" means a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship, but, in the event of a trans-shipment, does not include a performing party that performs any of the carrier's obligations inland during the period between the departure of the goods from a port and their arrival at another port of loading. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

"Article 4. Applicability of defences and limits of liability

"[renumber current article 4 as paragraph 1]

"2. If judicial or arbitral proceedings are instituted in respect of loss or damage [or delay] covered by this Convention against master, crew or any other person who performs services on board the ship or employees or agents of a carrier or a maritime performing party that person is entitled to defences and limits of liability as provided for in this Convention.

"3. Paragraph 2 applies whether judicial or arbitral proceedings are founded in contract, in tort or otherwise.

"Article 18. Liability of the carrier for other persons

"The carrier is liable for the breach of its obligations pursuant to this Convention caused by the acts or omissions of:

"(a) Any performing party;

"(b) Master or crew of the ship;

"(c) Employees or agents of the carrier or a performing party; or

"(d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

"Article 19. Liability of maritime performing parties

"1. A maritime performing party that initially received the goods for carriage in a Contracting State, or finally delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a

Contracting State if the occurrence that caused the loss, damage or delay took place during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge from a ship, when it has custody of the goods or at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage:

"(a) Is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention, and

"(b) Is liable for the breach of its obligations pursuant to this Convention caused by the acts and omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage. …"

142. It was explained that the three guiding principles agreed upon by the Working Group with respect to the reformulation of the definitions of "performing party" and "maritime performing party" (see above, para. 131) had been followed in redrafting the text. In the revised text, "Performing party" was defined narrowly, such that subparagraph (a) detailed the inclusive list, and subparagraph (b) detailed the excluded persons, which was thought to solve the potential problem of the employee of the maritime performing party being held liable pursuant to the draft convention for the actions of its employer. In addition, it was indicated that the list of persons included in the vicarious liability provision of draft article 18 was expanded to specifically include the persons who, the Working Group had decided, should receive such protection. Further, automatic protection was specifically included for the broader category of persons, as agreed by the Working Group, and protection pursuant to draft article 4 was expanded, including small additional changes such as the inclusion of arbitral proceedings in the text of the provision. Certain technical adjustments were also made to draft article 19 (1), such as moving a portion of subparagraph 1 (a) into the chapeau. Finally, it was explained that the last sentence of the definition of "maritime performing party" was intended to exclude specifically from the definition those inland carriers who carried the goods only into or out of the port, as decided by the Working Group.

*"by the carrier" in draft article 1 (6)(b)(ii)*

143. It was suggested that the closing phrase, "by the carrier" in draft article 1 (6)(b)(ii) could be deleted as redundant. However, it was explained that that phrase was necessary because subparagraph (b) set out the exclusions from the definition, and subparagraph (b)(ii) specifically referred to the situation in draft article 14 (2), where a shipper or other person could agree to perform obligations normally undertaken by the carrier. In such a case, it was clarified, the draft convention should exclude from the definition those retained either directly or indirectly by cargo interests, but that since the carrier itself was also retained by the shipper, the phrase had to be included to ensure that the carrier was not excluded as a "performing party".

*"Inland carrier" in draft article 1 (7)*

144. In response to concerns raised that the phrase "inland carrier" did not include carriage by inland waterway, partially due to uncertainties of translation in various language versions of the text, the Working Group affirmed that it intended to include road, rail and inland waterway transport within the term. There was support for a request that that intention be clarified in the text, and for the suggestion that the position of ferries operated by inland carriers also be clarified, perhaps more in terms of the definition of the contract of carriage of goods by sea than as part of the definition of "maritime performing parties."

145. In addition, it was noted that the term "inland carrier" might not be ideal, since the word "carrier" was a defined term, and it was suggested that "inland performing party" might be preferable. That suggestion was not favoured, however, as it was thought that it could inadvertently exclude from the definition of "maritime performing party" some inland performing parties who clearly should be included, such as stowage planners, who might do their work exclusively from an office located outside of a port, but who were clearly maritime performing parties.

*"trans-shipment" and "port" in draft article 1 (7)*

146. A question was raised regarding the exclusion of performing parties in the case of trans-shipment from the definition of "maritime performing party." While it was acknowledged that the Working Group had agreed to such treatment, concern was raised regarding the apparent gap that such treatment created in the coverage of the draft convention. Nonetheless, the text in this regard was accepted as drafted.

147. An additional drafting point was raised with respect to the second sentence of the definition of "maritime performing party" referring to trans-shipment. It was thought that that sentence could be deleted as being covered by the closing sentence of the definition that only included in its scope inland carriers that performed services exclusively within a port area, thus excluding from the definition those involved in trans-shipment that did not perform services exclusively in a port area, but rather travelled between ports. Some support was expressed for that view, and it was suggested that such an approach could be considered in further drafting adjustments.

148. Concerns were raised, however, that in the case of very large or geographically proximate ports, or different ports that were administered under a single authority, it would be very difficult to determine whether a performing party were performing its services "exclusively within a port area", and thus very difficult to determine who qualified as "maritime performing parties." Support was expressed for those concerns, including some support for the suggestion that the Working Group might wish to consider excluding altogether inland carriers from operation of the draft convention. In response, it was noted that the Working Group had previously agreed to leave the determination of what constituted a "port" to local authorities and the judiciary, since views on that topic differed widely according to geographic conditions. It was also indicated that it was difficult to determine whether this would be a serious problem, and that, in any event, the draft convention had left undefined a number of terms given the inability of the instrument to answer every question. In addition, it was noted that the Hamburg Rules referred to the "port" without defining the term. Despite concerns that such an approach to determining

the ambit of a particular port could result in unnecessary and expensive litigation to determine the local meaning of "port", it was agreed that a solution such as the suggested exclusion of all inland carriers would be a policy decision that would have serious consequences throughout the draft convention. As such, the current approach taken in draft article 1 (7) was broadly supported.

*Draft article 4*

149. It was observed that paragraph 1 of draft article 4 should be amended through the inclusion of "arbitral proceedings" in order to render it consistent with the additional paragraphs proposed in the revised text. In response to a question regarding the use of the phrase "that person is entitled to defences and limits of liability as provided for in this Convention" in the revised text, it was explained that a different phrase was used from that of the original text in order to clarify that where, for example, a carrier contractually agreed to increase its limitation on liability, a person referred to in draft article 4 would not be bound by that contractual agreement, but would rather be governed by the terms of the draft convention. Support was expressed for that approach, and clarification of the text in that regard was encouraged.

*Various drafting issues*

150. It was indicated that the definition of "performing party" included agents but excluded employees, and that in some jurisdictions, agents and employees would be treated similarly. In response to a question, it was noted that there was a duplication in draft article 18 that should be corrected, in that subparagraph (a) referred to "any performing party" and subparagraph (c) included "agents", but that "agents" were already included in the definition of "performing party". However, it was thought that that issue should be examined more closely, since it might still be necessary to refer to "agents of the carrier" in draft article 18. A further suggestion was made that "agents of the carrier" should be expressly included in the definition of the "performing party."

151. In response to a question regarding the treatment of employees and agents under draft article 19 (1)(b), it was noted that the phrase "any person to which it has entrusted the performance" was intended to include such persons. However, it was agreed that should any doubt persist in that regard, the master and crew of the ship, employee and agent should be included in the text of draft article 19 (1)(b). A preference was expressed for such a clarification in the text, but a further observation was made that that inclusion should be very specific so as to ensure that it referred to the master and crew of the ship that performed the ocean transport leg for which the maritime performing party was responsible.

152. A question was also raised regarding the inclusion of independent contractors in the Himalaya protection. It was indicated that "subcontractors" were included in the definition of the "performing party" and thus were included under Himalaya protection by virtue of the inclusion of the "performing party", but it was suggested that if that reference were unclear, consideration could be given to the addition of "independent contractors".

*Conclusions reached by the Working Group regarding the revised text*

153. After discussion, the Working Group decided that:

- It was satisfied that the revised text corresponded to its earlier decisions;
- Some drafting suggestions as set out in the paragraphs above should be considered by the Secretariat, including examination of the list of persons excluded from "performing party"; the treatment of "agents" in draft article 1 (6), 4 (2) and 18; and appropriate wording to include inland waterways in the closing sentence of draft article 1 (7);
- The revised text was otherwise generally acceptable to the Working Group.

## Chapter 19 – Validity of contractual terms

### General remarks

154. In accordance with its earlier decision to consider all provisions affecting the scope of application of the draft convention at the current session, the Working Group proceeded to consider the provisions in chapter 19 (Validity of contractual terms) of the draft convention, together with the definition of "volume contracts" (article 1, paragraph 2), once the Working Group had had sufficient time to study and consult on proposals that had been submitted by some delegations on the issue of freedom of contract under the draft convention (joint proposals by Australia and France contained in documents A/CN.9/612 and A/CN.9/WG.III/WP.88).

### Draft article 88. General provisions

155. The Working Group was reminded that its most recent consideration of draft article 88 on the validity of contractual terms was at its seventeenth session (see A/CN.9/594, paras. 146 to 153). The Working Group proceeded to consider draft article 88 as contained in A/CN.9/WG.III/WP.81.

### Paragraph 1

156. The Working Group was in agreement that draft paragraph 1 should be approved as drafted.

### Paragraph 2

157. A suggestion was made that paragraph 2, concerning exclusions or limitations in the contract of carriage to the obligations and liabilities of shippers, should be drafted in similar fashion to paragraph 1 in order to act as a counter-balance to that provision, which concerned exclusions or limitations in the contract of carriage to the obligations and liabilities of carriers. By way of explanation regarding how a shipper's obligations might still be increased despite the fact that there was currently no limit on a shipper's liability in the draft convention, it was noted that a shipper's liability might, for example, be increased from one based on negligence to one of strict liability.

158. While there were some suggestions to delete the paragraph completely, there was agreement in the Working Group to keep the paragraph in the text and to remove the square brackets surrounding it.

159. Some doubts were raised with respect to the word "or increases" which appeared in square brackets in subparagraphs (a) and (b). If the obligations of the shipper being referred to in paragraph 2 were limited to those set out in the draft convention, it was thought that the references to "or increases" should be kept and the brackets deleted. However, if the obligations referred to additional obligations outside of the draft convention, it was said that the references to "or increases" should be deleted from the text. Since, generally speaking, the view of the Working Group was that shippers in the case of this paragraph needed greater protection, as the paragraph related to contracts of carriage other than a volume contract, there was support for the view to retain the references to "or increases" and to delete the square brackets surrounding them. However, it was thought that further consideration should be given to the possibility of confusion regarding which obligations were being referred to, and possible adjustments should be made to the text to clarify the issue, if necessary.

*Conclusions reached by the Working Group regarding draft paragraph 2*

160. After discussion, the Working Group decided that:

- The text of draft paragraph 2 should be retained in the draft convention as drafted; and
- The text in square brackets "or increases" should be retained and the brackets removed.

**Draft article 89 – Special rules for volume contracts**

161. The Working Group noted that the text that appeared in draft article 89 was the result of extensive negotiations that had taken place since the Working Group's twelfth session (Vienna, 6-17 October 2003), and reflected, with some drafting adjustments, a compromise that had been achieved at the seventeenth session of the Working Group (New York, 3-13 April 2006).

162. There was wide support within the Working Group for the notion of freedom of contract and the need to incorporate in the draft convention provisions that took into account commercial reality, in particular the growing use of volume contracts. There was support for the view that shippers were not exposed to any significant risk of being deprived from the protection afforded by the draft convention since shippers were free to enter into volume contracts and negotiate their terms or, alternatively, to ship goods under a transport document fully covered by the draft convention. The choice between one or the other option was within each shipper's commercial judgement. However, there was strong support for the proposition that, while generally desirable in the case of parties with equal bargaining power, unlimited freedom of contract might in other cases deprive the weaker party, typically small shippers, of any protection against unreasonable unilateral conditions imposed by carriers. It was further said that, as presently drafted, draft article 89, when read in conjunction with the definition of volume contracts in draft article 1, paragraph 2, did not afford the desirable level of protection. The Working Group was reminded that the history of the law of carriage of goods by sea

was the history of the gradual introduction of mandatory rules on liability, which nowadays could be found in various international conventions regulating different modes of carriage. As the draft convention was said to be the only international instrument to contain provisions that offered considerable scope for freedom of contract, the Working Group was urged to consider proposals to remedy that situation.

163. Those proposals as contained in A/CN.9/WG.III/WP.88 and A/CN.9/612 included essentially three elements. Firstly, the definition of volume contracts in draft article 1, paragraph 2, should be amended so as to provide for a minimum period and a minimum quantity of shipments, or at least require such shipments to be "significant". Secondly, the substantive condition for the validity of a volume contract (that is, that it should be "individually negotiated"), and the formal condition for validity of derogations (that the derogation should be "prominently" specified), as provided in draft article 89, paragraph 1, should be made cumulative, rather than alternative, so as to make it clear that both parties to the contract must expressly consent to the derogations. Thirdly, the list of matters on which no derogation was admitted, which currently included only the carrier's obligation to keep the ship seaworthy and properly crew the ship (art. 16 (1)), and the loss of the right to limit liability (art. 64), should be expanded so as to cover draft article 17 (basis of the carrier's liability), draft article 62 (limits of liability), draft article 30 (basis of the shipper's liability to the carrier), chapter 5 (obligations of the carrier); and draft articles 28 to 30, and 33 (obligations of the shipper). There were various expressions of support for the proposition that, even if the Working Group were not to accept all of those elements, at least a revision of the definition of volume contracts should be considered, so as to narrow down its scope of application and protect smaller shippers, in view of the potentially very wide share of international shipping that might, in practice, be covered by the current definition of volume contracts. Failure to do so, it was said, might mean that the draft convention would be devoid of practical significance.

164. At that stage, the Working Group was reminded of its past deliberations on the matter and the evolution of the treatment of freedom of contract under the draft convention. It was pointed out that special rules for volume contracts and the extent of freedom of contract that should be afforded thereunder had been under consideration by the Working Group for a number of years. Following the approach taken in previous maritime instruments, the draft convention had been originally conceived as a body of law incorporating essentially mandatory rules for all parties. Thus, the initial version of the draft convention had provided, in relevant part that "any contractual stipulation that derogates from this instrument is null and void, if and to the extent that it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee" (A/CN.9/WG.III/WP.21, article 17.1).

165. At the twelfth session of the Working Group (Vienna, 6-17 October 2003), however, it had been suggested that more flexibility should be given to the parties to so-called "Ocean Liner Service Agreements" in the allocation of their rights, obligations and liabilities, and that they should have the freedom to derogate from the provisions of the draft convention, under certain circumstances (A/CN.9/WG.III/WP.34, paras. 18-29). It was proposed that such freedom should be

essentially granted whenever one or more shippers and one or more carriers entered into agreements providing for the transportation of a minimum volume of cargo in a series of shipments on vessels used in a liner service, and for which the shipper or shippers agreed to pay a negotiated rate and tender a minimum volume of cargo (A/CN.9/WG.III/WP.34, para. 29).

166. At that session, there was broad agreement that certain types of contracts either should not be covered by the draft instrument at all, or should be covered on a non-mandatory, default basis. It was considered that such contracts would include those that, in practice, were the subject of extensive negotiation between shippers and carriers, as opposed to transport contracts that did not require (or where commercial practices did not allow for) the same level of variation to meet individual situations. The latter generally took the form of contracts of adhesion, in the context of which parties might need the protection of mandatory law. The Working Group agreed, however, that the definition of the scope of freedom of contract and the types of contracts in which such freedom should be recognized needed further consideration (A/CN.9/544, paras. 78-82).

167. The Working Group considered a revised proposal on freedom of contract under "Ocean Liner Service Agreements" (A/CN.9/WG.III/WP.42) at its fourteenth session Working Group (Vienna, 29 November-10 December 2004). At that time, the Working Group heard a number of concerns regarding freedom of contract under Ocean Liner Service Agreements. In particular, it was suggested that it should not be possible for parties to OLSAs to contract out of certain mandatory provisions of the draft instrument. It was also stated that the introduction of a special regime for OLSAs could create market competition-related problems. Concerns were also expressed regarding the protection of small shippers with weak bargaining power who could be subject to potential abuse by carriers through OLSAs. However, it was also said that in current trade practice, small shippers generally preferred to resort to rate agreements, which were not contracts of carriage but which guaranteed a maximum rate without specifying volume, rather than committing to volume contracts, and that the attractiveness of rate agreements combined with market forces would minimize any potential exposure to abuses by carriers under the proposed OLSA regime. Broad support was expressed for the inclusion of OLSA provisions in the draft instrument, subject to these and other concerns (A/CN.9/572, paras. 99-101). The Working Group concluded its deliberations at that stage by deciding that it was not opposed to the inclusion of a provision on OLSAs in the draft instrument, subject to the clarification of issues relating to the scope of application of the draft instrument to volume contracts generally. The Working Group further decided that particular care should be dedicated to the definition of OLSAs and to the protection of the interests of small shippers and of third parties, and that further consideration should be given to examining which provisions, if any, of the draft convention should be of mandatory application in an OLSA. Lastly, the Working Group invited the original proponents of the OLSA proposal to work with other interested delegations on refining the OLSA definition (A/CN.9/572, para. 104).

168. The Working Group reverted to the matter of freedom of contract under "Ocean Liner Service Agreements" at its fifteenth session (New York, 18-28 April 2005). The Working Group was then informed of the outcome of the consultations that had taken place pursuant to the request made at its

fourteenth session. It was then suggested that since "Ocean Liner Service Agreements" were a type of volume contract, adjustments could be made to the provisions in A/CN.9/WG.III/WP.44 and to draft articles 88 and 89 in order to subsume OLSAs into the existing approach to volume contracts in the scope of application of the draft instrument. The Working Group concurred with that suggestion (A/CN.9/576, paras. 12, and 14-16). The Working Group then proceeded to consider manners of addressing the concerns that had been expressed at its earlier session, as regards the conditions under which it should be possible to derogate from the provisions of the draft convention. While a view was expressed that no derogation from the provisions of the draft convention should be allowed under any conditions, there was support for derogation to be allowed in some circumstances. The Working Group generally accepted that the following four conditions should be met before it would be possible for a volume contract, or individual shipments thereunder, to derogate from the draft instrument: (a) the contract should be [mutually negotiated and] agreed to in writing or electronically; (b) the contract should obligate the carrier to perform a specified transportation service; (c) a provision in the volume contract that provides for greater or lesser duties, rights, obligations, and liabilities should be set forth in the contract and may not be incorporated by reference from another document; and (d) the contract should not be [a carrier's public schedule of prices and services,] a bill of lading, transport document, electronic record, or cargo receipt or similar document but the contract may incorporate such documents by reference as elements of the contract (A/CN.9/576, paras. 17-19). The Working Group proceeded to consider the question as to whether there should be mandatory provisions of the draft convention from which derogation should never be allowed, and if so, what were they. In this respect, the Working Group decided that the seaworthiness obligation should be a mandatory provision of the draft instrument from which derogation was not allowed (A/CN.9/576, paras. 17-19).

169. The Working Group last considered the matter of volume contracts at its seventeenth session (New York, 3-13 April 2006), on the basis of a revised version of the draft convention (A/CN.9/WG.III/WP.56) and amending proposals that had been made following informal consultations (A/CN.9/WG.III/WP.61). At that session, some concerns were reiterated regarding the possible abuse of volume contracts to derogate from the provisions of the draft convention, particularly in cases where volume contracts could involve a large amount of trade. Concerns were raised that it could be seen as inconsistent to have such broad freedom of contract to derogate from a mandatory convention, and the view was expressed that a preferable approach would be instead to list specific provisions that could be subject to derogation. Another view was expressed that the combination of paragraphs 1 and 5 of draft article 95, and of the definition of volume contracts in draft article 1 had addressed earlier concerns regarding sufficient protection for the contracting parties. An additional concern was expressed that while, generally, some freedom of contract was desirable and that volume contracts as such were not necessarily objectionable, it was possible that draft paragraph (1) (b) did not provide sufficient protection for the parties to such contracts (A/CN.9/594, para. 155). Overall, however, strong support was expressed in the Working Group both for the volume contract regime in the draft convention in general, and for the redrafted text of draft paragraph 95 (1) as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61. The view was expressed that the volume contract framework provided an

appropriate balance between necessary commercial flexibility to derogate from the draft convention in certain situations, while nonetheless providing adequate protection for contracting parties (A/CN.9/594, para. 156). The Working Group next considered the issue of whether it was desirable to include in the volume contract regime of the draft convention a provision containing a list of absolutely mandatory provisions from which there could be no derogation regardless of any agreement, such as that set out in draft paragraph 95 (4) in paragraph 49 of A/CN.9/WG.III/WP.61. Some concern was raised regarding the inclusion of such a provision in the draft convention, since it was felt that it could be used in the later interpretation of the draft convention to reintroduce the notion of overriding obligations that had been carefully avoided in the drafting of the provisions. However, strong support was expressed for the inclusion of a provision listing the mandatory provisions from which there could never be derogation pursuant to the volume contract regime in the draft convention. It was felt that including a provision such as draft paragraph 95 (4) was an important part of the overall compromise intended to provide sufficient protection for contracting parties under the volume contract framework (A/CN.9/594, para. 160). As regards which provisions should be included in such a list, it was agreed that all of the references in the then draft paragraph 95 (4) as set out in A/CN.9/WG.III/WP.61 should be kept in the text (A/CN.9/594, para. 161).

170. The text that appeared in draft article 89, therefore, was said to be the result of a carefully crafted compromise that had involved extensive negotiations over a number of sessions of the Working Group. There were several expressions of sympathy for the concerns that had been expressed in connection with the treatment of freedom of contract under the draft convention. However, the prevailing view within the Working Group was that the current text of draft article 89 reflected the best possible consensus solution to address those concerns in a manner that preserved a practical and commercially meaningful role for party autonomy in volume contracts. There was wide agreement within the Working Group that it would be highly unlikely that the Working Group would be in a position to build an equally satisfactory consensus around a different solution, and the Working Group was strongly urged not to make attempts in that direction at such a late stage of its deliberations.

171. It was also noted that a number of delegations that currently advised against revisiting draft article 89 had shared at least some of those concerns and had been originally inclined towards a stricter regime for freedom of contract. While those delegations did not regard draft article 89 in all respects as an ideal solution, it was said that their major concern, namely the protection of third parties, had been satisfactorily addressed by the provisions of paragraph 5 of the draft article. Furthermore, the use of the words “series of shipments” in the definition of volume contracts in draft article 1, paragraph 2, provided additional protection against the risk of unilateral imposition of standard derogations from the draft convention, since occasional or isolated shipments would not qualify as “volume contract” under the draft convention.

*Conclusions reached by the Working Group regarding draft article 89*

172. After extensive consideration of the various views expressed, the Working Group rejected the proposal to reopen the previously-agreed compromise and

approved the text of draft article 89 that had previously been accepted in April 2006 (see A/CN.9/594, paras. 154 to 170).

**Draft article 90. Special rules for live animals and certain other goods**

173. The Working Group was reminded that its most recent consideration of draft article 90 on special rules for live animals and certain other goods was at its seventeenth session (see A/CN.594, paras. 171 to 172). The Working Group proceeded to consider draft article 90 as contained in A/CN.9/WG.III/WP.81.

**Chapeau and subparagraph (a)**

174. The Working Group was in agreement that the chapeau and draft subparagraph (a) should be approved as drafted, bearing in mind that adjustments might need to be made to the text following the Working Group's reconsideration of the definitions of "performing party" and "maritime performing party".

**Subparagraph (b)**

175. The Working Group took note of the proposal set out in A/CN.9/WG.III/WP.90 that, to combat alleged abuses that considered containers or road vehicles "non-ordinary shipments" in order to have the container or road vehicle considered to be a single unit for the purposes of limiting liability, the following sentence should be added to the end of the subparagraph: "The containers or road vehicles, whose transport is made by a ship entirely or partially equipped to undertake such transport, cannot be considered as 'non-ordinary commercial shipments'." The view was expressed that such an addition was unnecessary, since clauses of that type usually appeared in some short sea voyages, such as ferry carriage, in respect of which carriers typically issued sea waybills rather than bills of lading which would trigger the Hague and Hague-Visby Rules. However, it was expected that the contract of carriage applicable in such a case would trigger the draft convention, whose provisions would eliminate such an abuse.

176. The Working Group was in agreement that draft subparagraph (b) should be approved as drafted.

## Liability for delay in delivery of the goods

177. The Working Group was reminded that its most recent consideration of liability for delay in the delivery of goods pursuant to the draft convention had taken place in the context of shipper's liability for delay, which had been last considered at its eighteenth session (see A/CN.9/616, paras. 83 to 113). It was also recalled that two proposals with respect to liability for delay had been submitted to the Working Group for consideration: a proposal on delay prepared in light of the consideration of the topic during its eighteenth session (A/CN.9/WG.III/WP.85) and a proposal on carrier and shipper delay (A/CN.9/WG.III/WP.91). The Working Group proceeded to consider the various provisions concerning delay as contained in A/CN.9/WG.III/WP.81.

**General introduction**

178. The Working Group was reminded that it had considered the topic of liability for delay in the delivery of goods during a number of its sessions, and that the topic was one of particular sensitivity on the part of both shippers and carriers. Given the thoroughness of previous discussions on the topic, it was thought that a complete review of the issues involved and the carrier and shipper interests at stake was unnecessary, and discussion proceeded to various proposals that had been placed before the Working Group. It was explained that the proposal contained in A/CN.9/WG.III/WP.85 was a written version of what had been proposed orally during the eighteenth session of the Working Group (A/CN.9/616, paras. 101-113), which, it was recalled, had been an attempt by the Working Group to retain in the draft convention liability for delay on the part of both the carrier and the shipper, and to find an appropriate limitation level for shipper's liability for delay. In light of that, the proposal was said to be a compromise that contained three elements: a clarification of draft article 18 that the carrier was not liable for any loss or damage to the extent that it was attributable to other shippers; the limitation of shipper's liability for pure economic loss arising from delay to an amount that was in square brackets in the text; and a general rule on causation to be placed in draft article 22.

179. The Working Group was reminded that its deliberations on damages for delay were concerned with pure economic loss resulting from delay, since physical damage to the goods resulting from delay would be covered by the draft convention under its provisions on liability for loss of or damage to the goods. Further, it was indicated that research undertaken on the topic had found very few reported cases, and no successful cases, in jurisdictions that allowed for the recovery of damages for delay. While some doubt was expressed regarding the reason for so few cases on the topic, a view was expressed that the findings suggested that there was no commercial need for delay provisions, and it was said that, in any event, they should be non-mandatory. More specific arguments were put forward in support of the view that liability for delay should be non-mandatory, as set out in A/CN.9/WG.III/WP.91. Although it was said that the deletion of liability for delay on the part of both the shipper and the carrier was the best option in light of commercial reality and the apparent difficulty in finding an acceptable way to limit the liability of the shipper for damages due to delay, an alternative proposal set out in A/CN.9/WG.III/WP.91 was to make shipper's and carrier's liability for delay non-mandatory, or subject to freedom of contract. However, concerns were raised that this approach would simply result in carriers inserting standard language in the transport document exempting them from liability for any damages due to delay.

**Discussion**

180. The Working Group was informed that the working hypothesis for a compromise on the issue of delay that had been proposed during its eighteenth session, and that was embodied in A/CN.9/WG.III/WP.85, had not met with sufficient support in further formal and informal consultations, and that it was in danger of failing. In light of that possibility, a number of other proposals were made regarding how best to deal with the issue of liability for delay in the draft convention. Those proposals could be summarized as follows:

(a) All reference to liability for delay on the part of the shipper and on the part of the carrier should be deleted from the text of the draft convention, thus leaving the determination of such matters to national law;

(b) A more elaborate proposal consisted of three elements. First, the shipper's liability for delay should be deleted due to failure to find a suitable means to limit that liability. Secondly, the text of draft article 21 on delay should be limited to the opening phrase ("Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed") and the rest of the draft article should be deleted. Thirdly, draft article 63 should be made mandatory by deletion of the phrase in square brackets "unless otherwise agreed";

(c) The limitation of liability for economic loss caused by delay should be made subject to freedom of contract by retaining the text in square brackets in draft article 63 and removing the brackets;

(d) Liability for delay should be made non-mandatory, or subject to freedom of contract, in regard to both the carrier and the shipper;

(e) The text with respect to the recoverability of damages as proposed during the eighteenth session of the Working Group (see para. 107, A/CN.9/616) should be reintroduced in addition to the proposal set out in A/CN.9/WG.III/WP.85;

(f) Shipper's liability for delay should be excluded from the draft convention, and carrier liability for delay should only be maintained in the case where the shipper made clear to the carrier its interest in timely delivery;

(g) Liability for delay should be mandatory on the part of the carrier, but more flexible with respect to shippers;

(h) The treatment of both the carrier and the shipper should be identical with respect to liability for damages for delay;

(i) A provision should be included that made clear that compensation for economic loss that was not connected to any physical damage should be excluded from the draft convention in the case of both the shipper and the carrier;

(j) Liability for delay should be mandatory on the part of both the shipper and the carrier; and

(k) The same approach to delay should be taken as was adopted in the Hamburg Rules, including the limitation level of two and one half times the freight payable for the goods delayed.

181. The Working Group heard a number of views on which of the proposals set out in the previous paragraph were preferred, and which could be considered as second and third choices. In the course of that discussion, while no clear consensus for any one of the approaches set out above initially emerged in the Working Group, a number of strongly held positions were enunciated and received support in the Working Group. These may be summarized as:

(a) There appeared to be general agreement that the compromise articulated in A/CN.9/WG.III/WP.85 would not achieve acceptance in the Working Group;

(b) There was strong support for the retention of liability on the part of the carrier for damages arising due to delay;

(c) There was support for the view that liability for delay on the part of the carrier should be mandatory; and

(d) There was a high degree of flexibility regarding the necessity of including liability on the part of shippers for damages due to delay, particularly given information provided to the Working Group on the difficulty and expense involved for shippers insuring for pure economic loss.

182. In light of the strong views expressed, the Working Group sought to reach a compromise on the issue by focussing on the first two alternative approaches set out in paragraph 180 above. It was stated that one of the advantages of deleting liability for delay for both the shipper and the carrier from the draft convention was to give greater flexibility to jurisdictions that had specific rules on carrier delay. In addition, the view was expressed that it was better to have no rule on liability for delay in the draft convention than to formulate one that was inadequate or detrimental to the operation of mandatory domestic law. The countervailing view was that the three-pronged proposal would allow for at least a certain level of harmonization with respect to the rules on delay, rather than leaving the entire matter to domestic law. Furthermore, a compromise solution that limited the notion of delay to a failure to deliver the goods within the agreed delivery period would fit well with a commercial approach that had been advocated to the problem of liability for delay.

183. While a general preference appeared to emerge in favour of the three-pronged proposal described in paragraph 180 (b) above, the Working Group heard conflicting views on the desirability of deleting the clause in draft article 21 that referred to the time within which it would be reasonable to expect that a diligent carrier would deliver the goods, having regard to the terms of the contract, the customs, practices and usages of the trade, and the circumstances of the journey. There was strong support for retaining those words, which were said to be the core of the draft article and to offer an important safeguard to protect shippers from unreasonable delay by carriers. Shippers, it was stated, should not only be entitled to damages for delay when carriers failed to deliver by an expressly agreed date. Shippers deserved the same protection when they relied on advertisements and line schedules published by carriers. However, there was also strong support for deleting the words in question, which were said to express a vague concept of difficult application that was likely to increase the risk of litigation.

184. At that stage, the Working Group was invited to consider an amended version of the three-pronged approach set out in paragraph 180 (b) above. The Working Group was reminded that the first option for several delegations was to have mandatory rules on carrier delay in the draft convention, failing which they would prefer the deletion of all references to liability for delay from the text of the draft convention, thus leaving the determination of such matters to domestic law. The proponents of that solution were however prepared to accept the three-pronged approach set out in paragraph 180 (b) above, subject to the deletion of the word “expressly” from the description of delay enunciated in draft article 21. Such an adjustment, it was said, would render the deletion of the latter half of the draft provision less problematic for many in the Working Group, and reduce the burden of

proof on cargo claimants regarding agreement on the time of delivery. Others were of the view, however, that deletion of the word "expressly" would not substantively alter the provision. In the spirit of compromise, the Working Group welcomed that proposal and supported the three-pronged approach as amended by it.

**Draft article 26. Carriage preceding or subsequent to sea carriage**

185. The Working Group was reminded that draft article 26 had been last considered at its eighteenth session (see A/CN.9/616, paras. 216 to 228). The Working Group proceeded to consider draft article 26 on carriage preceding or subsequent to sea carriage as contained in A/CN.9/WG.III/WP.81.

186. In respect of draft article 26 generally, the Working Group was reminded that a proposal had been made suggesting a consolidated text for draft articles 26, 64 (2) and the former draft article 89 as it appeared in A/CN.9/WG.III/WP.56 (see A/CN.9/WG.III/WP.89). It was suggested that the close connection between those draft provisions in terms of regulating the relationship of the draft convention with other conventions made it desirable to consolidate them into a single provision that would be clearer and more reader-friendly. The Working Group, however, preferred to continue treating those provisions separately and did not take up that proposal.

**Paragraph 1**

"[*or national law*]"

187. Some support was expressed for a retention of the bracketed text "or national law" in draft paragraph 1. In that respect, it was said that the contract of carriage under a "maritime plus" regime such as that envisaged pursuant to the draft convention, might contain a very long inland leg and a comparatively short sea leg. In that context, it was said that a reference to national law in draft article 26 was necessary in some jurisdictions to preserve mandatory national law that applied in respect of the inland transport. In further support of maintaining the references to national law in draft paragraph 1, it was suggested that with that reference non-maritime performing parties would have greater certainty that they did not fall within the liability regime of the draft convention. Further, in response to suggestions that the inclusion of the reference to mandatory national law strayed too far from the draft convention's goal of uniformity, it was pointed out that the inclusion of "international instruments" in paragraph 1 already provided for the possible inclusion of regional international agreements, which could simply consist of an exchange of notes between two States.

188. However, strong support was shown for the deletion of the phrase "or national law" as currently found in square brackets in draft paragraph 1. Although there was sympathy for those who sought a solution for the problems outlined in the previous paragraph, it was said that the retention of references to national law represent a major departure from the balance that had already been achieved on the network approach as contained in draft article 26, paragraph 1. It was further said that there had been an understanding that in formulating a basis for the network system, it had not been possible to reach complete uniformity due to the need to accommodate in certain limited situations the operation of other unimodal conventions such as the Convention on the Contract for the International Carriage of Goods by Road (CMR)

and the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM-COTIF). However, it was said that the expansion of those narrow exceptions to include all mandatory national law would undermine the usefulness of the entire provision and would greatly detract from the uniformity and predictability of the draft convention as a whole. In addition, it was suggested that the inclusion of a reference to national law in article 26, paragraph 1 could render it impossible to use draft article 4 ("the Himalaya clause") to protect performing parties. Another problem with the inclusion of a reference to national law was said to be that it would create uncertainty for both shippers and carriers in terms of determining which liability regime would govern their activities.

*The compromise proposal*

189. In light of the support within the Working Group in favour of both retaining and of deleting the phrase "or national law" in paragraph 1, a compromise proposal was suggested. The proposal was to allow Contracting States that wished to apply their mandatory national law to inland cases of loss of or damage to the goods to do so by means of declarations made in accordance with draft article 94. It was envisaged that Contracting States should be required to identify specifically the national law that would apply in those cases. The effect of such a declaration would be to allow the courts of that State to apply national law to cases of localized inland damage in that State. However, courts of other States than the State making the declaration would not be bound by that declaration, and would apply the text of the draft convention according to its terms, and without regard to mandatory national law. Furthermore, it was clarified that courts of the State making the declaration would only be able to apply their substantive national law with respect to damage occurring within that State, and that the declaration would not provide a basis for any purported extraterritorial effect of the national law in cases of inland loss or damage outside of that State.

190. While strong preferences were expressed in the Working Group for both retaining and deleting the references to national law, broad support was expressed for the compromise proposal. While the inclusion of national law in draft article 26, even if by way of declaration rather than in the text itself, was said to detract from the uniformity of the draft convention, it was noted that at least the specification of only certain national laws by specific countries making declarations to that effect would allow for greater uniformity and predictability than including reference in the text to the national law of all Contracting States. Further, such an approach allowed for the accommodation of the needs of certain States who had mandatory national provisions regarding their inland carriage. The Working Group was reminded that such an approach had been advocated in A/CN.9/WG.III/WP.23. In light of the technical nature of formulating the appropriate approach to the declaration technique, the Working Group agreed not to consider specific proposals to that effect at the present stage and requested the Secretariat to offer draft language in due course. The Working Group took note of the view that if the declaration approach were adopted by the Working Group as a compromise solution, part of the compromise should be the deletion of the phrase "or national law" in draft article 62 (2) on non-localized damage, if draft article 62 (2), which was in square brackets, were retained in the text.

*Variant A or B*

191. While support was expressed in the Working Group for the retention of Variant A of subparagraph 1 (a), a stronger preference was expressed for Variant B as being clearer and more likely to be interpreted accurately. It was further said that the text of Variant B was preferable in that it ensured that the operation of the draft convention would take place independently of the scope provisions of other transport conventions. Variant A, it was suggested, was less desirable, since it was drafted as primarily a conflict of conventions provision that relied upon the interpretation of the scope provisions of other transport conventions.

*Conclusions reached by the Working Group regarding paragraph 1*

192. The Working Group was in agreement that:

- All references to the phrase "[or national law]" should be deleted from paragraph 1;
- The Secretariat should draft a declaration provision allowing a Contracting State to include in draft article 26 (1) its mandatory national law provided that: (1) the State specifically identified in a declaration to that effect made pursuant to draft article 94; (2) the national law of the State making the declaration applied to the loss or damage in question; and (3) the damage occurred in the territory of the State that made the declaration; and
- Variant B of draft subparagraph 1 (a) should be taken up and Variant A deleted.

**Paragraph 2**

193. It was observed that draft paragraph 2 of article 26 referred to draft article 62 (2), and it was suggested that discussion of draft article 26 (2) should be deferred until the Working Group had considered draft article 62 (2). That suggestion was approved by the Working Group in light of the relationship between draft article 26 on localized damage to the goods and draft article 62 (2) on non-localized damage to the goods. However, it was also suggested that draft article 62 (2) could not be considered until a decision regarding the limitation level in draft article 62 (1) had been made was not taken up in light of the link regarding the scope of the draft convention shared by draft articles 26 and 62 (2).

**Paragraph 2 of draft article 62 (2) regarding the limits of liability**

194. The Working Group proceeded to consider the text of paragraph 2 of draft article 62 as found in A/CN.9/WG.III/WP.81.

195. Strong support was expressed for the deletion of draft paragraph 2 in its entirety. The view was expressed that the provision in issue was ambiguous and that it had no place in a "maritime plus" convention. In support of that view, it was said that it was important to recall that the subject matter of the provision was non-localized damage to the goods. Since by definition, it would be unknown during which leg of the transport the damage occurred, only the contracting carrier could be held liable for such damage, and not the performing party. A provision such as draft paragraph 2 was said to undermine the very purpose of adopting an international convention. It was argued, in that connection, that although a limit on the liability of the carrier had not been settled upon, it surmised from previous

discussions (see A/CN.9/616, paras. 162 to 174) that in the majority of cases, the limit would be sufficient to cover the damage to any goods, even particularly valuable goods, based on the per package limitation rate. The only result of a provision such as paragraph 2, it was said, would be to undermine the application of the per package limitation amounts in the draft convention by substituting the lesser per kilogram limitation under other transport conventions such as the CMR or CIM COTIF. Further, since only the contracting carrier would be held liable for non-localized damage, it was said that there was no logical explanation for the approach suggested in paragraph 2.

196. In addition to arguments raised in favour of the compensation rates of the per package rule in the draft convention (for both sides of the discussion, see, in general, A/CN.9/616, paras. 162 to 174) and for the suggestion that draft paragraph 2 should therefore be deleted, problems were indicated regarding the operation of the draft provision. In particular, it was said that where the damage could be said to occur during two legs of the transport, as for example, in the case of perishable goods in a container that was not properly refrigerated, it was not possible to determine whether draft paragraph 2 should apply. It was also noted that it would often be difficult to determine which transport regime offered the higher limitation amount, since the decision would entail a comparison of per package and per kilogram limitation rates, and, it was said, for goods weighing less than 82 kilograms per package, the per package limitation amount in the draft convention would always result in a higher limitation amount. Further complications were indicated with respect to the intended operation of draft paragraph 2, including difficulty regarding how to decide whether a limit on liability was unbreakable and with respect to the general increase in uncertainty and a need for litigation that it was said paragraph 2 would cause. It was also suggested that draft paragraph 2 was inconsistent with the burden of proof regime under draft article 26.

197. In response, strong support was also expressed for retaining the text of draft paragraph 2, at least in square brackets, until the Working Group had decided on what the limitation level in draft paragraph 1 would be. It was pointed out that the low limitation rate of the Hague-Visby Rules might not be considered sufficient in the case of, for example, heavy machinery cargo, which would not be subject to the per package rule, but would rather benefit from the higher per kilogram rates of the other transport conventions.

198. Views were also expressed regarding what aspects the text should contain, if it were kept. Amongst those that favoured retaining the text of draft paragraph 2, at least in square brackets, there was a preference expressed for Variant A of the draft provision as being more clearly drafted. In terms of the phrase “[or national law]”, there was support both for its retention and its deletion.

199. Further, there was support in the Working Group for the view that, in spite of the arguments for and against retaining draft paragraph 2, the clearest solution to the problem would be to have a suitable limitation on liability in paragraph 1 of draft article 62 apply in the case of all non-localized damage to goods. In such a situation, there was support in the Working Group for the view that draft paragraph 2 could be deleted. In light of that view, it was suggested that draft paragraph 2 should be retained in square brackets pending a decision on paragraph 1 of draft article 62. However, the Working Group was also reminded that for some, the compromise reached regarding the disposition of the phrase “or national law” in

draft article 26 (1) was closely tied to the disposition of draft article 62 (2), particularly with respect to deletion of the phrases "or national law", and it was suggested that draft article 26 (1) should also be placed in square brackets pending the disposition of draft article 62 (2).

*Conclusions reached by the Working Group regarding paragraph 2 of draft article 62*

200. The Working Group recognized the broadly prevailing preference for the deletion of draft article 62 (2) but decided to retain the text in square brackets as it appeared in A/CN.9/WG.III/WP.81.

*Paragraph 3 of draft article 26*

201. The Working Group next considered the text of paragraph 3 of draft article 26 as found in A/CN.9/WG.III/WP.81. It was observed that draft paragraph 3 was intended to clarify that no deviation could be made from draft article 26 except by choice of law, and that notwithstanding paragraph 1 of draft article 26, the normal liability rules of the draft convention would continue to apply. While there was some doubt regarding the necessity of including a provision such as paragraph 3, support was expressed for the additional clarity that it lent the application of the general liability rules in the draft convention.

*"maritime performing party"*

202. A question was raised regarding whether it was necessary to refer to the maritime performing party in the text of draft paragraph 3, since the focus of draft article 26 was on the contract of carriage, and should thus perhaps be limited to a reference to the carrier. Some doubt was expressed regarding this view, however, and it was agreed that the concern regarding the inclusion of the maritime performing party would be noted.

*Conclusions reached by the Working Group regarding paragraph 3*

203. The Working Group agreed that:

- The square brackets around the text of draft paragraph 3 should be deleted and the text of the provision retained; and
- The Secretariat examine the need for referring to the maritime performing party in the draft paragraph and make proposals to the Working Group in due course.

**Draft article 84. International conventions governing the carriage of goods by air**

204. In keeping with its discussion of matters involving the relationship of the draft convention with other transport conventions as determined by the operation of draft article 26, the Working Group next considered a provision that had been added to the text of the draft convention following its most recent consideration of those issues during its eighteenth session (see A/CN.9/616, paras. 216 to 235). It was recalled that at that session, the Working Group had requested that a provision be proposed in the draft convention in order to ensure that it would not conflict with the Montreal Convention (see A/CN.9/616, paras. 225 and 234 to 235). Draft

article 84, as it appeared in A/CN.9/WG.III/WP.81 was intended to respond to that request.

205. To the extent that conventions such as the CMR also contained a certain multimodal dimension, the question was raised whether other unimodal transport conventions in addition to the Montreal and Warsaw Conventions should be mentioned in the provision in order to ensure that conflicts were not encountered with those conventions. In response, it was noted that the Working Group had considered the issue at its eighteenth session, and that it had decided to include in the draft convention text like that found in draft article 84 only with respect to the Montreal and Warsaw Conventions, which were unique in their intention to include multimodal transport to such an extent that a conflict between those conventions and the draft convention was inevitable. There was support for retaining draft article 84 as it appeared in the text.

*Conclusions reached by the Working Group regarding draft article 84*

206. The Working Group was in agreement that draft article 84 should be approved as drafted.

## Chapter 8 – Obligations of the shipper to the carrier

### Draft article 27. Delivery for carriage

207. The Working Group was reminded that its most recent consideration of draft article 27 on delivery for carriage was at its sixteenth session (see A/CN.9/591, paras. 109 to 120). The Working Group proceeded to consider draft article 27 as contained in A/CN.9/WG.III/WP.81.

### Paragraph 1

208. The Working Group was in agreement that draft paragraph 1 should be approved as drafted.

### Paragraph 2

209. Although there was some support for the deletion of the provision, there was general agreement in the Working Group that draft paragraph 2 should be retained in the text of the draft convention and the square brackets around it removed.

210. It was indicated that reference was made in draft article 14 (2) to parties other than the shipper, such as the person referred to in article 34, the controlling party, and the consignee, and it was suggested that, in addition to the shipper's obligation, there should also be an obligation in paragraph 2 on those parties to properly and carefully carry out such tasks as they are performed. In any event, it was noted that all of the tasks set out in paragraph 2 were unlikely to be performed by the shipper, such as discharge, and it was suggested that there should be alignment between the wording of draft article 14 (2) and paragraph 2. One remedy suggested was that a phrase be added along the lines of "tasks that the shipper performs or causes to be performed". It was further indicated that draft article 34 (1) on the liability of the shipper for other persons was also unclear, which added to the problem. In that regard, it was suggested that if draft article 34 (1) included the shipper's liability for

the consignee and the controlling party, paragraph 2 could remain the same, but that if draft article 34 (1) did not include the consignee and the controlling party, those parties should be included in draft paragraph 2. There was support both for that view and for the view that the draft provision should remain as drafted and should be limited to the shipper's obligations, since draft article 14 (2) referred to an agreement between the shipper and the carrier for the performance of those tasks by a person other than the carrier, and it was proper that any liability that might arise in the performance of those tasks should lie with the shipper.

211. The view was expressed that the wording of draft paragraph 2 was imprecise in that the entire list of tasks set out therein did not need to be performed properly and carefully by the shipper, but instead only those tasks agreed to pursuant to draft article 14 (2). It was suggested that the list of tasks should be qualified through the addition of the phrase "as agreed" or "in accordance with the agreement". There was support for that suggestion, although other views were expressed that the use of the word "or" made the intention of the draft provision sufficiently clear without any additional text.

*Conclusions reached by the Working Group regarding draft paragraph 2*

212. After discussion, the Working Group decided that:

- The text of draft paragraph 2 should be retained in the draft convention as drafted and the square brackets removed;
- Regard should be had to whether the text of draft paragraph 2 should be aligned with that of draft articles 14 (2) and 34 (1) particularly in terms of the inclusion of the consignee and the controlling party; and
- The text of draft paragraph 2 could be clarified through the addition of a phrase such as "as agreed".

**Paragraph 3**

213. The Working Group was in agreement that draft paragraph 3 should be approved as drafted.

**Draft article 28. Obligations of the shipper and the carrier to provide information and instructions**

214. The Working Group was reminded that its most recent consideration of the previous text on which draft article 28 on the obligations of the shipper and the carrier to provide information and instructions was based was at its seventeenth session (see A/CN.9/594, paras. 175 to 186). The Working Group proceeded to consider draft article 28 as contained in A/CN.9/WG.III/WP.81.

215. It was indicated that the title of the draft article, which in substance concerned mutual cooperation between the carrier and the shipper, was rather close to that of draft article 29, which concerned shipper's obligations, and it was suggested that a different title for draft article 28 might be preferable so as to avoid confusion and to indicate its status as something less than an obligation of the shipper. The Working Group approved the content of draft article 28.

*Conclusions reached by the Working Group regarding draft article 28*

216. After discussion, the Working Group decided that:

- The text of draft article 28 was approved, with any necessary adjustments to the title.

**Draft article 29. Shipper's obligations to provide information, instructions and documents**

217. The Working Group was reminded that its most recent consideration of the previous text on which draft article 29 on the shipper's obligations to provide information, instructions and documents was at its seventeenth session (see A/CN.9/594, paras. 187 to 194). The Working Group proceeded to consider draft article 29 as contained in A/CN.9/WG.III/WP.81.

**Paragraph 1**

218. In reference to footnote 97 of A/CN.9/WG.III/WP.81, the suggestion was made to delete the word "reasonably" as it appeared before the word "necessary" in the chapeau of draft paragraph 1 for the reason that it was said to be redundant. Further, the view was expressed that the obligation to provide information, instructions and documents was an important shipper's obligation that should not in any way be qualified. However, the Working Group was in agreement that the draft paragraph should be approved as drafted.

**Paragraph 2**

219. The Working Group was in agreement that draft paragraph 2 should be approved as drafted.

**Draft article 30. Basis of shipper's liability to the carrier**

**Paragraph 1**

220. The Working Group was reminded that it had most recently considered the basis of shipper's liability to the carrier at its seventeenth session (see A/CN.9/594, paras. 199-207) and earlier at its sixteenth session (see A/CN.9/591, paras. 136-153).

221. The Working Group was also reminded that it had decided that the liability for breach of the shipper's obligations should be generally fault-based with an ordinary burden of proof (see A/CN.9/591, para. 138). Thus, once a carrier had proved loss or damage was caused by the breach of obligations or negligence of the shipper, the shipper could seek to prove that the loss or damage was not due to its fault.

*Variant A or B*

222. It was noted that Variant A expressly placed the burden of proof on the carrier to show that the loss or damage was caused by the goods or by a breach of the shipper's obligations under draft articles 27 and 29, subparagraphs 1 (a) and (b). By contrast, Variant B focussed on shipper liability for loss, damage or delay caused by the breach of its obligations under draft articles 27 or 29 provided such loss, damage or delay was due to the fault of the shipper. It was further noted that the second

sentence, which relieved the shipper of all or part of its liability if it proved that the cause or one of the causes was not attributable to its fault or to the fault of any person referred to in draft article 34, was intended to apply regardless of which of the two variants was ultimately chosen.

223. Some support was expressed for Variant A for the reason that it appeared to implement the earlier decision of the Working Group that shipper liability should be based on fault and expressly imposed the burden of proof on the carrier.

224. However, support was also expressed for Variant B for the reason that it was a clearer expression that shipper liability was fault-based within a contractual relationship. It was said that Variant B was preferable as it expressly set out the responsibility of the shipper and indicated that the carrier bore the onus of proving that the shipper had breached its obligations and that there was a link of causation between the breach and the loss or damage.

225. Some delegations indicated that Variant B would be acceptable provided that the second sentence of paragraph 1 were deleted. It was said that that sentence created confusion as to the fault-based nature of shipper liability and also cast uncertainty on the principle that the carrier bore the burden of proof in respect of a breach of shipper obligations. Concern was expressed that that sentence appeared to require a shipper to prove that it was not at fault which might lead to the situation that draft article 30 contradicted draft article 17 which dealt with carrier liability. For example, if two or more containers came loose and damaged the ship, the cause of damage could be due to the carrier's failure to load the goods on board correctly or the result of the shipper not having packed the goods in the containers correctly. It was said that, applying the second sentence, if a carrier sued the shipper, the shipper would have the burden of proof to show what occurred on board which would in practice be very difficult. For that reason, it was proposed that shipper liability, contained in draft article 30, should not exactly mirror carrier liability in draft article 17, which merely required that claimants prove that the loss, damage or delay occurred during the period of responsibility of the carrier. It was said that shipper liability should instead be based on fault based on ordinary principles of burden of proof that the shipper was at fault. It was also said that article 30 ought to regulate shipper liability for breach of its obligations due to fault and should not try to regulate who had the burden of proof.

226. In response, it was explained that the second sentence of paragraph 1 was not intended to reverse the burden of proof but rather to set out the position that applied in most legal systems that, once the carrier had discharged its burden of proof in relation to the breach of an obligation by the shipper, the shipper could, except in respect of obligations for which it had strict liability under draft articles 31 and 32, nevertheless bring proof to show that the loss or damage or delay was not attributable to its fault or to the fault of any person referred to in draft article 34.

227. Following that explanation, some support was expressed for variant B provided it was reformulated so as to clarify that the burden of proof lay on the carrier. It was noted that the confusion in respect of burden of proof that applied in draft article 30 had arisen because it had generally been referred to as an ordinary burden of proof as if it involved a case in tort, when in fact the article referred to a contractual cause of action. It was noted that that problem did not arise in some jurisdictions which classified the cause of action for delay as neither a claim in tort

or contract but rather as a statutory claim. Given the potential for misunderstanding, it was said that paragraph 1 of draft article 30 should be reformulated to clarify the nature of the burden of proof and the standards that applied thereto.

228. However, some support was expressed for a reformulation of paragraph 1 to provide a straightforward rule of negligence that the carrier prove the fault of the shipper. It was said that neither variant appeared to make clear that the carrier be required to prove the loss was caused by the shipper and that the shipper could be relieved of liability where it showed that it was not at fault. On that basis, an alternative text to Variants A and B was proposed in the following terms: "Subject to the provisions of articles 31 and 32, the shipper is liable to the carrier for loss or damage caused by the breach of its obligations pursuant to article 27 and article 29, unless the shipper proves that the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34".

229. Some reservations were expressed to that formulation for the reason that it did not appear to emphasize the fault-based liability of the shipper. However, the proposal also received some support for the reasons that: it clarified that the burden of proof was in relation to contractual obligations; it indicated that the liability was fault-based such that the obligations of the shipper under articles 27 and 29 were "best efforts" obligations; and it also clarified that first the carrier was to prove the breach, damage and the causation between the two, and it was then for the shipper to show that it was not at fault.

230. It was suggested that, given that the Working Group had generally reached consensus on the nature of the shipper liability provision, the reformulation could be left to the Secretariat. A proposal was made that such a reformulation could be in the following terms: "Subject to the provisions of articles 31 and 32, the shipper is liable to the carrier for loss or damage proved by the carrier to be the result of a breach by the shipper of its obligations pursuant to articles 27 and 29, unless the shipper proves that the cause or one of the causes of the loss or damage was not attributable to its fault or to the fault of any person referred to in article 34". Some support was expressed for that reformulation although it was suggested that it be modified to indicate that the carrier must not only prove the loss or damage but also that the shipper was in breach of its obligations. It was also suggested that the text might be improved if the questions of fault-based liability and strict liability contained in draft articles 31 and 32 were separated out into two separate sentences.

*Reference to article 31 in second sentence of draft article 30, paragraph 1*

231. A question was raised whether the reference in the second sentence to article 31 was correct. In that respect it was noted that draft article 31 contained an obligation on the shipper to provide accurate information in a timely manner (paragraph 1) and to guarantee the accuracy of that information (paragraph 2). It was said that strict liability that applied under the second sentence of draft article 30, paragraph 1 should apply only to paragraph 2 of draft article 31 and not to paragraph 1, given that the obligation to provide information in a timely manner should be subject to fault-based rather than strict liability. That proposal received some support.

*"was caused by the goods"*

232. It was questioned why it was necessary to include the expression "was caused by the goods" in variant A. Some support was expressed for inclusion of the term regardless which variant was chosen to cover situations where the damage was clearly caused by the goods. However, some concern was expressed that the term might be confusing under some systems of law. It was suggested that the formulation of the text seemed to place an obligation of result and not of means on the shipper. It was said that the inclusion of the term was illogical given that goods did not have a life of their own and could not, of themselves cause loss or damage. It was said that the words were also unnecessary given the obligations on the shipper to, inter alia, load the goods so that they would not cause harm to persons or property as set out in article 27, paragraph 1.

*Delay*

233. Given the Working Group's earlier decision that carrier liability for delay should be limited to situations where the carrier had agreed to deliver the goods within a certain time (see paras. 180 to 184 above) it was suggested that, as a matter of fairness, a shipper should only be liable for delay if it had so agreed. It was said that that approach would create fairness as between the carrier and shipper.

234. It was reiterated that the Working Group had decided to delete all references to delay. However, it was noted that mere deletion of all references to delay might not be sufficient to remove the possibility of delay being implied given that the term "loss" as used in both variants, could be interpreted to encompass loss caused by delay. As well, concern was expressed that deletion of all references to delay should not be interpreted as exonerating the shipper from any cause of action for delay that might arise under applicable national law.

235. To avoid any interpretation of implied liability for delay and ensure the preservation of applicable law on shipper's delay, a proposal was made to add language along the following lines to draft article 30, paragraph 1: "The term 'loss' referred to in this article or in article 31 or article 32 does not include the loss caused by delay. Nothing in this Convention prevents the carrier from claiming shipper liability for delay under the applicable law". It was explained that the first sentence of that proposal was intended to clarify that there was no implied cause of action against the shipper for delay under the draft convention, and the second sentence was intended to clarify that any applicable national law relating to the question of shipper's delay remained unaffected. Some support was expressed for that clarifying text.

236. Nevertheless, it was said that the second sentence of the proposed text might be unnecessary as the applicable law would apply automatically to matters beyond the scope of the draft convention. In that regard, it was noted that obligations existed under the draft convention for which there was no corresponding liability on either the carrier's or the shipper's side, and the liability for those obligations was thus left to applicable law.

*Conclusions reached by the Working Group regarding draft article 30, paragraph 1*

237. After discussions, the Working Group decided that:

- The text of paragraph 1 be reformulated in accordance with its discussions bearing in mind that the liability of the shipper should be fault-based and take account of the contractual relationship between the shipper and the carrier; and
- That references to delay contained in paragraph 1 be deleted with the possible inclusion of text clarifying that the applicable law relating to shipper's delay was not intended to be affected.

**Paragraph 2**

238. Subject to the deletion of the bracketed text "or delay" in accordance with its earlier decision to delete references to delay, the Working Group was in agreement that paragraph 2 should be approved as drafted.

**Revised text of draft article 30**

239. In accordance with its earlier decision to consider the reformulated text of draft article 30, paragraph 1 (see above, paras. 220 to 237), the Working Group continued its deliberations on the following revised text of that provision:

"Article 30. Basis of the shipper's liability to the carrier

"1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations pursuant to articles 27, [and] 29, subparagraphs 1(a) and (b) [and 31, paragraph 1].

"2. Except in respect of loss or damage caused by a breach by the shipper of its obligations under articles 31 [, paragraph 2,] and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34."

240. It was explained that the redrafted text was based on the proposal made to the Working Group (see above, para. 230), along with the general views expressed in the Working Group with respect to draft article 30. It was further explained that the text in square brackets in both paragraphs was intended to indicate only that the references therein should be adjusted according to the necessary clarifications to be made to draft article 31, in order to ensure that the obligation to provide accurate information was made subject to strict liability, and that the obligation to provide timely information was based on fault. It was also noted that a correction should be made to the final line of the draft text of paragraph 1, deleting the reference to "(a) and (b)".

241. Although there was some support for the reinsertion of a reference in paragraph 2 that it was the shipper's responsibility to prove that the cause of the loss or damage was not attributable to its fault, there was broad agreement in the Working Group for the structure and approach of the revised text as drafted.

242. Two drafting suggestions met with approval in the Working Group, and should be examined by the Secretariat:

(a) Paragraph 1 could be redrafted to refer to all of the shipper's liabilities, including both the fault-based liability and strict liability, since the carrier had to prove the same loss or damage and breach of the shipper's obligation in both contexts; and

(b) Paragraph 2 could be restructured to refer first to the general principle, and next to the exception.

*Conclusions reached by the Working Group regarding the revised text*

243. After discussion, the Working Group decided that:

- It was satisfied that the revised text corresponded to its earlier discussion;
- The drafting suggestions as set out in the paragraph above should be considered by the Secretariat; and
- The revised text was otherwise generally acceptable to the Working Group.

**Draft article 31. Information for compilation of contract particulars**

244. The Working Group was reminded that its most recent consideration of the content of draft article 31 on information for the compilation of contract particulars was at its seventeenth session (see A/CN.9/594, paras. 187 to 194). The Working Group proceeded to consider draft article 31 as contained in A/CN.9/WG.III/WP.81.

**Paragraph 1**

245. It was noted that due to a typographical error, draft paragraph 1 made reference only to draft article 37, subparagraphs 1 (a), (b) and (c), and it was agreed that the reference should be corrected to include subparagraph 37 (1)(d). It was further indicated that the draft provision had antecedents in the Hague-Visby and Hamburg Rules, and that it was a particularly important provision since it set out the shipper's obligation that would trigger the strict liability provision in draft article 31 (2). Given the serious consequences of a breach of the obligations set out in draft paragraph 1, it was suggested that the use of the word "including" in the draft paragraph was too broad and that it should be more precise in order to provide the shipper with greater predictability regarding its potential strict liability.

246. The Working Group was in agreement that draft paragraph 1 should be corrected through the addition of a reference to subparagraph 37 (1)(d), but that the provision could be accepted, bearing in mind that an adjustment to the drafting might be necessary in order to render the text more precise, as indicated in the above paragraph.

**Paragraph 2**

247. It was recalled that the Working Group had agreed to delete from the text of the draft convention all instances of shipper's liability for delay (see above, paras. 182 to 184), and that the reference to "delay" in square brackets in the draft paragraph would be deleted accordingly. A question was raised with respect to the fact that draft paragraph 2 set out the liability of the shipper for the accuracy of the information provided to the carrier, but not with respect to its

timeliness. It was explained that, in keeping with the Hague-Visby and the Hamburg Rules, the Working Group had decided at an earlier session to render a failure by the shipper to provide accurate information to be subject to strict liability, while it had intended to make a failure by the shipper to provide timely information subject only to liability based on the fault of the shipper.

248. The Working Group was in agreement that paragraph 2 should be approved as drafted, with the deletion of the reference to "delay."

**Draft article 32. Special rules on dangerous goods**

249. The Working Group was reminded that its most recent consideration of the content of draft article 32 on special rules for dangerous goods was at its seventeenth session (see A/CN.9/594, paras. 195 to 198). The Working Group proceeded to consider draft article 32 as contained in A/CN.9/WG.III/WP.81, bearing in mind that the references to "delay" in square brackets were to be deleted in accordance with the previous decision of the Working Group (see above, paras. 182 to 184).

"[*or become*]"

250. The Working Group first considered the phrase "or become" as it appeared in square brackets in the chapeau of draft article 32. In light of concerns regarding the safety of shipping, it was suggested that the text should be retained in the draft provision and the brackets deleted in order to allow for the widest possible scope for the prevention of accidents involving dangerous goods, such that it would include those that were dangerous prior to and during the voyage. In response, doubts were raised as to whether the inclusion of the phrase "or become" was necessary in light of the inclusion in the chapeau of the phrase "reasonably appear likely to become", which was said to be sufficiently broad to include all risks. Further, it was said that it would be unfair to hold the shipper liable for a failure to inform the carrier about the nature of the goods if they only became dangerous during the voyage, well after they had been delivered by the shipper for carriage. As such, it was thought that the best solution would be to delete the phrase "or become".

251. There was broad support in the Working Group for the deletion of the phrase "or become", however, a suggestion to delete the word "reasonably" as redundant in the phrase "reasonably appear likely to become" was not supported.

"[*the carriage of such goods][such failure to inform*]"

252. It was suggested that the variant "the carriage of such goods" in subparagraph (a) should be retained and the variant "such failure to inform" should be deleted, since the carrier could suffer potentially enormous losses due to the shipper's failure to provide information on the dangerous nature of the goods, such that retention of the phrase offering the broadest protection was warranted. However, that suggestion was not taken up, and there was strong support in the Working Group for the retention of the phrase "such failure to inform" as better addressing the issue of causation of the damage than the phrase "the carriage of such goods", which should be deleted. It was further noted that the phrase "such

failure to inform" was more consistent with the approach taken to causation in draft subparagraph (b).

*Conclusions reached by the Working Group regarding draft article 32*

253. After discussion, the Working Group decided that:

- The phrase "or becomes" in the chapeau of draft article 32 should be deleted along with the square brackets surrounding it;
- References to the shipper's liability for delay should be deleted and the text adjusted accordingly;
- The phrase "such failure to inform" should be retained in the text and the square brackets surrounding it deleted, and the phrase "the carriage of such goods" should be deleted along with the square brackets surrounding it; and
- The text of draft article 32 was otherwise accepted by the Working Group.

**Draft article 33. Assumption of the shipper's rights and obligations by the documentary shipper**

254. The Working Group was reminded that its most recent consideration of the content of draft article 33 on the assumption of the shipper's rights and obligations by the documentary shipper was at its sixteenth session (see A/CN.9/591, paras. 171 to 175). The Working Group proceeded to consider draft article 33 as contained in A/CN.9/WG.III/WP.81.

255. It was observed that the definition of "documentary shipper" as set out in paragraph 10 of draft article 1 had been created from the first sentence of the previous version of the draft provision as found in A/CN.9/WG.III/WP.56.

256. The Working Group agreed that draft articles 1 (10) and 33 should be approved as drafted.

**Draft article 34. Liability of the shipper for other persons**

257. The Working Group was reminded that its most recent consideration of the content of draft article 34 on the liability of the shipper for other persons was at its sixteenth session (see A/CN.9/591, paras. 176 to 180). The Working Group proceeded to consider draft article 34 as contained in A/CN.9/WG.III/WP.81.

**Paragraph 1**

258. It was suggested that the bracketed text in draft paragraph 1 should be retained and the brackets surrounding it deleted, since it was thought that the shipper should not be held responsible for the actions of the carrier. While it was questioned whether the text in square brackets was necessary, it was agreed that, if it provided clarification of the draft provision, its inclusion was acceptable. There was broad support for the retention of the text in square brackets. In addition, the Working Group requested the Secretariat to address the drafting problem raised during the consideration of draft articles 14 (2), 27 (2) and 17 (3)(h) (see above, para. 157), which should be rendered consistent with draft article 34 (1) with regard to whether the shipper was responsible for the acts and omissions of the controlling party and the consignee.

**Paragraph 2**

259. The Working Group agreed to delete draft paragraph 2, based on its earlier decision to delete draft article 18 (2) (see above, para. 78).

*Conclusions reached by the Working Group regarding draft article 34*

260. After discussion, the Working Group decided that:

- The phrase in square brackets in draft article 34 (1) should be retained and the square brackets surrounding it should be deleted;
- The Secretariat was requested to make the necessary adjustments to draft articles 14 (2), 27 (2), 17 (3)(h) and 34 in order to render consistent the treatment of the shipper's responsibility for the acts of the consignee and the controlling party; and
- Draft article 34 (2) should be deleted.

**Draft article 35. Cessation of shipper's liability**

261. The Working Group was reminded that its most recent consideration of the content of draft article 35 regarding the cessation of the shipper's liability was at its sixteenth session (see A/CN.9/591, paras. 181 to 183). The Working Group proceeded to consider draft article 35 as contained in A/CN.9/WG.III/WP.81.

262. It was noted that the reference in subparagraph (a) should be corrected to read "article 33" rather than "article 35", and that given the defined term "documentary shipper" in draft article 1 (10), that term should be used instead of the reference to "a person referred to in article 33". In addition, the Secretariat was requested to consider whether the term "documentary shipper" could also be substituted for the phrase in the chapeau of the draft provision "any other person identified in the contract particulars as the shipper", and whether any adjustment should be made to the title of the draft article in terms of adding the documentary shipper. In addition, it was suggested that the term "void" should be used instead of "not valid" in the chapeau, and that draft subparagraph (c) should be retained in square brackets until the Working Group had made its final decision regarding chapter 12 on transfer of rights.

*Conclusions reached by the Working Group regarding draft article 35*

263. After discussion, the Working Group decided that:

- The reference to "article 35" should be corrected to "article 33", and the term "documentary shipper" as defined in draft article 1 (10) should be used in subparagraph (a) and possibly in the chapeau;
- Consideration should be given to changing the word "not valid" to "void"; and
- Draft article 35 (c) should be retained in square brackets pending a decision by the Working Group on chapter 12.

## Chapter 9 – Transport documents and electronic transport records

264. The Working Group was reminded that its most recent consideration of draft chapter 9 on transport documents and electronic transport records had commenced at its seventeenth session (see A/CN.9/594, paras. 216 to 233) and had continued at its eighteenth session (see A/CN.9/616, paras. 9 to 82). It was also recalled that the most recent complete consideration of the topic by the Working Group had taken place during its eleventh session (see A/CN.9/526, paras. 24-61), and that a written proposal regarding the identity of the carrier in then draft article 40 (3) had been submitted for the consideration of the Working Group for its eighteenth session (see A/CN.9/WG.III/WP.79). The consideration by the Working Group of the provisions of chapter 9 at the present session was based on the text as set out in A/CN.9/WG.III/WP.81.

265. The Working Group was reminded that the substantive articles contained in draft chapter 9 were closely related to a number of definitions, including those contained in subparagraphs 16, 17, 18, 20, 21, 22 and 23 of draft article 1.

### Draft article 36. Issuance of the transport document or the electronic record

266. The Working Group noted that draft article 36 had been amended as agreed by the Working Group at its seventeenth session (A/CN.9/594, paras. 223 and 224).

267. Support was expressed for draft article 36 as drafted. It was noted that subparagraph (b) entitled the shipper to obtain from the carrier either a negotiable or non-negotiable transport document but that the latter part of subparagraph (b) did not entitle the shipper to obtain a negotiable transport document if the shipper and carrier had agreed not to use a negotiable transport document or a negotiable electronic transport document. A clarification was sought as to whether a shipper could nevertheless obtain a non-negotiable transport document or non-negotiable electronic transport document in that circumstance. It was agreed that such was the intention of subparagraph (b) and if that was not clear then the text should be clarified. It was suggested that the subparagraph could be restructured so that the exception to the principle which was currently contained in the chapeau could appear after the principle which was stated in subparagraphs (a) and (b).

*Conclusions reached by the Working Group regarding draft article 36*

268. The Working Group decided that, subject to the proposed drafting suggestions, the text in draft article 36 as found in A/CN.9/WG.III/WP.81 should be approved.

### Draft article 37. Contract particulars

269. The Working Group took note that draft article 37 had been redrafted as agreed by the Working Group at its seventeenth session (A/CN.9/594, paras. 225 and 233).

### Paragraph 1

270. The Working Group considered paragraph 1 as contained in A/CN.9/WG.III/WP.81 and a proposal in respect of subparagraph (1) (a) of that draft article as contained in A/CN.9/WG.III/WP.86.

271. It was noted that subparagraph 1 (a) obliged the carrier to include a "description of the goods" as furnished by the shipper and that the draft convention contained no limits as to the amount of information that could be provided by the shipper. In light of the increasing tendency of shippers to provide lengthy and detailed technical descriptions of goods for inclusion in the transport document particularly since the use of computers had facilitated such lengthy descriptions, a proposal was made to introduce a limit as to the length, nature and degree of detail of the information the shipper might seek to include in the transport document. It was noted that without such a limitation, a carrier would be obliged to perform a reasonable check of all information furnished by the shipper which was physically practicable and commercially reasonable to check in accordance with draft article 41, subparagraph 2 (a). As well, it was noted that as the description of goods would often be transferred to the cargo manifest, overly lengthy descriptions could overburden customs and security authorities as well as banks. To address that concern it was proposed to amend subparagraph 1 (a) so that it read as follows: "a description in general terms of the goods". Support was expressed for that proposal given that it was based on the wording of subparagraph 1 (a) of article 15 of the Hamburg Rules.

272. However, a concern was expressed that the reference to "in general terms" might be too vague and an amended proposal was made to include wording along the following lines: "a description as appropriate for the transport" to cover situations such as where import restrictions applied in respect of certain goods and to provide sufficient information, particularly in relation to dangerous goods. Support was expressed for that proposal and it was suggested that the word "relevant" might be substituted for, or included in addition to, the word "appropriate".

273. In response, it was said that the proposal was not intended to affect the carrier's right to reject information that did not meet the requirements needed for any customs clearances or relating to security. It was noted that subparagraph 1 (b) of draft article 29 also required the shipper to provide information as reasonably necessary to, inter alia, allow the carrier to comply with the law. Nevertheless, support was expressed for the amended proposal for the reason that it appeared to reflect both a minimum and maximum limit for information that ought to be included.

*Additional particulars*

274. Proposals were made that the list contained in draft article 37, paragraph 1, should also refer to the consignee, the date of delivery, where it had been agreed upon, the name of the vessel, the loading and unloading ports and an indication of whether the goods were of a dangerous nature. In response, it was said that the list of contract particulars contained in article 37 had already been decided upon by the Working Group and should not be reconsidered without adequate consensus in that regard. As well, it was noted that requiring inclusion of the name of a vessel, whilst possible in a port-to-port context, would be almost impossible in the door-to-door context when a carrier was often not the ship owner but instead a non-vessel operating carrier. In response, it was said that the intention was not to revisit the issue but rather to align draft article 37 with draft article 31, which related to

information for compilation of contract particulars, and which had been revised at the current session.

*"the transport document or electronic transport document referred to in article 36"*

275. It was noted that paragraphs 1 and 2 of draft article 37 referred to "the transport document or electronic transport document referred to in article 36". It was suggested that that reference should be confined to a transport document or electronic transport document referred to in draft article 36, paragraph (b) only, given that the documents covered by paragraph (a) of that draft article merely evidenced receipt of the goods. There was support for that proposal.

**Paragraph 2**

276. It was suggested that the reference to the "name and address of a person identified as a carrier" could be misinterpreted as permitting the naming of a person other than a contractual carrier as the carrier in the transport document and thereby create a so-called "documentary carrier". It was noted that such had not been the intention of the Working Group. To avoid such difficulties, it was suggested that the text refer simply to the name and address of the carrier, as contained in an earlier version of paragraph 2. It was noted that the text had been changed to follow the language used in UCP 500. However, it was said that the new UCP 600 no longer referred to the "name and address of a person identified as a carrier". The Secretariat was requested to confirm that the language used in subparagraph 2 (a) was consistent with the approach taken in UCP 600.

*Conclusions reached by the Working Group regarding draft article 37*

277. The Working Group agreed:

- To amend paragraph 1 (a) to contain language along the following lines: "a description as appropriate for the transport";
- To review paragraph 2 (a) to ensure its consistency with UCP 600; and
- To approve paragraph 3.

**Draft article 38. Identity of the carrier**

278. The Working Group took note that draft article 38 had been redrafted as agreed by the Working Group at its eighteenth session (A/CN.9/616, para. 28).

**Paragraph 1**

279. A proposal was made to refer to "a carrier" rather than "the carrier" given that the words "the carrier" implied identification already.

280. A proposal was made to delete paragraph 1 as it appeared to act as an absolute presumption by providing that if a carrier was identified by name, then any contrary information in the transport document should have no effect. It was said that the naming of a carrier should merely raise a rebuttable presumption. However, support was expressed for the retention of paragraph 1 given that there might be doubts as to the identity of a carrier, particularly where there was inconsistency between the named carrier on the face of a transport document from that on the reverse of that

document. Some concern was expressed that the words “by name” might be confusing in some language versions. However it was noted that the words “by name” were necessary to indicate that the actual name of the carrier, and not merely a logo or other circumstantial evidence, was the essential element.

**Paragraph 2**

281. A proposal was made to delete both variants of paragraph 2 for the reasons that:

- A presumption that the registered owner of the ship was the carrier was unfair given that the owner might have no knowledge of the contract of carriage;
- The registered owner was often a separate entity from the ship owner;
- A document holder that relied on a document that plainly did not state the name of the carrier and failed to take reasonable measures to ascertain the identity of the carrier did not deserve protection; and
- There was substantial jurisprudence on the identity of the carrier in a number of jurisdictions and the relationship of paragraph 2 to that jurisprudence was unclear.

282. That proposal received some support but it was suggested that, if paragraph 2 were retained, it should be limited in scope to situations where the wrong person was named in the contract of carriage. It was further suggested that, if paragraph 2 were ultimately retained, then paragraph 3 should also be kept to avoid the actual carrier from using the presumption that the registered owner of the ship was the carrier as a defence.

283. It was noted that retention of paragraph 2 was not of great import in those jurisdictions that allowed the shipper to seek the arrest of the ship directly against the registered owner to secure claims against the carrier, but it was suggested that retention of the paragraph was preferable. It was also said that a registered owner could not be said to be totally unrelated to the contract of carriage, since the owner of a ship should be expected to take interest in the purposes for which the ship was used.

284. Some support was expressed for the retention of Variant A, but broad support was expressed for the retention of Variant B as it was consistent with modern shipping practice in its recognition that the registered ship owner might not be the person who entered into the contract of carriage. It was said that Variant B represented a compromise approach that allowed a registered owner to identify the proper carrier and covered situations of registered owners as well as bareboat charterers which was more appropriate to modern practices, particularly in the liner container transport context. As well, it was noted that the rule contained in paragraph 2 was consistent with the new rule that performing parties were jointly liable with carriers given that the registered ship owner was a performing party.

285. Proposals were made to amend Variant B as follows:

- Delete “bareboat” from paragraph 2; and
- For the sake of clarity, delete “in the same manner” and substitute the words “in the same manner as the registered owner of the ship”.

286. Some support was expressed for the addition of the clarifying words "in the same manner as the registered owner of the ship". However, opposition was expressed to deletion of the term "bareboat" given that the bareboat charterer would, in practice, often be treated in the same way as a ship owner, since it related particularly to a charter for a ship, and should therefore have the same possibilities of rebutting any presumption that were available to the registered owner of the ship. In that respect, it was noted that in simply referring to a "charterer", reference would not necessarily be had to the charterer of a ship, but rather could encompass a voyage charterer or a time charterer, who only contracted for the services of the ship, and could thus not be considered akin to a registered owner for the purposes of identifying the carrier.

**Paragraph 3**

287. It was suggested that the purpose of paragraph 3 was better expressed in footnote 122 of A/CN.9/WG.III/WP.81 than the text as contained therein. It was agreed to reformulate the paragraph based on that footnote.

*Conclusions reached by the Working Group regarding draft article 38*

288. The Working Group:

- Accepted paragraph 1 as drafted;
- Accepted Variant B of paragraph 2 and referred the text to the Secretariat to consider whether or not the text should better clarify that the bareboat charterer might defeat the presumption of being the carrier in the same manner that the registered owner might defeat such a presumption; and
- Requested that paragraph 3 be redrafted based on the language used in footnote 122 of A/CN.9/WG.III/WP.81.

**Draft article 39. Signature**

**Paragraph 1**

289. The Working Group noted that draft article 39 had been redrafted as agreed by the Working Group when it has last discussed the draft provision at its eighteenth session (A/CN.9/616, para. 12 and 13) by substituting the phrase "by or on behalf of the carrier" for the phrase "by the carrier or a person having authority from the carrier".

290. It was noted that, as drafted, paragraph 1 might not conform with the rules relating to transport documents contained in the UCP 600, which provided that any signature by an agent indicated that it was signing for or on behalf of the carrier. It was suggested that paragraph 1 be amended so as to conform with the language contained in UCP 600. A further proposal was made that the words "or a person duly mandated by the latter" should replace the words "or a person acting on its behalf" so as to clarify that the person was acting within a mandate granted by the carrier.

291. In reply, it was said that the UCP 600 had a different purpose to the draft convention, in that the former was concerned with facilitating the system of documentary credits, while the latter set out legal rules with legal consequences. It was recalled that, while the insertion of additional text might clarify paragraph 1,

the Working Group had already agreed to leave issues of agency to the applicable law, rather than dealing with them in the draft convention. The Working Group agreed to accept paragraph 1 as drafted.

**Paragraph 2**

292. The Working Group was in agreement that draft paragraph 2 should be approved as drafted.

*Conclusions reached by the Working Group regarding draft article 39*

293. The Working Group accepted draft article 39 as drafted.

**Draft article 40. Deficiencies in the contract particulars**

294. The Working Group was reminded that its most recent consideration of draft article 40 on deficiencies in the contract particulars was at its eighteenth session (see A/CN.9/616, paras. 10 to 13). The Working Group proceeded to consider draft article 40 as contained in A/CN.9/WG.III/WP.81.

295. Subject to a few adjustments to the text of the provision in different language versions, the Working Group accepted paragraphs 1, 2 and 3 of draft article 40 as drafted.

**Proposed paragraph 4 of draft article 40**

296. As indicated in footnote 129 of A/CN.9/WG.III/WP.81, the Working Group had in a previous session agreed to add to draft article 37 (2) a new subparagraph (d) requiring the number of original negotiable transport documents to be included in the contract particulars when more than one original was issued. It was noted that the draft convention did not state the legal effect of a failure to include that information in the contract particulars. It was proposed that, in order to provide the holder of one of the original negotiable transport documents and the carrier with some certainty, the legal effect of such a failure should be that when there was no indication of the number of originals in the contract particulars, the negotiable transport document would be deemed to have stated that only one original was issued. It was suggested that such a provision should be included in the text as draft paragraph 4 of article 40. There was support in the Working Group for that suggestion.

*Conclusions reached by the Working Group regarding draft article 40*

297. The Working Group accepted draft article 40 as drafted, and requested the Secretariat to draft a new paragraph 4 in keeping with the approach discussed in the paragraph above.

**Draft article 41. Qualifying the description of the goods in the contract particulars**

298. The Working Group was reminded that its most recent consideration of the content of draft article 41 on the qualifying the description of the goods in the contract particulars was at its eighteenth session (see A/CN.9/616, paras. 29 to 39

and 69 to 73). The Working Group proceeded to consider draft article 41 as contained in A/CN.9/WG.III/WP.81.

299. Some drafting suggestions were made with respect to draft article 41. A suggestion was made to adjust the title of the draft article so that it referred to "information" rather than to "description", which seemed to limit it to draft article 37 (1)(a) only. In paragraph 41 (1)(a), it was suggested that the word "materially" before the phrase "false or misleading" could be deleted as redundant. An additional suggestion was made to coordinate the text of paragraphs 1, 2 and 3, which all used the term "qualify", while paragraph 1 referred to a type of correction, and paragraphs 2 and 3 referred more to reservations. Finally, it was suggested that in draft paragraphs 1 (b) and 2 (b), reference was made to the accuracy of the information, for which the shipper was held strictly liable under the draft convention, and that in light of that fact, it might be preferable to use the phrase "the carrier has reasonable grounds to believe" rather than "the carrier reasonably considers."

*Conclusions reached by the Working Group regarding draft article 41*

300. The Working Group accepted draft article 41 as drafted, subject to adjustments made to the text by the Secretariat in light of the suggestions in the paragraph above.

**Draft article 42. Evidentiary effect of the contract particulars**

301. The Working Group was reminded that its most recent consideration of the content of draft article 42 on the evidentiary effect of the contract particulars was at its eighteenth session (see A/CN.9/616, paras. 45 to 68). The Working Group was reminded that draft article 42 as contained in A/CN.9/WG.III/WP.81 was the product of extensive debate and compromise at its eighteenth session, and a preference was expressed to postpone the third reading of that provision until the twentieth session of the Working Group, in order to accord it sufficient time for thorough discussion of subparagraph (a), which had since been included in the draft article.

*Conclusions reached by the Working Group regarding draft article 42*

302. The Working Group agreed to postpone the third reading of draft article 42 until its twentieth session.

**Draft article 43. "Freight prepaid"**

303. The Working Group was reminded that its most recent consideration of draft article 43 on "freight prepaid" was at its eighteenth session (see A/CN.9/616, paras. 74 to 82). The Working Group proceeded to consider draft article 43 as contained in A/CN.9/WG.III/WP.81. A suggestion to insert a good faith requirement was rejected on the grounds that such a requirement was self-evident.

*Conclusions reached by the Working Group regarding draft article 43*

304. The Working Group accepted draft article 43 as drafted.

# III. Other business

## Planning of future work

305. The Working Group agreed to continue with its third reading, commencing with draft article 42, and continuing with chapter 10 of the draft convention, at its twentieth session (Vienna, 15 to 25 October, 2007). The Working Group also took note that its twenty-first session was scheduled for 7 to 18 April 2008, but that the scheduling of both sessions was subject to the approval of the Commission at its fortieth session in 2007.