

UNITED NATIONS
CONFERENCE ON
THE LIABILITY OF OPERATORS
OF TRANSPORT TERMINALS
IN INTERNATIONAL TRADE

Vienna, 2-19 April 1991

OFFICIAL RECORDS

*Documents of the Conference
and
Summary Records of the Plenary Meetings
and of the Meetings
of the Main Committees*



UNITED NATIONS

New York, 1993

INTRODUCTORY NOTE

The Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade contains the preliminary documents, the summary records of the plenary meetings and the meetings of the Main Committees, the Final Act and the Convention; it also contains a complete index of the documents relevant to the proceedings of the Conference.

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The symbols of the United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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The summary records contained in this volume were originally circulated as documents A/CONF.152/SR.1-9, A/CONF.152/C.1/SR.1-18 and A/CONF.152/C.2/SR.1-4. They include the corrections to the provisional summary records that were requested by the delegations and such editorial changes as were considered necessary.

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In this publication, country names and designations are those in use when the original documents were first published.

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CONTENTS

	<u>Page</u>
Excerpts from the General Assembly resolution convening the Conference.....	1
Officers of the Conference and its committees.....	2
Agenda.....	3
Rules of procedure.....	4
Index to the documents of the Conference.....	14

Part I

DOCUMENTS OF THE CONFERENCE

Proposals, reports and other documents

A. Report of the Credentials Committee (A/CONF.152/8/Rev.1*).....	23
B. Background to the draft Convention on the Liability of Operators of Transport Terminals in International Trade (A/CONF.152/6).....	24
C. Text of the draft Convention on the Liability of Operators of Transport Terminals in International Trade approved by the United Nations Commission on International Trade Law (A/CONF.152/5).....	25
D. Compilation of comments and proposals by Governments and international organizations on the draft Convention on the Liability of Operators of Transport Terminals in International Trade (A/CONF.152/7 and Add.1 and 2).....	32
E. Report of the First Committee (A/CONF.152/9).....	54
F. Report of the Second Committee (A/CONF.152/10 and Add.1).....	79
G. Draft articles 1 to 16 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade as adopted by the First Committee (A/CONF.152/11).....	86
H. Draft articles 17 to 25 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade as prepared by the Drafting Committee and approved by the Second Committee (A/CONF.152/12).....	90
I. Draft articles of the draft Convention on the Liability of Operators of Transport Terminals in International Trade prepared or approved by the Drafting Committee (A/CONF.152/DC/L.2-6).....	93
1. Changes in articles 1, 3, 4, 5 and 6 adopted by the First Committee through 8 April 1991 (A/CONF.152/DC/L.2).....	93
2. Articles 1, 3, 4 and 5 (A/CONF.152/DC/L.3).....	93
3. Changes in articles 18, 19, 21, 23 and 25 adopted by the Second Committee (A/CONF.152/DC/L.4).....	95
4. Article 4, 6 to 9, 17, 18, 21 to 25 (A/CONF.152/DC/L.5).....	95
5. Changes in articles 19 to 21 adopted by the Second Committee (A/CONF.152/DC/L.6).....	99
J. Proposals and amendments submitted to the plenary Conference (A/CONF.152/L.2-7).....	99
Final Act of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade (A/CONF.152/13).....	101

Part II

SUMMARY RECORDS

Summary records of the plenary meetings

	<u>Page</u>
<u>1st plenary meeting</u>	
<u>Tuesday, 2 April 1991, at 10.30 a.m.</u>	
ITEM 1 OF THE PROVISIONAL AGENDA	
Opening of the Conference.....	113
ITEM 2 OF THE PROVISIONAL AGENDA	
Election of the President.....	113
<u>2nd plenary meeting</u>	
<u>Tuesday, 2 April 1991, at 2.30 p.m.</u>	
ITEM 3 OF THE PROVISIONAL AGENDA	
Adoption of the agenda.....	114
AGENDA ITEM 4	
Adoption of the rules of procedure.....	114
AGENDA ITEM 5	
Election of Vice-Presidents of the Conference and of a chairman of each of the main committees.....	114
AGENDA ITEM 6	
Credentials of representatives to the Conference: (a) Appointment of the Credentials Committee.....	114
AGENDA ITEM 8	
Organization of work.....	114
AGENDA ITEM 9	
Consideration of the question of the liability of operators of transport terminals in international trade in accordance with General Assembly resolution 44/33 of 4 December 1989.....	114
<u>3rd plenary meeting</u>	
<u>Wednesday, 3 April 1991, at 9.30 a.m.</u>	
AGENDA ITEM 5	
Election of Vice-Presidents of the Conference and of a chairman of each of the main committees (<u>continued</u>).....	115
<u>4th plenary meeting</u>	
<u>Friday, 5 April 1991, at 4.55 p.m.</u>	
AGENDA ITEM 5	
Election of Vice-Presidents of the Conference and of a chairman of each of the main committees (<u>continued</u>).....	116
AGENDA ITEM 7	
Appointment of members of the Drafting Committee.....	116

AGENDA ITEM 6

Credentials of representatives to the Conference (continued)

(a) Appointment of the Credentials Committee (continued)..... 116

5th plenary meeting

Monday, 8 April 1991, at 4.35 p.m.

AGENDA ITEM 7

Appointment of members of the Drafting Committee (concluded)..... 117

AGENDA ITEM 6

Credentials of representatives to the Conference (continued)

(a) Appointment of the Credentials Committee (concluded)..... 117

AGENDA ITEM 5

Election of Vice-Presidents of the Conference and of a chairman of each of the main committees (concluded)..... 117

6th plenary meeting

Tuesday, 16 April 1991, at 9.30 a.m.

AGENDA ITEM 9

Consideration of the question of the liability of operators of transport terminals in international trade in accordance with General Assembly resolution 44/33 of 4 December 1989 (continued)..... 117

Draft Convention on the Liability of Operators of Transport Terminals in International Trade:

Title of the Convention..... 118
 Article 1..... 121
 Article 2..... 121
 Article 3..... 121
 Article 4..... 121
 Article 5..... 121
 Article 6..... 121
 Article 7..... 122
 Article 8..... 122

7th plenary meeting

Wednesday, 17 April 1991, at 9.30 a.m.

AGENDA ITEM 9

Consideration of the question of the liability of operators of transport terminals in international trade in accordance with General Assembly resolution 44/33 of 4 December 1989 (continued)..... 122

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued):

Article 9..... 122
 Article 10..... 123
 Article 11..... 124
 Article 12..... 124
 Article 13..... 124
 Article 14..... 124
 Article 15..... 124
 Article 16..... 124

	<u>Page</u>
Article 17.....	124
Article 18.....	124
Article 19.....	124
Article 20.....	124
Article 21.....	124
Article 22.....	126
 <u>8th plenary meeting</u>	
<u>Wednesday, 17 April 1991, at 2.30 p.m.</u>	
AGENDA ITEM 9	
Consideration of the question of the liability of operators of transport terminals in international trade in accordance with General Assembly resolution 44/33 of 4 December 1989 (<u>concluded</u>).....	126
Draft Convention on the Liability of Operators of Transport Terminals in International Trade (<u>concluded</u>):	
Article 22 (<u>concluded</u>).....	126
Article 23.....	127
Article 24.....	127
Article 25.....	127
Preamble.....	127
AGENDA ITEM 10	
Adoption of a convention and other instruments deemed appropriate, and of the Final Act of the Conference.....	129
AGENDA ITEM 6	
Credentials of representatives to the Conference (<u>concluded</u>):	
(b) Report of the Credentials Committee.....	130
AGENDA ITEM 10	
Adoption of a convention and other instruments deemed appropriate, and of the Final Act of the Conference (<u>concluded</u>).....	131
 <u>9th plenary meeting</u>	
<u>Friday, 19 April 1991, at 10.30 a.m.</u>	
AGENDA ITEM 11	
Signature of the Final Act, of the Convention and of other instruments.....	131
AGENDA ITEM 12	
Closure of the Conference.....	131
 <u>Summary records of meetings of the First Committee</u>	
<u>1st meeting</u>	
<u>Wednesday 3 April 1991, at 10 a.m.</u>	
AGENDA ITEM 1	
Adoption of the agenda.....	132
AGENDA ITEM 3	
Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade	
Article 1(a).....	132

2nd meetingWednesday, 3 April 1991, at 2.30 p.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Terminals in International Trade (continued)

Article 1(a) (<u>continued</u>).....	136
Article 1(b).....	137
Article 1(c).....	138

3rd meetingThursday, 4 April 1991, at 9.30 a.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Article 1(d).....	142
Article 1(e) and (f).....	142
Article 1, proposals for new subparagraphs.....	143
Article 1(a) (<u>continued</u>).....	144
Article 1, proposals for new subparagraphs (<u>continued</u>).....	145

4th meetingThursday, 4 April 1991, at 2.30 a.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Article 3.....	146
----------------	-----

AGENDA ITEM 2

Election of a Vice-Chairman and a Rapporteur.....	150
---	-----

5th meetingFriday, 5 April 1991, at 9.30 a.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Proposal for new article.....	150
Article 1, proposals for new subparagraphs (<u>continued</u>).....	151
Article 4.....	151

6th meetingFriday, 5 April 1991, at 2.30 p.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Article 4 (<u>continued</u>).....	154
-------------------------------------	-----

AGENDA ITEM 2

Election of a Vice-Chairman and a Rapporteur (<u>concluded</u>).....	157
--	-----

7th meetingMonday, 8 April 1991, at 9.30 a.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Article 4 (<u>continued</u>).....	157
Article 3 (<u>concluded</u>).....	158
Article 1, proposals for new subparagraphs (<u>continued</u>).....	159
Article 5.....	159

8th meetingMonday, 8 April 1991, at 2.30 p.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Article 5 (<u>continued</u>).....	162
Article 6.....	165

9th meetingTuesday, 9 April 1991, at 9.30 a.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Article 6 (<u>continued</u>).....	167
-------------------------------------	-----

10th meetingTuesday, 9 April 1991, at 2.30 a.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Article 6 (<u>concluded</u>).....	171
New article 6 <u>bis</u>	173

11th meetingWednesday, 10 April 1991, at 9.30 a.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Article 4 (<u>concluded</u>).....	177
Article 1, proposals for new subparagraphs (<u>continued</u>).....	179
Article 7.....	179
Article 8.....	179
Article 9.....	181

12th meeting

Wednesday, 10 April 1991, at 2.30 a.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Article 9 (<u>concluded</u>).....	183
Article 10.....	186

13th meeting

Thursday, 11 April 1991, at 9.30 a.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Article 10 (<u>concluded</u>).....	190
Article 11.....	194

14th meeting

Thursday, 11 April 1991, at 2.30 p.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Article 11 (<u>concluded</u>).....	195
Article 12.....	196
Article 15.....	200
Article 16.....	201

15th meeting

Friday, 12 April 1991, at 9.30 a.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Articles 1 (proposals for new subparagraphs), 2 and 15 (<u>continued</u>).....	201
--	-----

16th meeting

Friday, 12 April 1991, at 2.30 p.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued)

Article 1, 2 and 15 (<u>concluded</u>).....	207
Article 13	208
Article 20.....	209
Proposal for new article.....	209
Article 5 (<u>concluded</u>).....	210
Article 12 (<u>concluded</u>).....	210

17th meetingMonday, 15 April 1991, at 9.30 a.m.

AGENDA ITEM 3

Consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (concluded)

Article 14 211

AGENDA ITEM 4

Consideration of the report of the Drafting Committee to the Committee..... 211

18th meetingWednesday, 17 April 1991, at 9.30 a.m.

AGENDA ITEM 5

Consideration of the report of the Committee to the plenary Conference..... 212

Completion of the Committee's work..... 213

Summary records of meetings of the Second Committee1st meetingMonday, 8 April 1991, at 9.30 a.m.

AGENDA ITEM 1

Adoption of the agenda..... 214

AGENDA ITEM 2

Election of a Vice-Chairman and a Rapporteur..... 214

AGENDA ITEM 3

Consideration of articles 17 to 19, and 21 to 25, of the draft Convention on the Liability of Operators of Transport Terminals in International Trade

Article 17..... 214
 Article 18..... 214
 Article 19..... 214
 Article 22..... 214
 Article 23..... 215
 Article 24..... 215
 Article 25..... 216

2nd meetingWednesday, 10 April 1991, at 9.30 p.m.

AGENDA ITEM 2

Election of a Vice-Chairman and a Rapporteur (concluded)..... 216

AGENDA ITEM 3

Consideration of articles 17 to 19, and 21 to 25, of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (concluded)

Article 19 (concluded)..... 216
 Article 21..... 216
 Closing formula..... 218

3rd meeting

Friday, 12 April 1991, at 9.30 a.m.

AGENDA ITEM 4

Consideration of the report of the Drafting Committee to the Committee 218

AGENDA ITEM 5

Consideration of the report of the Committee to the plenary Conference..... 218

4th meeting

Monday, 15 April 1991, at 11.45 a.m.

AGENDA ITEM 4

Consideration of the report of the Drafting Committee to the Committee (concluded).. 219

AGENDA ITEM 5

Consideration of the report of the Committee to the plenary Conference (concluded).. 219

Completion of the Committee's work..... 219

EXCERPTS FROM THE GENERAL ASSEMBLY RESOLUTION CONVENING THE CONFERENCE*

Resolution 44/33. Report of the United Nations Commission on International Trade Law on the work of its twenty-second session

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it created the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade, as well as its resolution 43/166 of 9 December 1988,

Reaffirming its conviction that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would significantly contribute to universal economic cooperation among all States on a basis of equality, equity and common interest and to the elimination of discrimination in international trade and, thereby, to the well-being of all peoples,

Having considered the report of the United Nations Commission on International Trade Law on the work of its twenty-second session, 1/

Noting that the Commission adopted a draft convention on the liability of operators of transport terminals in international trade 2/ and recommended in the decision in paragraph 225 of its report that the General Assembly should convene an international conference of plenipotentiaries for a duration of three weeks in 1991 to conclude, on the basis of the draft convention, a convention on the liability of operators of transport terminals in international trade,

. . .

4. Expresses its appreciation to the Commission for the valuable work done in preparing a draft convention on the liability of operators of transport terminals in international trade;

5. Decides that an international conference of plenipotentiaries shall be convened at Vienna from 2 to 19 April 1991 to consider the draft convention prepared by the Commission and to embody the results of its work in a convention on the liability of operators of transport terminals in international trade;

6. Requests the Secretary-General:

(a) To invite all States to participate in the conference;

(b) To invite representatives of organizations that have received a standing invitation from the General Assembly to participate in the sessions and the work of all international conferences convened under its auspices in the capacity of observers to participate in the conference in that capacity, in accordance with Assembly resolutions 3237 (XXIX) of 22 November 1974 and 31/152 of 20 December 1976;

(c) To invite representatives of the national liberation movements recognized by the Organization of African Unity in its region to participate in the conference in the capacity of observers in accordance with General Assembly resolution 3280 (XXIX) of 10 December 1974;

(d) To invite the specialized agencies and the International Atomic Energy Agency, as well as interested organs of the United Nations and interested international organizations, to be represented at the conference by observers;

. . .

*Resolution 44/33 was also issued as document A/CONF.152/1.

1/ Official Records of the General Assembly, Forty-fourth Session, Supplement No. 17 (A/44/17).

2/ Ibid., annex I.

OFFICERS OF THE CONFERENCE AND ITS COMMITTEES

President of the Conference

Mr. José María Abascal Zamora (Mexico)

Vice-Presidents of the Conference

The representatives of the following States: Argentina, Australia, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, China, Egypt, Gabon, Indonesia, Iran (Islamic Republic of), Italy, Japan, Morocco, Nigeria, Philippines, Spain, Sweden, Union of Soviet Socialist Republics and Yugoslavia.

First Committee

Chairman: Mr. Jean-Paul Beraudo (France).

Vice-Chairman: Mr. Mahmoud Soliman (Egypt).

Rapporteur: Mr. Abbas Safarian Nematabad (Islamic Republic of Iran).

Second Committee

Chairman: Ms. Jelena Vilus (Yugoslavia).

Vice Chairman: Mr. Ken Fujishita (Japan).

Rapporteur: Ms. Sylvia Strolz (Austria).

Drafting Committee

Chairman: Mr. P.C. Rao (India).

Members: China, Egypt, France, Germany, Guinea, Mexico, Morocco, Nigeria, Philippines, Spain, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America.

Credential Committee

Chairman: Mr. Ross Hornby (Canada).

Members: Argentina, Canada, China, Guinea, Lesotho, Iran (Islamic Republic of), Mexico, Ukrainian Soviet Socialist Republic and United States of America.

Secretariat of the Conference

Mr. Carl-August Fleischhauer, Under-Secretary-General for Legal Affairs, the Legal Counsel, Office of Legal Affairs (Representative of the Secretary-General of the United Nations).

Mr. Eric E. Bergsten, Secretary of UNCITRAL and Chief of the International Trade Law Branch, Office of Legal Affairs (Executive Secretary of the Conference).

Mr. Gerold Herrmann, Senior Legal Officer, International Trade Law Branch, Office of Legal Affairs (Assistant Executive Secretary of the Conference).

Mr. Kwame Opoku, Senior Legal Officer, United Nations Office at Vienna (Secretary of the Credentials Committee).

Mr. Stephen R. Katz, Legal Officer, General Legal Division, Office of Legal Affairs (Secretary of the First Committee).

Mr. Jernej Sekolec, Legal Officer, International Trade Law Branch, Office of Legal Affairs (Assistant Secretary of the Conference).

Mr. Simeon Sahaydachny, Legal Officer, International Trade Law Branch, Office of Legal Affairs (Secretary of the Second Committee).

Mr. R. S. Gabi, Legal Officer, International Trade Law Branch, Office of Legal Affairs (Assistant Secretary of the Conference).

Mr. Muna Ndulo, Legal Officer, International Trade Law Branch, Office of Legal Affairs (Assistant Secretary of the Conference).

Mr. Renaud Sorieul, Legal Officer, International Trade Law Branch, Office of Legal Affairs (Assistant Secretary of the Conference).

AGENDA*

1. Opening of the Conference
2. Election of the President
3. Adoption of the agenda
4. Adoption of the rules of procedure
5. Election of Vice-Presidents of the Conference and of a chairman of each of the main committees
6. Credentials of representatives to the Conference
 - (a) Appointment of the Credentials Committee
 - (b) Report of the Credentials Committee
7. Appointment of members of the Drafting Committee
8. Organization of work
9. Consideration of the question of the liability of operators of transport terminals in international trade in accordance with General Assembly resolution 44/33 of 4 December 1989
10. Adoption of a convention and other instruments deemed appropriate, and of the Final Act of the Conference
11. Signature of the Final Act, of the Convention and of other instruments
12. Closure of the Conference

*As adopted by the Conference at its 2nd plenary meeting.

RULES OF PROCEDURE*

I. REPRESENTATION AND CREDENTIALS

Composition of delegations

Rule 1

The delegation of each State participating in the Conference shall consist of a head of delegation and such other representatives, alternate representatives and advisers as may be required.

Alternates and advisers

Rule 2

The head of delegation may designate an alternate representative or an adviser to act as a representative.

Credentials

Rule 3

The credentials of heads of delegations and the names of representatives, alternate representatives and advisers shall be submitted to the Executive Secretary of the Conference if possible not later than 24 hours after the opening of the Conference, and may be submitted to the Executive Secretary prior to the opening of the Conference. Any subsequent change in the composition of delegations shall also be submitted to the Executive Secretary. The credentials shall be issued either by the Head of State or Government or by the Minister for Foreign Affairs.

Credentials Committee

Rule 4

A Credentials Committee of nine members shall be appointed at the beginning of the Conference. Its composition shall be based on that of the Credentials Committee of the General Assembly of the United Nations at its forty-fifth session. It shall examine the credentials of delegations and report to the Conference without delay.

Provisional participation in the Conference

Rule 5

Pending a decision of the Conference upon their credentials, heads of delegations shall be entitled to participate provisionally in the Conference.

II. OFFICERS

Elections

Rule 6

The Conference shall elect from among the heads of delegations or representatives of participating States the following officers: a President and twenty-two Vice-Presidents, a Chairman for each of the main committees provided for in rule 46 and the Chairman of the Drafting Committee provided for in rule 47. These officers shall be elected on the basis of ensuring the representative character of the General Committee. The Conference may also elect such other officers as it deems necessary for the performance of its functions.

General powers of the President

Rule 7

1. In addition to exercising the powers conferred upon him or her elsewhere by these rules, the President shall preside at the plenary meetings of the Conference, declare the opening and closing of each meeting, direct the discussion, ensure observance of these rules, accord the right to speak, promote general agreement, inform the General Committee on efforts to reach general agreement, put questions to the vote and announce decisions. The President shall rule on points of order and, subject to these rules, shall have complete control of the proceedings and over the maintenance of order thereat. The President may propose to the Conference the closure of the list of speakers, a limitation on the time to be allowed to speakers and on the number of times each

*As adopted by the Conference at its 2nd plenary meeting. The text is the same as the provisional rules of procedure (A/CONF.152/3), except for some modifications adopted at the 4th plenary meeting.

representative may speak on a question, the adjournment or the closure of the debate and the suspension or the adjournment of a meeting.

2. The President, in the exercise of his or her functions, remains under the authority of the Conference.

Acting President

Rule 8

1. If the President finds it necessary to be absent from a meeting or any part thereof, he or she shall designate a Vice-President to take his or her place.

2. A Vice-President acting as President shall have the powers and duties of the President.

Replacement of the President

Rule 9

If the President is unable to perform his or her functions, a new President shall be elected.

The President shall not vote

Rule 10

The President, or a Vice-President acting as President, shall not vote in the Conference, but shall designate another member of his or her delegation to vote in his or her place.

III. GENERAL COMMITTEE

Composition

Rule 11

There shall be a General Committee consisting of 26 members, which shall comprise the President and Vice-Presidents of the Conference, the Chairmen of the main committees and the Chairman of the Drafting Committee. The President of the Conference or, in his or her absence, one of the Vice-Presidents designated by him or her shall serve as Chairman of the General Committee.

Substitute members

Rule 12

If the President or a Vice-President of the Conference is to be absent during a meeting of the General Committee, he or she may designate a member of his or her delegation to sit and vote in the Committee. In case of absence, the Chairman of a main committee shall designate the Vice-Chairman of that Committee as his or her substitute, and the Chairman of the Drafting Committee shall designate a member of the Drafting Committee. When serving on the General Committee, the Vice-Chairman of a main committee or member of the Drafting Committee shall not have the right to vote if he or she is of the same delegation as another member of the General Committee.

Functions

Rule 13

The General Committee shall assist the President in the general conduct of the business of the Conference and, subject to the decisions of the Conference, shall ensure the coordination of its work.

IV. SECRETARIAT

Duties of the Secretary-General

Rule 14

1. The Secretary-General of the United Nations shall be the Secretary-General of the Conference. He, or his representative, shall act in that capacity in all meetings of the Conference and its committees.

2. The Secretary-General shall appoint an Executive Secretary of the Conference and shall provide and direct the staff required by the Conference and its committees.

Duties of the secretariat

Rule 15

The secretariat of the Conference shall, in accordance with these rules:

- (a) Interpret speeches made at meetings;
- (b) Receive, translate, reproduce and distribute the documents of the Conference;
- (c) Publish and circulate the official documents of the Conference;
- (d) Prepare and circulate records of public meetings;
- (e) Make and arrange for the keeping of sound recordings of meetings;
- (f) Arrange for the custody and preservation of the documents of the Conference in the archives of the United Nations;
- (g) Generally perform all other work that the Conference may require.

Statements by the secretariat

Rule 16

In the exercise of the duties referred to in rules 14 and 15, the Secretary-General or any other member of the staff designated for that purpose may, at any time, make either oral or written statements concerning any question under consideration.

V. OPENING OF THE CONFERENCE

Temporary President

Rule 17

The Secretary-General of the United Nations or, in his absence, his representative shall open the first meeting of the Conference and preside until the Conference has elected its President.

Decisions concerning organization

Rule 18

The Conference shall, to the extent possible, at its first meeting:

- (a) adopt its rules of procedure;
- (b) elect its officers and constitute its subsidiary organs;
- (c) adopt its agenda, the draft of which shall, until such adoption, be the provisional agenda of the Conference; and
- (d) decide on the organization of its work.

VI. CONDUCT OF BUSINESS

Quorum

Rule 19

The President may declare a meeting open and permit the debate to proceed when representatives of at least one third of the States participating in the Conference are present. The presence of representatives of a majority of the States so participating shall be required for any decision to be taken.

Speeches

Rule 20

1. No one may address the Conference without having previously obtained the permission of the President. Subject to rules 21, 22, 24, 25 and 27, the President shall call upon speakers in the order in which they signify their desire to speak. The Secretariat shall be in charge of drawing up a list of such speakers. The President may call a speaker to order if his or her remarks are not relevant to the subject under discussion.

2. The Conference may limit the time allowed to each speaker and the number of times each representative may speak on a question. Before a decision is taken, two representatives may speak in favour of, and two against, a proposal to set such limits. When the debate is limited and a speaker exceeds the allotted time, the President shall call him or her to order without delay.

Precedence

Rule 21

The chairman or rapporteur of a committee, or the representative of a sub-committee or working group, may be accorded precedence for the purpose of explaining the conclusions arrived at by his or her committee, sub-committee or working group.

Points of order

Rule 22

During the discussion of any matter, a representative may at any time raise a point of order, which shall be decided immediately by the President in accordance with these rules. A representative may appeal against the ruling of the President. The appeal shall be put to the vote immediately, and the President's ruling shall stand unless overruled by a majority of the representatives present and voting. A representative may not, in raising a point of order, speak on the substance of the matter under discussion.

Closing of list of speakers

Rule 23

During the course of a debate the President may announce the list of speakers and, with the consent of the Conference, declare the list closed.

Right of reply

Rule 24

1. Notwithstanding rule 23, the President shall accord the right of reply to a representative of any State participating in the Conference who requests it. Any other representative may be granted the opportunity to make a reply.

2. Replies made pursuant to the present rule shall be made at the end of the last meeting of the day, or at the conclusion of the consideration of the relevant issue if that is sooner.

3. The number of interventions in reply for any delegation at a given meeting should be limited to two per issue.

4. The first intervention in reply, for any delegation on any issue at a given meeting, shall be limited to five minutes and the second intervention shall be limited to three minutes.

Adjournment of debate

Rule 25

Subject to rule 38, a representative may at any time move the adjournment of the debate on the question under discussion. In addition to the proposer of the motion permission to speak on the motion shall be accorded only to two representatives in favour and to two opposing the adjournment, after which the motion shall, subject to rule 28, be immediately put to the vote.

Closure of debate

Rule 26

Subject to rule 38, a representative may at any time move the closure of the debate on the question under discussion, whether or not any other representative has signified his or her wish to speak. Permission to speak on the motion shall be accorded only to two representatives opposing the closure, after which the motion shall, subject to rule 28, be immediately put to the vote.

Suspension or adjournment of the meeting

Rule 27

Subject to rule 38, a representative may at any time move the suspension or the adjournment of the meeting. No discussion on such motions shall be permitted and they shall, subject to rule 28, be immediately put to the vote.

Order of motions

Rule 28

The motions indicated below shall have precedence in the following order over all proposals or other motions before the meeting:

- (a) To suspend the meeting;
- (b) To adjourn the meeting;
- (c) To adjourn the debate on the question under discussion;

(d) To close the debate on the question under discussion.

Basic proposal

Rule 29

The basic proposal for consideration by the Conference shall be the draft Convention on the Liability of Operators of Transport Terminals in International Trade (Official Records of the General Assembly, Forty-fourth Session, Supplement No. 17 (A/44/17, annex I) (the draft Convention is reproduced in A/CONF.152/5). Other proposals shall be those submitted at the Conference in accordance with rule 30.

Other proposals and amendments

Rule 30

Other proposals and amendments shall normally be submitted in writing to the Executive Secretary of the Conference, who shall circulate copies to all delegations. As a general rule, no proposal shall be discussed or put to the vote at any meeting of the Conference unless copies of it have been circulated to all delegations not later than the day preceding the meeting. The President may, however, permit the discussion and consideration of amendments, even though these amendments have not been circulated or have been circulated only the same day.

Decisions on competence

Rule 31

Subject to rule 22, any motion calling for a decision on the competence of the Conference to discuss any matter or to adopt a proposal submitted to it shall be put to the vote before the matter is discussed or a decision is taken on the proposal in question.

Withdrawal of proposals and motions

Rule 32

A proposal or a motion may be withdrawn by its proposer at any time before voting on it has commenced, provided that it has not been amended. A proposal or a motion that has thus been withdrawn may be reintroduced by any representative.

Reconsideration of proposals

Rule 33

When a proposal has been adopted or rejected it may not be reconsidered unless the Conference, by a two-thirds majority of the representatives present and voting, so decides. Permission to speak on the motion to reconsider shall be accorded only to two speakers opposing the motion, after which it shall be immediately put to the vote.

VII. DECISION-MAKING

Voting rights

Rule 34

Each State participating in the Conference shall have one vote.

Majority required

Rule 35

1. Decisions of the Conference on all matters of substance shall be taken by a two-thirds majority of the participating States present and voting.

2. Decisions of the Conference on all matters of procedure shall be taken by a majority of the participating States present and voting.

3. If the question arises whether a matter is one of procedure or of substance, the President of the Conference shall rule on the question. An appeal against this ruling shall be put to the vote immediately, and the President's ruling shall stand unless overruled by a majority of the participating States present and voting.

4. If a vote is equally divided, the proposal or motion shall be regarded as rejected.

Meaning of the phrase "participating States present and voting"

Rule 36

For the purpose of these rules, the phrase "participating States present and voting" means participating States present and casting an affirmative or negative vote. Participating States that abstain from voting shall be considered as not voting.

Method of voting

Rule 37

Except as provided in rule 44, the Conference shall normally vote by show of hands, except that a representative may request a roll-call, which shall then be taken in the English alphabetical order of the names of the States participating in the Conference, beginning with the State whose name is drawn by lot by the President. The name of each State shall be called in all roll-calls and its representative shall reply "yes", "no" or "abstention".

Conduct during voting

Rule 38

After the President has announced the commencement of voting, no representative shall interrupt the voting except on a point of order in connection with the process of voting.

Explanation of vote

Rule 39

Representatives may make brief statements consisting solely of explanations of vote, before the voting has commenced or after the voting has been completed. The President may limit the time to be allowed for such explanations. The representative of a State sponsoring a proposal or motion shall not speak in explanation of vote thereon, unless it has been amended.

Division of proposals

Rule 40

A representative may move that parts of a proposal be voted on separately. If a representative objects, the motion for division shall be voted upon. Permission to speak on the motion shall be accorded only to two representatives in favour and two opposing the division. If the motion is carried, those parts of the proposal that are subsequently approved shall be put to the vote as a whole. If all operative parts of the proposal have been rejected, the proposal shall be considered to have been rejected as a whole.

Amendments

Rule 41

A proposal is considered an amendment to another proposal if it merely adds to, deletes from or revises part of that proposal. Unless specified otherwise, the word "proposal" in these rules shall be considered as including amendments.

Order of voting on amendments

Rule 42

When an amendment to a proposal is moved, the amendment shall be voted on first. When two or more amendments to a proposal are moved, the Conference shall vote first on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom and so on until all the amendments have been put to the vote. Where, however, the adoption of one amendment necessarily implies the rejection of another amendment, the latter shall not be put to the vote. If one or more amendments are adopted, the amended proposal shall then be voted upon.

Order of voting on proposals

Rule 43

1. If two or more proposals, other than amendments, relate to the same question, they shall, unless the Conference decides otherwise, be voted on in the order in which they were submitted. The Conference may, after each vote on a proposal, decide whether to vote on the next proposal.

2. Revised proposals shall be voted on in the order in which the original proposals were submitted, unless the revision substantially departs from the original proposal. In that case the original proposal shall be considered as withdrawn and the revised proposal shall be treated as a new proposal.

3. A motion requiring that no decision be taken on a proposal shall be put to the vote before a vote is taken on the proposal in question.

Elections

Rule 44

All elections shall be held by secret ballot unless, in the absence of any objection, the Conference decides to proceed without taking a ballot when there is an agreed candidate or slate.

Rule 45

1. When one or more elective places are to be filled at one time under the same conditions, those candidates, in a number not exceeding the number of such places, obtaining in the first ballot a majority of the votes cast and the largest number of votes shall be elected.

2. If the number of candidates obtaining such a majority is less than the number of places to be filled, additional ballots shall be held to fill the remaining places.

VIII. COMMITTEES

Main committees, sub-committees and working groups

Rule 46

1. The Conference shall establish two main committees (the "First Committee" and the "Second Committee") each of which may set up sub-committees or working groups. Participation in the main committees is open to all States participating in the Conference.

2. The Conference shall determine the matters to be considered by each main committee. The General Committee, upon the request of the Chairman of a main committee, may adjust the allocation of work between the main committees.

Drafting Committee

Rule 47

1. The Conference shall establish a Drafting Committee consisting of the Chairman elected under rule 6 and 14 members appointed by the Conference on the proposal of the General Committee. The Rapporteur of each of the main committees may participate ex officio, without a vote, in the work of the Drafting Committee.

2. The Drafting Committee shall consider draft articles referred to it by a main committee. The Drafting Committee shall furthermore prepare drafts and give advice on drafting as requested by the Conference or by the main committee concerned. It shall coordinate and review the drafting of all texts adopted, and shall report, as appropriate, either to the Conference or to the main committee concerned.

Officers

Rule 48

1. Each main committee shall have as its officers a Chairman, a Vice-Chairman and a Rapporteur. Other subsidiary organs shall have a chairman and such other officers as may be required.

2. Except as otherwise provided in rules 6 and 11, each committee, sub-committee and working group shall elect its own officers.

Quorum

Rule 49

1. The Chairman of a main committee may declare a meeting open and permit the debate to proceed when representatives of at least one quarter of the States participating in the Conference are present. The presence of representatives of a majority of the States so participating shall be required for any decision to be taken.

2. A majority of the representatives of any other committee, sub-committee or working group shall constitute a quorum.

Other committees

Rule 50

1. In addition to the General Committee, Credentials Committee, the main committees, and the Drafting Committee, the Conference may establish such committees and working groups as it deems necessary for the performance of its functions.
2. Each committee may set up sub-committees and working groups.

Rule 51

1. The members of the committees and working groups of the Conference that the Conference may decide to establish according to rule 50(1) shall, unless the Conference decides otherwise, be appointed by the President.
2. Members of sub-committees and working groups of committees shall, unless the committee in question decides otherwise, be appointed by the Chairman of the committee.

Officers, conduct of business and voting

Rule 52

The rules contained in chapters II, VI (except rule 19) and VII above shall be applicable, mutatis mutandis, to the proceedings of committees, sub-committees and working groups, except that:

- (a) The chairmen of committees (other than the main committees), sub-committees and working groups may exercise the right to vote;
- (b) Decisions of committees, sub-committees and working groups shall be taken by a majority of the participating States present and voting, except as provided by rule 33.

IX. LANGUAGES AND RECORDS

Languages of the Conference

Rule 53

Arabic, Chinese, English, French, Russian and Spanish shall be the languages of the Conference.

Interpretation

Rule 54

1. Speeches made in a language of the Conference shall be interpreted into the other such languages.
2. A representative may speak in a language other than a language of the Conference if the delegation concerned provides for interpretation into one such language.

Records and sound recordings of meetings

Rule 55

1. Summary records of the plenary meetings of the Conference and of the meetings of the main committees shall be kept in the languages of the Conference. As a general rule, they shall be circulated as soon as possible, in all the languages of the Conference, to all representatives, who shall inform the secretariat within five working days after the circulation of the summary record of any corrections they wish to have made.

2. The secretariat shall make sound recordings of meetings of the Conference, the main committees and the Drafting Committee. Such recordings shall be made of meetings of other committees, sub-committees or working groups when the body concerned so decides.

Languages of official documents

Rule 56

Official documents shall be made available in the languages of the Conference.

X. PUBLIC AND PRIVATE MEETINGS

Plenary meetings and meetings of the main committees

Rule 57

The plenary meetings of the Conference and meetings of the main committees shall be held in public unless the body concerned decides otherwise. All decisions taken by the plenary of the Conference at a private meeting shall be announced at an early public meeting of the plenary.

Other meetings

Rule 58

As a general rule meetings of the General Committee, the Drafting Committee, sub-committees or working groups shall be held in private.

XI. OTHER PARTICIPANTS AND OBSERVERS

Representatives of organizations that have received a standing invitation from the General Assembly to participate in the sessions and the work of all international conferences convened under the auspices of the General Assembly in the capacity of observers

Rule 59

Representatives of organizations that have received a standing invitation from the General Assembly to participate in the sessions and the work of all international conferences convened under the auspices of the General Assembly may participate, in accordance with General Assembly resolution 3237 (XXIX) of 22 November 1974, as observers in the deliberations of the Conference, the main committees and, as appropriate, other committees, sub-committees or working groups.

Representatives of national liberation movements

Rule 60

Representatives of national liberation movements recognized in its region by the Organization of African Unity may participate, in accordance with General Assembly resolution 3280 (XXIX) of 10 December 1974 in the deliberations of the Conference, the main committees and, as appropriate, other committees, sub-committees or working groups on any matter of particular concern to those movements.

Representatives of the specialized agencies 1/

Rule 61

Representatives designated by the specialized agencies may participate, without the right to vote, in the deliberations of the Conference, the main committees and, as appropriate, other committees, sub-committees or working groups on questions within the scope of their activities.

Representatives of other intergovernmental organizations

Rule 62

Representatives designated by other intergovernmental organizations invited to the Conference may participate as observers, without the right to vote, in the deliberations of the Conference, the main committees and, as appropriate, other committees, sub-committees or working groups on questions within the scope of their activities.

Representatives of interested United Nations organs

Rule 63

Representatives designated by interested organs of the United Nations may participate as observers, without the right to vote, in the deliberations of the Conference, its main committees and, as appropriate, other committees, sub-committees or working groups on questions within the scope of their activities.

Written statements

Rule 64

Written statements submitted by the designated representatives referred to in rules 59 to 63 shall be distributed by the Secretariat to all delegations in the quantities and in the language in which the statements are made available to it at the site of the Conference.

XII. SUSPENSION AND AMENDMENT OF THE RULES OF PROCEDURE

Method of suspension

Rule 65

Any of these rules may be suspended by the Conference provided that twenty-four hours' notice of the proposal for the suspension has been given, which may be waived if no representative

1/ For the purpose of these rules, the term "specialized agencies" includes the International Atomic Energy Agency and the General Agreement on Tariffs and Trade.

objects. Any such suspension shall be limited to a specific and stated purpose and to a period required to achieve that purpose.

Method of amendment

Rule 66

These rules of procedure may be amended by a decision of the Conference taken by a two-thirds majority of the representatives present and voting, after the General Committee has reported on the proposed amendment.

INDEX TO THE DOCUMENTS OF THE CONFERENCE

<u>Document No.</u>	<u>Title</u>	<u>Observations</u>	<u>Page</u>
<u>Documents of the plenary Conference</u>			
A/CONF.152/1	Excerpts from General Assembly Resolution 44/33 of 4 December 1989 relevant to the United Nations Conference on the Liability of Operators of Transport Terminals		
A/CONF.152/2	Provisional Agenda	Adopted without change at the 2nd plenary meeting of the Conference	
A/CONF.152/3	Provisional Rules of Procedure	Adopted without changes at the 2nd plenary meeting of the Conference, except for some changes adopted at the 4th plenary meeting	
A/CONF.152/4	Methods of work and procedures of the Conference: memorandum by the Secretary-General		
A/CONF.152/5	Text of a draft Convention on the Liability of Operators of Transport Terminals in International Trade approved by the United Nations Commission on International Trade Law		25
A/CONF.152/6	Background to draft Convention on the Liability of Operators of Transport Terminals in International Trade		24
A/CONF.152/7 and Add.1 and Corr.1 and Add.2	Compilation of Comments and Proposals by Governments and international organizations on the draft Convention on the Liability of Operators of Transport Terminals in International Trade		32
A/CONF.152/8/ Rev.1*	Report of the Credentials Committee		23
A/CONF.152/9	Report of the First Committee		54
A/CONF.152/10 and Add.1	Report of the Second Committee		79
A/CONF.152/11	Articles 1 to 16 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade as adopted by the First Committee		86
A/CONF.152/12	Draft articles 17 to 25 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade as prepared by the Drafting Committee and approved by the Second Committee		90
A/CONF.152/13	Final Act of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade		101
A/CONF.152/14	Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade: documents of the Conference and summary records of the plenary meetings and of the meetings of the Main Committees	United Nations Publication, Sales Number E.93.XI.3	

*Reissued for technical reasons.

<u>Document No.</u>	<u>Title</u>	<u>Observations</u>	<u>Page</u>
A/CONF.152/L.1	Draft Final Act of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade	Adopted with some changes at the 8th plenary meeting of the Conference and then reissued as document A/CONF.152/13	
A/CONF.152/L.2	China: title of Convention		99
A/CONF.152/L.3	China: article 9		99
A/CONF.152/L.4	Netherlands, United Kingdom of Great Britain and Northern Ireland: article 22(1)		99
A/CONF.152/L.5	Australia, Germany, Italy, Japan: article 1(a)		99
A/CONF.152/L.6	China, Mexico, Spain, Union of Soviet Socialist Republics, United States of America: preamble		100
A/CONF.152/L.7	United States of America: article 21		100
A/CONF.152/SR.1-9 [includes corrigendum]	Summary records of the plenary meetings of the Conference		113

Documents of the First Committee

A/CONF.152/C.1/L.1	Provisional agenda		
A/CONF.152/C.1/L.2/Rev.1 and Add. 1-9	Draft report of the First Committee		
A/CONF.152/C.1/L.3	Germany: article 8(1)		
A/CONF.152/C.1/L.4	United States of America: article 1(b)		
A/CONF.152/C.1/L.5	United States of America: article 1		
A/CONF.152/C.1/L.6	Germany: article 1		
A/CONF.152/C.1/L.7	United States of America: article 2 (and article 15)		
A/CONF.152/C.1/L.8	Germany: article 2(1)		
A/CONF.152/C.1/L.9	Germany: article 3		
A/CONF.152/C.1/L.10	United States of America: article 4(4)		
A/CONF.152/C.1/L.11	Germany: article 5		
A/CONF.152/C.1/L.12	Germany: article 6		
A/CONF.152/C.1/L.13	Germany: article 6 <u>bis</u>		
A/CONF.152/C.1/L.14	United States of America: article 7(3)		
A/CONF.152/C.1/L.15	United States of America: article 10		

<u>Document No.</u>	<u>Title</u>	<u>Observations</u>	<u>Page</u>
A/CONF.152/C.1/L.16	Germany: article 10		
A/CONF.152/C.1/L.17	Germany: article 12(2)(b)		
A/CONF.152/C.1/L.18	United States of America: article 12(2)		
A/CONF.152/C.1/L.19	Japan: article 1(a)		
A/CONF.152/C.1/L.20	Spain: article 5		
A/CONF.152/C.1/L.21	Spain: article 9		
A/CONF.152/C.1/L.22	Spain: article 13(1)		
A/CONF.152/C.1/L.23	Netherlands: article 1		
A/CONF.152/C.1/L.24	Netherlands: article 5		
A/CONF.152/C.1/L.25	Netherlands: article 8(1)		
A/CONF.152/C.1/L.26	Japan: article 4(1 <u>bis</u>)		
A/CONF.152/C.1/L.27	Japan: article 6 ((1)(c) <u>bis</u>)		
A/CONF.152/C.1/L.28	Sweden: article 1		
A/CONF.152/C.1/L.29	Belgium: article 1(a)		
A/CONF.152/C.1/L.30	Belgium: article 20		
A/CONF.152/C.1/L.31	United Kingdom of Great Britain and Northern Ireland: proposal for a new article	Considered under article 1	
A/CONF.152/C.1/L.32	Egypt: article 2		
A/CONF.152/C.1/L.33	Belgium: article 3		
A/CONF.152/C.1/L.34	Mexico: article 3		
A/CONF.152/C.1/L.35	Mexico: article 4		
A/CONF.152/C.1/L.36	Finland: article 3		
A/CONF.152/C.1/L.37	United Kingdom of Great Britain and Northern Ireland: article 1		
A/CONF.152/C.1/L.38	United Kingdom of Great Britain and Northern Ireland: article 3		
A/CONF.152/C.1/L.39	Belgium: article 5(5)(new paragraph)		
A/CONF.152/C.1/L.40	Belgium: article 9		

<u>Document No.</u>	<u>Title</u>	<u>Observations</u>	<u>Page</u>
A/CONF.152/C.1/L.41	Japan: article 11(2)		
A/CONF.152/C.1/L.42	Egypt: article 5(2)		
A/CONF.152/C.1/L.43	United Kingdom of Great Britain and Northern Ireland: article 4		
A/CONF.152/C.1/L.44 and Rev.1	Ad hoc working group: article 1 (new subparagraph)		
A/CONF.152/C.1/L.45	Yugoslavia: article 6(4)		
A/CONF.152/C.1/L.46	Turkey: article 11(2)		
A/CONF.152/C.1/L.47	Turkey: article 12(1)		
A/CONF.152/C.1/L.48	United Kingdom of Great Britain and Northern Ireland: proposal for a new article	Considered under article 20	
A/CONF.152/C.1/L.49	Morocco: article 5		
A/CONF.152/C.1/L.50	United Nations Environment Programme: article 9		
A/CONF.152/C.1/L.51	Morocco: article 6(1)(b)		
A/CONF.152/C.1/L.52	Morocco: article 11		
A/CONF.152/C.1/L.53	Morocco: article 12		
A/CONF.152/C.1/L.54	Morocco: article 10(3) and (4)		
A/CONF.152/C.1/L.55	Finland: article 9		
A/CONF.152/C.1/L.56 and Rev.1	Australia: article 1 (new subparagraph)		
A/CONF.152/C.1/L.57	Australia: article 15		
A/CONF.152/C.1/L.58	Egypt: article 12		
A/CONF.152/C.1/L.59	Netherlands: article 20		
A/CONF.152/C.1/L.60	The Islamic Republic of Iran: article 20		
A/CONF.152/C.1/L.61	Belgium: article 1(a)		
A/CONF.152/C.1/L.62	Report of the Drafting Committee to the First Committee: articles 1 to 16		
A/CONF.152/C1/SR.1-18 [includes corrigendum]	Summary records of meetings of the First Committee		

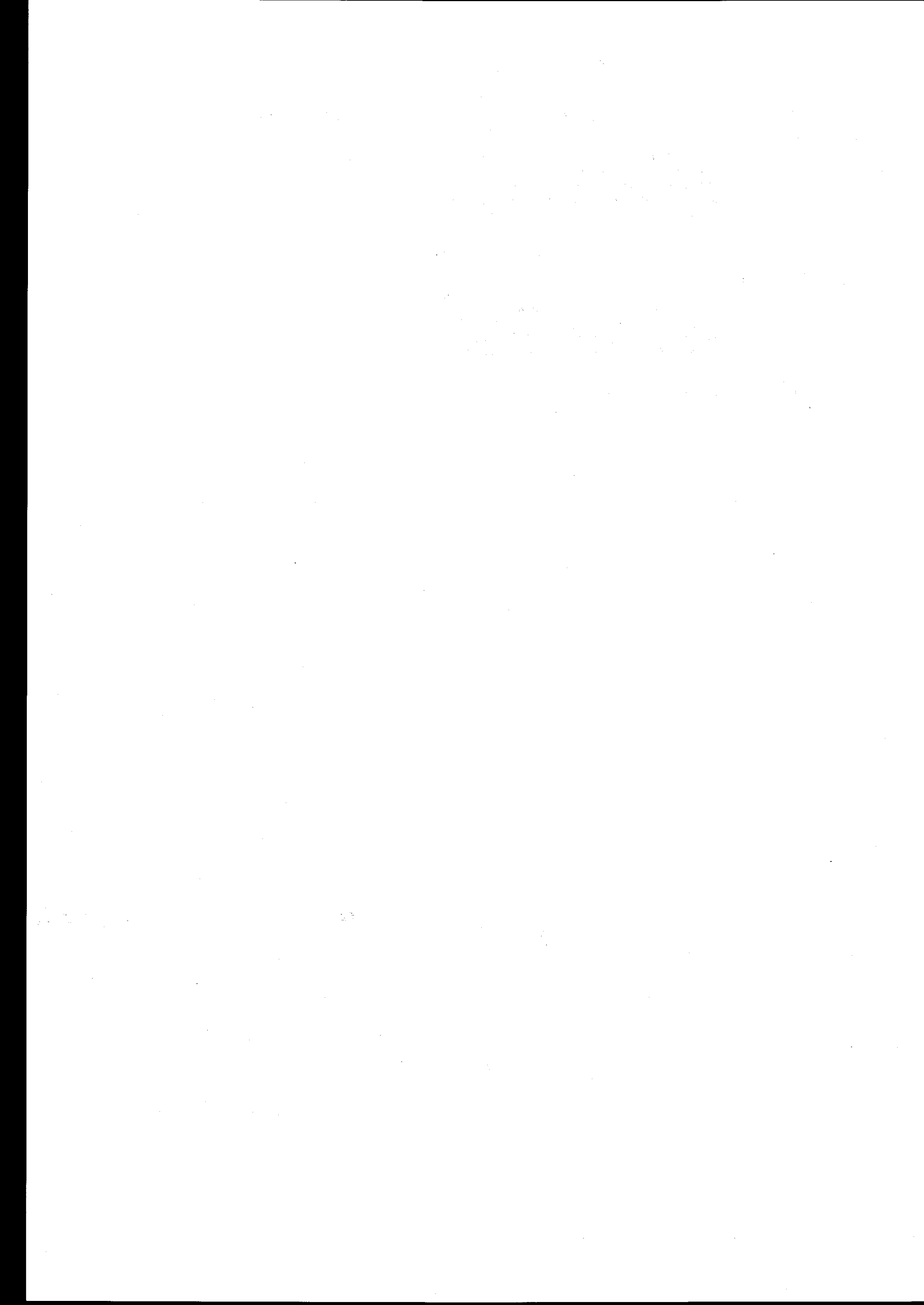
<u>Document No.</u>	<u>Title</u>	<u>Observations</u>	<u>Page</u>
<u>Documents of the Second Committee</u>			
A/CONF.152/C.2/L.1	Provisional agenda		
A/CONF.152/C.2/L.2 and Add. 1-3	Draft report of the Second Committee		
A/CONF.152/C.2/L.3	United States of America: article 22(1)		
A/CONF.152/C.2/L.4	Germany: article 22(1)		
A/CONF.152/C.2/L.5	Netherlands: article 22(1)		
A/CONF.152/C.2/L.6	Japan: article 21(1) and (4)		
A/CONF.152/C.2/L.7	Canada: article 19(3)		
A/CONF.152/C.2/L.8	Philippines: article 21		
A/CONF.152/C.2/L.9	Report of the Drafting Committee to the Second Committee; final clauses, articles 17 to 25		
A/CONF.152/C.2/SR.1-4 [includes corrigendum]	Summary records of meetings of the Second Committee		214
<u>Documents of the Credentials Committee</u>			
A/CONF.152/CC/L.1	Provisional agenda		
<u>Documents of the Drafting Committee</u>			
A/CONF.152/DC/L.1	Provisional agenda		
A/CONF.152/DC/L.2	Draft Convention on the Liability of Operators of Transport Terminals in International Trade: changes in articles 1, 3, 4, 5 and 6 as adopted by the First Committee through 8 April 1991		93
A/CONF.152/DC/L.3	Text of draft Convention on the Liability of Operators of Transport Terminals in International Trade as approved by the Drafting Committee on 9 April 1991: articles 1, 3, 4 and 5		93
A/CONF.152/DC/L.4	Text of draft Convention on the Liability of Operators of Transport Terminals in International Trade. Changed in articles 18, 19, 21, 23 and 25 as adopted by the Second Committee		95
A/CONF.152/DC/L.5 and Corr. 1	Text of draft Convention on the Liability of Operators of Transport Terminals in Inter- national Trade as approved by the Drafting Committee on 9 April 1991: articles 4, 6 to 9, 17, 18, 21 to 25		95

<u>Document No.</u>	<u>Title</u>	<u>Observations</u>	<u>Page</u>
A/CONF.152/DC/L.6	Text of draft Convention on the Liability of Operators of Transport Terminals in International Trade: changes in articles 19 and 21 as adopted by the Second Committee		99

Miscellaneous documents

A/CONF.152/CC/INF.1	Status of Credentials of Representatives to the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade: memorandum prepared by the Secretariat		
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A/CONF.152/INF.1 and Rev.1	List of Participants		
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Part I

DOCUMENTS OF THE CONFERENCE



PROPOSALS, REPORTS AND OTHER DOCUMENTS

A. REPORT OF THE CREDENTIALS COMMITTEE

Document A/CONF.152/8/Rev.1*

[Original: English]
[18 April 1991]

1. At its fourth plenary meeting, on 5 April 1991, the Conference, in accordance with paragraph 4 of the rules of procedure of the Conference, appointed a Credentials Committee composed of the following States: Argentina, Canada, China, Guinea, Iran (Islamic Republic of)**, Lesotho, Mexico, Ukrainian Soviet Socialist Republic and the United States of America.

2. The Credentials Committee held one meeting on 15 April 1991.

3. Mr. Ross Hornby (Canada) was unanimously elected Chairman of the Committee.

4. The Committee had before it a memorandum by the Secretary-General of the Conference dated 10 April 1991 on the status of credentials of representatives of participants attending the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade. Additional information on credentials received by the Secretary-General of the Conference after the issuance of the memorandum was provided to the Committee by the Secretary of the Committee. On the basis of the information made available to it the Committee noted that as at 15 April 1991:

(a) Formal credentials issued by the Head of State or Government or by the Minister for Foreign Affairs, as provided for in rule 3 of the rules of procedure of the Conference, have been submitted by the representatives of the following 30 States participating in the Conference: Australia, Austria, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, China, Denmark, Egypt, Finland, France, Gabon, Germany, Guinea, India, Iran (Islamic Republic of), Israel, Japan, Lesotho, Libyan Arab Jamahiriya, Mexico, Morocco, Netherlands, Spain, Sweden, Switzerland, Thailand, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and Yugoslavia.

(b) Credentials for the representatives of the following three States issued by their respective Head of State or Government or Minister for Foreign Affairs have been communicated to the Secretary-General of the Conference in the form of a cable or facsimile: Argentina, Italy and the Philippines.

(c) The designation of the representatives of the following 15 States has been communicated to the Secretary-General of the Conference by means of a letter, note verbale or cable from their respective permanent representatives or permanent missions to the United Nations (Geneva, New York or Vienna) or their embassies in Vienna: Belgium, Bolivia, Brazil, Chile, Indonesia, Iraq, Nigeria, Oman, Republic of Korea, Saudi Arabia, Turkey, United Arab Emirates, United States of America, Viet Nam and Yemen.

5. The Chairman proposed that the Committee adopt the following draft resolution:

"The Credentials Committee.

"Having examined the credentials of the representatives to the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, referred to in paragraph 4 of this report,

"1. Accepts the credentials of the representatives of the States referred to in paragraph 4(a), 4(b) and 4(c), above;

"2. Recommends to the Conference that it approve the report of the Credentials Committee".

6. The draft resolution proposed by the Chairman was adopted by the Committee without a vote.

7. Subsequently, the Chairman proposed that the Committee recommend to the Conference the adoption of a draft resolution (see paragraph 9 below). The proposal was approved by the Committee without a vote.

8. In the light of the foregoing, the present report is submitted to the Conference.

9. The Credentials Committee recommends to the Conference the adoption of the following draft resolution:

"Credentials of representatives to the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade,

*Reissued for technical reasons.

**At its fifth plenary meeting, the Conference elected the Islamic Republic of Iran to replace Saudi Arabia, which had been elected at the fourth plenary meeting but was unable to serve on the Committee.

The Conference.

Having examined the report of the Credentials Committee,

Approves the report of the Credentials Committee."

B. BACKGROUND TO THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS
IN INTERNATIONAL TRADE

Document A/CONF.152/6

[Original: English]
[26 July 1990]

1. The draft Convention on the Liability of Operators of Transport Terminals in International Trade, prepared by the United Nations Commission on International Trade Law (UNCITRAL), has its origins in work by the International Institute for the Unification of Private Law (UNIDROIT) on the topic of bailment and warehousing contracts. That topic was included in the work programme of UNIDROIT in 1960 in the context of combined transport operations, since particular problems arose in that context from the lack of uniform rules on the liability of persons into whose custody goods were entrusted before, during or after the actual transport of the goods (resolution number 9 of 22 April 1960 of the UNIDROIT Governing Council; annexed to the minutes of the 40th session of the Governing Council. 1/

2. On the basis of substantive studies of the subject prepared for UNIDROIT and enquiries made of Governments and of interested international organizations as to the desirability and feasibility of pursuing work on the topic, the UNIDROIT Governing Council, at its 56th session in 1977, decided to set up a Study Group to draw up uniform rules on the warehousing contract. 2/ By 1982, the Study Group had prepared a preliminary draft convention on the liability of operators of transport terminals which, together with an explanatory report on the preliminary draft convention prepared by the Secretariat of UNIDROIT, was approved by the UNIDROIT Governing Council at its 62nd session in May, 1983. 3/

3. In the meantime, as a result of informal exploratory communications between the Secretariats of UNIDROIT and UNCITRAL, the Secretary of UNCITRAL informed the UNIDROIT Governing Council, at its 61st session (1982), of the interest of the Commission in the subject. That interest arose out of the close relationship of the subject with international conventions relating to the carriage of goods, and in particular the United Nations Convention on the Carriage of Goods by Sea, 1978, which had been elaborated by the Commission, as well as the relevance of the subject to the needs of a number of developing countries (A/CN.9/225 and Corr. 1 (French only), footnote 10). At its fifteenth (1982) and sixteenth (1983) sessions, the Commission was informed by the observer from UNIDROIT of the interest of his organization in cooperating with the Commission in the future work leading to the preparation of a draft convention on the subject. 4/

4. The Commission decided at its sixteenth session to include in its programme of work the topic of international terminal operators, to request UNIDROIT to transmit its preliminary draft Convention to the Commission for its consideration, and to assign to a working group the task of preparing uniform rules on the topic. 5/ The text of the preliminary draft Convention was placed before the Commission at its seventeenth session (1984), at which it decided to assign the task of preparing uniform rules to its Working Group on International Contract Practices, which was composed of all States that were members of the Commission. 6/

5. The Working Group devoted its eighth, ninth, tenth and eleventh sessions to the preparation of the uniform rules (A/CN.9/260, A/CN.9/275, A/CN.9/287 and A/CN.9/298). As the text of the uniform rules evolved within the Working Group, the scope of the rules, which, within UNIDROIT, had originally been restricted to warehousing, was expanded to cover additional types of terminal operations that are now performed in connection with the transport of goods. At its eleventh session, in January 1988, the Working Group decided to recommend to the Commission that the uniform rules be adopted in the form of a convention (A/CN.9/298, paras. 10 and 84), and approved

1/ See UNIDROIT, Minutes of the Governing Council, 40th session (UNIDROIT document C.D. XL UNIDROIT 1960), annex.

2/ See UNIDROIT, Minutes of the Governing Council, 56th session (UNIDROIT document C.D. 56th session UNIDROIT 1977), p. 35 in English and p. 38 in French.

3/ See UNIDROIT, Minutes of the Governing Council, 62nd session (UNIDROIT document C.D. 62nd session UNIDROIT 1983), p. 15.

4/ See Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17 (A/37.17), para. 105; and ibid., Thirty-eighth Session, Supplement No. 17 (A/38/17), para. 110.

5/ Ibid., Thirty-eighth Session, Supplement No. 17 (A/38/17), para. 115.

6/ Ibid., Thirty-ninth Session, Supplement No. 17 (A/39/17), para. 113.

a draft Convention on the Liability of Operators of Transport Terminals in International Trade (A/CN.9/298, para. 11 and annex I). Pursuant to a request of the Commission at its twenty-first session (1988), 7/ the draft Convention was transmitted to all States and to interested international organizations for comments.

6. At its twenty-second session, in 1989, the Commission had before it the text of the draft Convention, and reports of the Secretary-General containing a compilation of comments submitted by Governments and international organizations on the draft Convention (A/CN.9/319 and Add.1-5) and draft final clauses for the draft Convention (A/CN.9/321). After making various modifications to the text, 8/ the Commission adopted the draft Convention on the Liability of Operators of Transport Terminals in International Trade and transmitted it to the General Assembly with a recommendation that the Assembly should convene an international conference of plenipotentiaries to conclude, on the basis of the draft Convention, a Convention on the Liability of Operators of Transport Terminals in International Trade. 9/ The text of the draft Convention adopted by the Commission 10/ is reproduced in A/CONF.152/5.

7. The General Assembly, by its resolution 44/33 of 4 December 1989, decided to convene an international conference of plenipotentiaries at Vienna from 2 to 19 April 1991 to consider the draft Convention prepared by the Commission and to embody the results of its work in a convention on the liability of operators of transport terminals in international trade. The relevant portions of resolution 44/33 are reproduced in A/CONF.152/1.

C. TEXT OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS
OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE APPROVED BY
THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Document A/CONF.152/5

[Previously published in the report of the
Commission on the work of its twenty-second session*]

[Arabic/Chinese/English/
[French/Russian/Spanish]
[13 May 1990]

Article 1

DEFINITIONS

In this Convention:

(a) "Operator of a transport terminal" (hereinafter referred to as "operator") means a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use. However, a person shall not be considered an operator whenever he is responsible for the goods under applicable rules of law governing carriage;

(b) Where goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if it was not supplied by the operator;

(c) "International carriage" means any carriage in which the place of departure and the place of destination are identified as being located in two different States when the goods are taken in charge by the operator;

(d) "Transport-related services" includes such services as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing;

(e) "Notice" means a notice given in a form which provides a record of the information contained therein;

* Official Records of the General Assembly, Forty-fourth Session, Supplement No. 17 (A/44/17), annex I.

7/ Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para. 29.

8/ Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), paras. 11-225.

9/ Ibid., para. 225.

10/ Ibid., annex I.

(f) "Request" means a request made in a form which provides a record of the information contained therein.

Article 2

SCOPE OF APPLICATION

(1) This Convention applies to transport-related services performed in relation to goods which are involved in international carriage:

(a) When the transport-related services are performed by an operator whose place of business is located in a State Party, or

(b) When the transport-related services are performed in a State Party, or

(c) When, according to the rules of private international law, the transport-related services are governed by the law of a State Party.

(2) If the operator has more than one place of business, the place of business is that which has the closest relationship to the transport-related services as a whole.

(3) If the operator does not have a place of business, reference is to be made to the operator's habitual residence.

Article 3

PERIOD OF RESPONSIBILITY

The operator shall be responsible for the goods from the time he has taken them in charge until the time he has handed them over to or has placed them at the disposal of the person entitled to take delivery of them.

Article 4

ISSUANCE OF DOCUMENT

(1) The operator may, and at the customer's request shall, within a reasonable period of time, at the option of the operator, either:

(a) Acknowledge his receipt of the goods by signing and dating a document presented by the customer that identifies the goods, or

(b) Issue a signed document identifying the goods, acknowledging his receipt of the goods and the date thereof, and stating their condition and quantity in so far as they can be ascertained by reasonable means of checking.

(2) If the operator does not act in accordance with either subparagraph (a) or (b) of paragraph (1), he is rebuttably presumed to have received the goods in apparent good condition. No such presumption applies when the services performed by the operator are limited to the immediate transfer of the goods between means of transport.

(3) The document referred to in subparagraph (b) of paragraph (1) may be issued in any form which preserves a record of the information contained therein.

(4) The signature on the document referred to in paragraph (1) may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the document is signed.

Article 5

BASIS OF LIABILITY

(1) The operator is liable for loss resulting from loss of or damage to the goods, as well as for delay in handing over the goods, if the occurrence which caused the loss, damage or delay took place during the period of the operator's responsibility for the goods as defined in article 3, unless he proves that he, his servants, agents or other persons of whose services the operator makes use for the performance of the transport-related services took all measures that could reasonably be required to avoid the occurrence and its consequences.

(2) Where a failure on the part of the operator, his servants, agents or other persons of whose services the operator makes use for the performance of the transport-related services to take the measures referred to in paragraph (1) combines with another cause to produce loss, damage or delay, the operator is liable only to the extent that the loss resulting from such loss, damage or delay is attributable to that failure, provided that the operator proves the amount of the loss not attributable thereto.

(3) Delay in handing over the goods occurs when the operator fails to hand them over to or place them at the disposal of a person entitled to take delivery of them within the time expressly

agreed upon or, in the absence of such agreement, within a reasonable time after receiving a request for the goods by such person.

(4) If the operator fails to hand over the goods to or place them at the disposal of a person entitled to take delivery of them within a period of 30 consecutive days after the date expressly agreed upon or, in the absence of such agreement, within a period of 30 consecutive days after receiving a request for the goods by such person, a person entitled to make a claim for the loss of the goods may treat them as lost.

Article 6

LIMITS OF LIABILITY

(1) (a) The liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding [8.33] units of account per kilogram of gross weight of the goods lost or damaged.

(b) However, if the goods are handed over to the operator immediately after carriage by sea or by inland waterways, or if the goods are handed over, or are to be handed over, by him for such carriage, the liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding [2.75] units of account per kilogram of gross weight of the goods lost or damaged. For the purposes of this paragraph, carriage by sea or by inland waterways includes pick-up and delivery within a port.

(2) The liability of the operator for delay in handing over the goods according to the provisions of article 5 is limited to an amount equivalent to two and a half times the charges payable to the operator for his services in respect of the goods delayed, but not exceeding the total of such charges in respect of the consignment of which the goods were a part.

(3) In no case shall the aggregate liability of the operator under both paragraphs (1) and (2) exceed the limitation which would be established under paragraph (1) for total loss of the goods in respect of which such liability was incurred.

(4) The operator may agree to limits of liability exceeding those provided for in paragraphs (1), (2) and (3).

Article 7

APPLICATION TO NON-CONTRACTUAL CLAIMS

(1) The defences and limits of liability provided for in this Convention apply in any action against the operator in respect of loss of or damage to the goods, as well as delay in handing over the goods, whether the action is founded in contract, in tort or otherwise.

(2) If such an action is brought against a servant or agent of the operator, or against another person of whose services the operator makes use for the performance of the transport-related services, such servant, agent or person, if he proves that he acted within the scope of his employment or engagement by the operator, is entitled to avail himself of the defences and limits of liability which the operator is entitled to invoke under this Convention.

(3) Except as provided in article 8, the aggregate of the amounts recoverable from the operator and from any servant, agent or person referred to in the preceding paragraph shall not exceed the limits of liability provided for in this Convention.

Article 8

LOSS OF RIGHT TO LIMIT LIABILITY

(1) The operator is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission of the operator himself or his servants or agents done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

(2) Notwithstanding the provision of paragraph (2) of article 7, a servant or agent of the operator or another person of whose services the operator makes use for the performance of the transport-related services is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission of such servant, agent or person done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Article 9

SPECIAL RULES ON DANGEROUS GOODS

If dangerous goods are handed over to an operator without being marked, labelled, packaged or documented in accordance with any law or regulation relating to dangerous goods applicable in the country where the goods are handed over and if, at the time the goods are handed over to him, the operator does not otherwise know of their dangerous character, he is entitled:

(a) To take all precautions the circumstances may require, including, when the goods pose an imminent danger to any person or property, destroying the goods, rendering them innocuous, or disposing of them by any other lawful means, without payment of compensation for damage to or destruction of the goods resulting from such precautions, and

(b) To receive reimbursement for all costs incurred by him in taking the measures referred to in subparagraph (a) from the person who failed to meet any obligation under such applicable law or regulation to inform him of the dangerous character of the goods.

Article 10

RIGHTS OF SECURITY IN GOODS

(1) The operator has a right of retention over the goods for costs and claims which are due in connection with the transport-related services performed by him in respect of the goods during the period of his responsibility for them. However, nothing in this Convention shall affect the validity under the applicable law of any contractual arrangements extending the operator's security in the goods.

(2) The operator is not entitled to retain the goods if a sufficient guarantee for the sum claimed is provided or if an equivalent sum is deposited with a mutually accepted third party or with an official institution in the State where the operator has his place of business.

(3) In order to obtain the amount necessary to satisfy his claim, the operator is entitled, to the extent permitted by the law of the State where the goods are located, to sell all or part of the goods over which he has exercised the right of retention provided for in this article. The preceding sentence does not apply to containers, pallets or similar articles of transport or packaging which are owned by a party other than the carrier or the shipper and which are clearly marked as regards ownership except in respect of claims by the operator for the cost of repairs of or improvements to the containers, pallets or similar articles of transport or packaging.

(4) Before exercising any right to sell the goods, the operator shall make reasonable efforts to give notice of the intended sale to the owner of the goods, the person from whom the operator received them and the person entitled to take delivery of them from the operator. The operator shall account appropriately for the balance of the proceeds of the sale in excess of the sums due to the operator plus the reasonable costs of the sale. The right of sale shall in all other respects be exercised in accordance with the law of the State where the goods are located.

Article 11

NOTICE OF LOSS, DAMAGE OR DELAY

(1) Unless notice of loss or damage, specifying the general nature of the loss or damage, is given to the operator not later than the third working day after the day when the goods were handed over by the operator to the person entitled to take delivery of them, the handing over is prima facie evidence of the handing over by the operator of the goods as described in the document issued by the operator pursuant to paragraph (1)(b) of article 4 or, if no such document was issued, in good condition.

(2) Where the loss or damage is not apparent, the provisions of paragraph (1) apply correspondingly if notice is not given to the operator within 15 consecutive days after the day when the goods reached the final recipient, but in no case later than 60 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them.

(3) If the operator participated in a survey or inspection of the goods at the time when they were handed over to the person entitled to take delivery of them, notice need not be given to the operator of loss or damage ascertained during that survey or inspection.

(4) In the case of any actual or apprehended loss of or damage to the goods, the operator and the person entitled to take delivery of the goods shall give all reasonable facilities to each other for inspecting and tallying the goods.

(5) No compensation shall be payable for loss resulting from delay in handing over the goods unless notice has been given to the operator within 21 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them.

Article 12

LIMITATION OF ACTIONS

(1) Any action under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

(2) The limitation period commences:

(a) On the day the operator hands over the goods or part thereof to, or places them at the disposal of, a person entitled to take delivery of them, or

(b) In cases of total loss of the goods, on the day the operator notifies the person entitled to make a claim that the goods are lost, or on the day that person may treat the goods as lost in accordance with paragraph (4) of article 5, whichever is earlier.

- (3) The day on which the limitation period commences is not included in the period.
- (4) The operator may at any time during the running of the limitation period extend the period by a declaration in writing to the claimant. The period may be further extended by another declaration or declarations.
- (5) A recourse action by a carrier or another person against the operator may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if it is instituted within 90 days after the carrier or other person has been held liable in an action against himself or has settled the claim upon which such action was based and if, within a reasonable period of time after the filing of a claim against a carrier or other person that may result in a recourse action against the operator, notice of the filing of such a claim has been given to the operator.

Article 13

CONTRACTUAL STIPULATIONS

- (1) Unless otherwise provided in this Convention, any stipulation in a contract concluded by an operator or in any document signed or issued by the operator pursuant to article 4 is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part.
- (2) Notwithstanding the provisions of the preceding paragraph, the operator may agree to increase his responsibilities and obligations under this Convention.

Article 14

INTERPRETATION OF THE CONVENTION

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application.

Article 15

INTERNATIONAL TRANSPORT CONVENTIONS

This Convention does not modify any rights or duties which may arise under an international convention relating to the international carriage of goods which is binding on a State which is a party to this Convention or under any law of such State giving effect to or derived from a convention relating to the international carriage of goods.

Article 16

UNIT OF ACCOUNT

- (1) The unit of account referred to in article 6 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be expressed in the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The equivalence between the national currency of a State Party which is a member of the International Monetary Fund and the Special Drawing Right is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The equivalence between the national currency of a State Party which is not a member of the International Monetary Fund and the Special Drawing Right is to be calculated in a manner determined by that State.
- (2) The calculation mentioned in the last sentence of the preceding paragraph is to be made in such a manner as to express in the national currency of the State Party as far as possible the same real value for amounts in article 6 as is expressed there in units of account. States Parties must communicate to the depositary the manner of calculation at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession and whenever there is a change in the manner of such calculation.

FINAL CLAUSES

Article 17

DEPOSITARY

The Secretary-General of the United Nations is the depositary of this Convention.

Article 18

SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL, ACCESSION

- (1) This Convention is open for signature at the concluding meeting of the United Nations Conference on ... and will remain open for signature by all States at the Headquarters of the United Nations, New York, until ...

- (2) This Convention is subject to ratification, acceptance or approval by the signatory States.
- (3) This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.
- (4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 19

APPLICATION TO TERRITORIAL UNITS

- (1) If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may at any time substitute another declaration for its earlier declaration.
- (2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
- (3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a State Party, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a State Party, unless it is in a territorial unit to which the Convention extends.
- (4) If a State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 20

RESERVATIONS

No reservations may be made to this Convention.

Article 21

EFFECT OF DECLARATION

- (1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.
- (2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.
- (3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.
- (4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 22

ENTRY INTO FORCE

- (1) This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.
- (2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.
- (3) Each State Party shall apply the provisions of this Convention to transport-related services with respect to goods taken in charge by the operator on or after the date of the entry into force of this Convention in respect of that State.

Article 23

REVISION AND AMENDMENT

- (1) At the request of not less than one third of the States Parties to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.
- (2) Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 24

REVISION OF LIMITATION AMOUNTS

(1) At the request of at least one quarter of the States Parties, the depositary shall convene a meeting of a Committee composed of a representative from each Contracting State to consider increasing or decreasing the amounts in article 6.

(2) If this Convention enters into force more than five years after it was opened for signature, the depositary shall convene a meeting of the Committee within the first year after it enters into force.

(3) The meeting of the Committee shall take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law.

(4) In determining whether the limits should be amended, and if so, by what amount, the following criteria, determined on an international basis, and any other criteria considered to be relevant, shall be taken into consideration:

(a) The amount by which the limits of liability in any transport-related convention have been amended;

(b) The value of goods handled by operators;

(c) The cost of transport-related services;

(d) Insurance rates, including for cargo insurance, liability insurance for operators and insurance covering job-related injuries to workmen;

(e) The average level of damages awarded against operators for loss of or damage to goods or delay in handing over goods; and

(f) The costs of electricity, fuel and other utilities.

(5) Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting.

(6) No amendment of the limits of liability under this article may be considered less than five years from the date on which this Convention was opened for signature.

(7) Any amendment adopted in accordance with paragraph (5) shall be notified by the depositary to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of 18 months after it has been notified, unless within that period not less than one third of the States that were States Parties at the time of the adoption of the amendment by the Committee have communicated to the depositary that they do not accept the amendment. An amendment deemed to have been accepted in accordance with this paragraph shall enter into force for all States Parties 18 months after its acceptance.

(8) A State Party which has not accepted an amendment shall nevertheless be bound by it, unless such State denounces the present Convention at least one month before the amendment enters into force. Such denunciation shall take effect when the amendment enters into force.

(9) When an amendment has been adopted in accordance with paragraph (5) but the 18-month period for its acceptance has not yet expired, a State which becomes a State Party to this Convention during that period shall be bound by the amendment if it enters into force. A State which becomes a State Party after that period shall be bound by any amendment which has been accepted in accordance with paragraph (7).

(10) The applicable limit of liability shall be that which, in accordance with the preceding paragraphs, is in effect on the date of the occurrence which caused the loss, damage or delay.

Article 25

DENUNCIATION

(1) A State Party may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at ..., this ... day of ... one thousand nine hundred and ..., in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

D. COMPILATION OF COMMENTS AND PROPOSALS BY GOVERNMENTS
AND INTERNATIONAL ORGANIZATIONS ON THE DRAFT
CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS
IN INTERNATIONAL TRADE

Document A/CONF.152/7 and Add.1 and 2

Document A/CONF.152/7

[Original: English]
[18 December 1990]

CONTENTS

	<u>Page</u>
I. INTRODUCTION	32
II. COMPILATION OF COMMENTS AND PROPOSALS	32
A. Governments	32
Canada	32
Denmark	33
Federal Republic of Germany	34
Japan	37
Philippines	38
United States of America	39
B. Intergovernmental organizations	41
International Labour Office	41
C. Non-governmental organizations	41
Institute of International Container Lessors	41

I. INTRODUCTION

This document sets forth the comments and proposals of Governments and international organizations on the draft Convention on the Liability of Operators of Transport Terminals in International Trade that were received as of 18 december 1990. As of that date comments and proposals had been received from the following Governments and international organizations:

Governments: Canada, Denmark, Germany, Federal Republic of, Japan, Philippines and United States of America.

Intergovernmental organizations: International Labour Office

Non-governmental organizations: Institute of International Container Lessors

II. COMPILATION OF COMMENTS AND PROPOSALS

A. Governments

Canada

[Original: English]

General comments

Following the adoption of the draft Convention on Liability of Operators of Transport Terminals in International Trade by UNCITRAL at its 22nd session, the Government of Canada held consultations with industry representatives and with the provincial and territorial governments of Canada with a view to assessing the impact of the proposed Convention on the transport terminal industry and on domestic laws.

Although some questioned the need for the proposed Convention at this time, most commentators supported the principle of international rules governing liability limits for operators of international transport terminals. The consensus was that there is a need for greater precision

in the language of the proposed Convention. In addition, it remains the view of the Government of Canada that the limits of liability to be established in the draft Convention should be relatively unbreakable.

To the extent that the text of the proposed Convention differs from the text that was submitted to the Commission by the Working Group on International Contract Practices in 1988 (A/CN.9/298, annex I), it has been improved. For example, the scope of application clause now indicates that the place where the services are performed should be one of the determining factors for the application of the proposed Convention. There will now be three connecting factors in the scope of application clause, namely: place of business, place of performance of the services, and the rules of private international law. It is expected that in practice the "place of performance" will be the usual condition for invoking the Convention.

The intention of some articles of the proposed Convention remain obscure. What follows are comments on some of those Articles and on others worthy of note.

Article-by-article comments

Article 1: Definitions

The term "goods" is still vague on whether it includes empty containers. If the intention is that empty containers should not be considered to be "goods", except when in transport, this should be said. Similarly, it should be said that "goods" includes "bulk commodities".

Article 3: Period of responsibility

It may be desirable to define what is meant by "taken in charge" so as to avoid litigation on the issue.

It is also unclear what is meant by "placed [...] at the disposal". There should be some objective way of determining when goods are placed at the disposal of the person entitled to take delivery of them, such as a written notice of discharge.

Article 5: Basis of liability

Although it is understood that force majeure is implicitly a defence under paragraph (1), an explicit reference to force majeure would make the proposed Convention more easily understood by prospective users.

It is noted that the draft article differs from the provisions of article 18 of the Warsaw Convention as amended by Montreal Protocol No. 4.

Article 6: Limits of liability

Paragraph 1(a) would be easier to understand if it specifically excluded goods handled by sea or by inland waters.

The measure of liability—units of account per kilogram of gross weight—could create problems for goods that are not shipped by weight but by volume or pieces.

It is noted that the possibility of making a special declaration of value, such as provided for in the Warsaw Convention, is not referred to in the draft Convention.

Article 11: Notice of loss, damage or delay

The notice period for loss is very short. In very large consignments, it can take a considerable period of time before goods are opened and loss or damage is discovered. A longer notice period should be provided in paragraph 11(1). Three working days may not constitute sufficient time to properly process a claim.

It is noted that the proposed Convention does not stipulate where a claim should be brought as is the case with article 28 of the Warsaw Convention.

It is not clear who is the person entitled to take delivery of goods. It may be a freight forwarder who normally does not inspect the goods.

Denmark

[Original: English]

The Convention will make it easier for exporters, carriers and other intermediaries to understand their legal status in relation to operators of transport terminals who in other countries are engaged in international carriage.

If the desired goal is to be attained, it will, however, be necessary for the Convention to include rules on venue and choice of legislation and rules concerning the procedure of calculating compensation for lost or damaged goods.

According to the draft, the Convention shall regulate international carriage only, cf. article 1(a), excluding terminal operations which are not part of an international carriage or are independent of a carriage. The transport terminal operator will, however, not always know whether the carriage is taking place as part of an international carriage.

It will frequently be highly difficult to determine whether a carriage is national or international. What may be doubtful is whether a pre-carriage operation is to be considered a national carriage or a part of an international carriage.

The definition of the term "international" in the draft may raise doubt as to whether the carriage agreements or the purchase agreements, or the production site or the final destination shall be determining.

Article 3 concerning the period of responsibility of the operator should be pinpointed.

It appears unfortunate that the physical location of the terminal - whether at dockside or inland - should be considered important, as is the case in article 6.

The rules on the rights of security in goods of the terminal operator under article 10 should be specified more precisely.

Specific comments on the provisions of the draft Convention will be made at the Conference.

Federal Republic of Germany

[Original: English]

The Federal Government welcomes the Draft Convention prepared by the United Nations Commission on International Trade Law as a sound and solid basis for the deliberations at the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade. The following observations and proposals are submitted for consideration.

1. Period of responsibility

The diversity of operations to which the Convention shall apply has been widened during the preparatory work. The original draft Convention was designed to cover safekeeping operations such as warehousing. The present draft Convention applies also to the direct transfer of goods from one means of transport to another (handling operations without safekeeping; cf. article 4(2), sentence 2).

However, the wording of article 1(a), (c) and article 3 of the draft Convention does not yet reflect this change, because the key expression "to take in charge" covers only part of the ground. The terminology should therefore be supplemented by an expression referring to handling operations.

Proposals:

The first sentence of article 1(a) should read:

"'Operator of a transport terminal' (hereinafter referred to as 'operator') means a person who, in the course of his business, undertakes to take in charge or to handle goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use."

Article 1(c) should read:

"'International carriage' means any carriage in which the place of departure and the place of destination are identified as being located in two different States when the operator takes the goods in charge or takes them over for handling;"

Article 3 should read:

"The operator shall be responsible for the goods from the time he has taken them in charge or taken them over for handling until the time he has handed them over to or has placed them at the disposal of the person entitled to take delivery of them."

2. Segmented transport

There should be no doubt that purely domestic legs of segmented international transport, if identified as being subject to individual domestic transport contracts, shall not be governed by the Convention. In order to clarify this inherent delimitation of the concept of "international carriage" the present draft Convention should be amended accordingly.

Proposal:

The following sentence should be added to article 1(c):

"If and to the extent that any segment of a carriage is identified as being performed under an individual domestic transport contract in respect of which the place of departure and the place of destination are not located in two different States, such domestic carriage shall not be considered to be an 'international carriage'."

3. Identification of internationality

The carriage is considered to be international if the places of departure and destination are "identified" as being located in two different States. One decisive criterion for ascertaining the internationality of a carriage is the transport documents accompanying the goods. The use of an international transport document (e.g. CMR or CIM document) should constitute a presumption that the carriage is international. If national documents are used the opposite presumption should apply.

Proposal:

The following sentence should be added to article 1(c):

"Goods accompanied by an international transport document shall be deemed to be involved in international carriage; goods accompanied by a domestic transport document shall be deemed not to be involved in international carriage."

4. Basis of liability

According to article 5(1) the liability of the operator is based on the presumption that he failed to take all measures that could reasonably be required to avoid the occurrence and its consequences. This presumption is not justified when the operator cannot exercise full control over the goods for reasons which serve the purposes of his customers. This happens particularly when the operator grants access to the goods for inspection or treatment by their owners or others entitled to dispose of them. In the case of such permitted third-party activities the likelihood of damage caused by an act or default of the operator is not greater than the likelihood that the loss of, or damage to the goods had been caused by others. A corresponding exception to the general rule of article 5(1) should be added.

Proposal:

A new paragraph 1 bis should be added to article 5(1):

"If, at the time of the occurrence, the customer or other persons were granted access to the area referred to in article 1 subparagraph (a) to inspect, treat or handle the goods, it is up to the claimant to prove that the operator, his servants, agents or other persons of whose services the operator makes use for the performance of the transport-related services failed to take all measures that could reasonably be required to avoid the occurrence and its consequences."

5. Limitation of liability

Article 6(1) draws a line between transport-related services in general and the handling of goods which the operator receives immediately after carriage by sea or by inland waterways or which are to be handed over by him for such carriage. This dual-limit approach is based on the assumption that the average value of shipped cargo is significantly lower than the value of goods carried by other means of transport. However, since vehicles and electronic or other equipment of considerable value have become a common object of carriage by sea, this assumption no longer reflects reality. Thus, only certain specific categories of goods and not different modes of carriage can justify different limits of liability.

Moreover, with respect to bulk cargo, railway lines and inland navigation vessels compete on the same freight market. Different liability conditions at transport terminals would have an impact on their position.

Both aspects lead to the following suggestion.

Proposal:

Subsection (b) of article 6(1) should be deleted.

As to the further content of article 6(1) see next proposal.

6. Alternative limitation of liability

The draft Convention provides for a limitation which is exclusively based on the gross weight of the goods lost or damaged. This approach proves unsatisfactory. The Federal Government holds the view that the Convention should follow the alternative approach of sea-borne trade as contained in article 4(5) of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924, as amended by the 1968 Protocol (Hague-Visby Rules) and in article 6(1) of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). If one proceeds on the assumption that the Convention shall also facilitate recourse actions by carriers, forwarders and insurers to recover damages from the terminal operator, the Convention should provide for an alternative limitation of liability per package/freight unit or per kilogram of gross weight of the goods, whichever is the higher.

The Federal Government admits that difficulties may arise where goods are unitized (e.g. consolidated in containers or on pallets). However, if one follows the model of article 6(2) of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), such difficulties are not insuperable. In particular, there would be no need for a complex documentation under article 4(1) of the draft Convention. The customer would have to prove the number of packages or units as a basis for calculating his claim. If he cannot do so by using a document signed or issued under article 4(1) of the draft Convention, he should be able to use other transport documents accompanying the goods.

Proposal:

Article 6(1) should read:

"The liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding [...] units of account per package or other freight unit, or [...] units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher."

The following article 6 (1 bis) should be added:

"For the purpose of calculating which amount is the higher in accordance with paragraph (1) of this article, the following rules apply:

(a) Where a container, pallet or similar article of transport or packaging is used to consolidate goods, the packages or other freight units enumerated in the document under article 4 paragraph (1) or, in the absence of such enumeration, the packages or other freight units enumerated in any other document accompanying the goods [and acknowledged by the operator without specific reservations] are deemed to be packages or other freight units. Except as aforesaid the goods consolidated in such container or on such pallet or any similar article of transport or packaging are deemed to be one single unit.

(b) In cases where the container, pallet or similar article of transport or packaging itself has been lost or damaged, that article of transport or packaging, if not supplied by the operator, is considered one separate unit."

7. Aggregation of claims

The present draft Convention does not set any limit to the aggregate amount of claims resulting from the same event. But under a mandatory liability regime the operator should not be exposed to the incalculable and barely insurable risk of an unlimited aggregation of claims, even if such claims are limited individually. It may be difficult, if not impossible, to find a formula for calculating differing overall amounts that would fit every individual type and size of transport terminal. The Convention should therefore fix one single relatively high amount.

Proposal:

After article 6 the following new article 6 bis should be added:

"In no case shall the liability of the operator for the aggregate of all claims arising on any distinct occasion which are assessed under the preceding articles exceed ... million units of account. If such aggregate of claims exceeds ... million units of account, that amount shall be distributed among the claimants in proportion to their claims."

8. Loss of limitation of liability

During the preparatory work views differed widely on the question whether the operator should lose the benefit of the limitation of liability in the case of his own intentional or reckless conduct as well as in the case of intentional or reckless acts of his employees. Basically, the present draft Convention is modeled on the concept of vicarious liability, rendering the limitation of liability quite easily exceedable. The Federal Government doubts whether this is the best approach. It may be more appropriate to make the limits of liability more reliable and at the same time increase the limitation amounts suggested in the draft Convention. Higher limitation amounts would not only improve the chance of the customer to recover damages but also justify the restriction of the exceedability of limitation amounts to cases where the operator himself (or the corporate representative of a transport terminal company) can be blamed for wilful misconduct.

Proposal:

The words "or his servants or agents" in article 8(1) should be deleted.

9. Right of retention

Article 10(1) provides for a right of retention which the operator shall enjoy with respect to the goods for services rendered during the period of his responsibility. UNCITRAL adopted a proposal to grant such a right of retention also for services rendered after that period (cf. Report of UNCITRAL on the work of its 22nd session 1/). The draft Convention, which does not reflect this decision, should be amended accordingly.

1/ Official Records of General Assembly, Forty-fourth session, Supplement No. 17) (A/44/17), paragraphs 126 and 207.

Proposal:

The first sentence of article 10(1) should read:

"The operator has a right of retention over the goods for costs and claims which are due in connection with the transport-related services performed by him in respect of the goods during or after the period of his responsibility for them."

10. Right of sale

Article 10(3) provides in its first sentence for a conflict of laws rule relating to the requirements and legal effects of an operator's right of sale. During the preparatory work it was understood that the possible conflict between the right of sale and any property rights of third parties in the goods should not be dealt with by the Convention (cf. preparatory documentation A/CN.9/260, paragraph 66; and A/CN.9/WG.II/WP.56, article 10, comment 6). Irrespective of this general approach a special provision has been added to article 10(3) according to which the conflict of laws rules contained in the first sentence of article 10(3) shall not apply to containers which are owned by a party other than the carrier or the shipper. Literally construed, such a provision means that the general principles of private international law do apply. The Federal Government doubts whether it makes much sense to split up the conflict of laws rule with respect to different categories of goods. It would prefer to have all issues relating to the sale of goods and to the rights of third parties in the goods dealt with by the applicable national law according to the general principles of private international law.

Proposal:

Paragraph (3) of article 10 should be deleted.

11. Limitation period

There are several provisions dealing with time periods in the draft Convention. Some of the periods commence on the day of a "request", others on the day of a "notice". Paragraph (2)(b) of article 12 refers to a notice of the loss of the goods without indicating whether the limitation period was to commence from the time of dispatch or of receipt of such notice. Other provisions such as paragraphs (3) and (4) of article 5 provide for a specific time period after receiving a request. Article 12(2)(b) of the draft Convention should be brought in line with such provisions.

Proposal:

Article 12(2)(b) should read:

"In cases of total loss of the goods, on the day the person entitled to make a claim that the goods are lost receives a notice from the operator stating the loss, or on the day that person may treat the goods as lost in accordance with paragraph (4) of article 5, whichever is earlier."

12. Entry into force

The number of ratifications required for the Convention to enter into force provided for in article 22(1) of the draft Convention should be increased considerably.

The above observations should not be regarded as being exhaustive. The Government of the Federal Republic of Germany reserves the right to submit further proposals during the diplomatic Conference.

Japan

[Original: English]

The Government of Japan is of the opinion that the draft Convention as contained in the document A/CONF.152/5 is a good basis for discussion at the international conference of plenipotentiaries. It seems appropriate, however, to make the following comments which would serve to improve several provisions of the draft Convention.

The following comments are submitted without prejudice to any final position to be taken by the Japanese Government at the Conference.

1. Article 1(a)

It is not quite clear under Article 1(a) whether the Convention applies to stevedores who are covered by applicable rules of law governing carriage. Considering the purpose of the Convention, which is to fill gaps between existing liability regimes for transportation, it would not be appropriate to allow stevedores to be exempted from the scope of the Convention by merely inserting in bills of lading a clause extending the same protection provided for carriers to stevedores.

This uncertainty could be eliminated by inserting a phrase "as a carrier or multimodal transport operator" after the word "responsible" in the second sentence of article 1(a).

2. Article 4(a)

Under article 4(1) the operator shall sign a document or issue a signed document when he is requested by a customer to do so. Our concern here is the fact that there is no time limit to the customer's request. Under the present provisions of Article 4(1), the operator can be obliged to sign or issue a document even after a suit against him is brought by the customer. A time limit of reasonable length should be set to the customer's right to request a document.

3. Article 10(1)

At the twenty-second session of UNCITRAL, it was understood that the operator's right to retain the goods under the first sentence of article 10(1) should be extended to cover costs and claims incurred after the expiration of his period of responsibility. The provision should be aligned with this understanding.

4. Article 11(2)

The term "final recipient" in the provisions of article 11(2) needs clarification in that it should be aligned with the understanding of the Working Group on International Contract Practices at its eleventh session that the term refers to a person who would be in a position of inspecting the goods (A/CN.9/298, paragraph 69). This could be resolved by inserting a phrase "who is in a position of inspecting them" after the words "final recipient".

Further consideration might be given, in this regard, to taking care of a case where the final recipient of the goods refuses to take delivery of them.

5. Article 21

Meaning of "declarations" is not defined in article 21 itself. If they refer to the declarations set forth in article 19, the order of articles 20 and 21 should be reversed, and the wording "this Convention" in the first line of present article 21(1) should be replaced by "article 19".

Philippines

[Original: English]

Comments of the Philippine Ports Authority on the draft Convention on the Liability of Operators of Transport Terminals in International Trade

Based on the provisions of Philippine Ports Authority (PPA) Administrative Orders No. 13-77 and No. 10-81, entitled "General Port Regulations of the Philippine Ports Authority" and "General Conditions of All Contracts/Permits for the Management and Operations of Cargo Handling Services", respectively, hereunder are our comments and proposals on the matter:

1. Paragraph (3) of article 5 clarifying the occurrence of delay when the operator fails to hand over the goods for the disposal of the person entitled to take delivery of them within the time expressly agreed upon or, in the absence of such agreement, within a reasonable time after receiving a request for the goods by such person should specifically mention the exact or definite period, say within fifteen (15) days from receipt of such request.

2. Relative to the provision of paragraph (4), Article 5, and paragraphs (5) and (2) of article 11, PPA regulations state that on failure of a contractor to deliver the goods, which should commence within one hour after presentation of a delivery permit by the cargo owner or his duly authorized representative, the contractor shall furnish upon request, a certificate showing shortage, damage or loss of cargo. The request for certification of loss or non-delivery shall be made within thirty (30) days from the date of delivery of the last package to the cargo owner. On the other hand, the issuance of certification of non-delivery should be made within fifteen (15) days from receipt of a written request for certification. Failure on the part of the contractor to act on the request means certification is deemed issued. Thereafter, a person entitled to make a claim shall file a formal request together with the necessary copies of Bill of Lading, Invoice, Certified Packing List and computation arrived at covering the loss, within fifteen (15) days from date of issuance by the contractor of a certificate of non-delivery.

3. On the limits of liability under paragraphs (1) and (2) of article 6, PPA regulates that the Operator shall be liable for the loss, damage or non-delivery of cargoes to the extent of the actual invoice value of each package, which in no case shall be more than ₱ 3,500.00 for each package unless the value of the cargo importation is otherwise specified in writing together with the declared bill of lading value and supported by a certified packing list.

The other provisions of the draft Convention intended for international acceptance are in conformity with the local regulations on claims and liability for losses and damages except of course on certain PPA procedures and the foregoing limitation in the payment of claims that is expressed in pesos.

Since the Convention aims to establish an internationally uniform rule on the liability of operators of transport terminals in international trade, this Authority shall highly appreciate

being informed of the ultimate outcome of the Plenipotentiary Conference of UNCITRAL which will be convened from 2 to 19 April 1991, in Vienna. Amendments of related local regulations may be considered, if needed, to be consistent with the draft for final adoption.

United States of America

[Original: English]

The United States agrees that the draft Convention on the Liability of Operators of Transport Terminals in International Trade, approved by the United Nations Commission on International Trade Law in May, 1989 (United Nations document A/CONF.152/5, 13 March 1990), is an appropriate point of departure for the work of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade in Vienna in April, 1991. However, the United States has the following comments on the draft Convention, including certain substantive modifications of the Convention that it believes should be adopted (underlined), with drafting improvements left for consideration at the Conference:

Article 1: Definitions

1. Description of "Goods": It is the U.S. interpretation of article 1(b) that empty containers, in a storage yard for empty containers, are not subject to the Convention. The Convention on the Liability of Operators of Transport Terminals concerns transport-related services to goods; it includes containers and packaging within the Convention only to the extent that they are used for consolidation or packaging of goods. The Convention itself or the negotiating records of the Convention should clarify that empty containers, in a storage yard for empty containers, are not subject to the Convention.

2. "Writing": "Writing" is not defined in the definition section of the draft Convention. The term is used in the Convention, for example in article 12(4). It would be an improvement if electronic writing could be recognized formally as an acceptable form of writing. This recognition could best be made in article 1, as follows:

"For the purposes of this Convention 'writing' includes electronic writing".

Article 4: Issuance of document

The United States strongly believes that there is a need for flexibility in the documentation requirements. It is anticipated that the document will normally be a carrier's bill of lading presented to the terminal operator; thus, the current formulation of article 4(1)(a) is satisfactory. It is in the interest of the customer to be able to choose an inexpensive and quick method of documentation, while at the same time retaining the right to require the operator to issue a document under article 4(1)(b) where the nature of the goods or the marketing situation makes it necessary for the customer to know the condition and quantity of the goods at this stage of the shipment. It would be especially burdensome (and costly) for stevedores to be required to state the condition and quantity of the goods during loading or unloading operations.

If additional requirements were to be added to the already existing provisions, the United States believes a qualification of such additional requirements should be added, such as "to the extent required by local circumstances", so as to limit the necessity for further requirements to those countries which really need them.

The further qualification "as far as they can be ascertained by reasonable means of checking" would be necessary to ensure that stevedores or terminal operators do not open sealed containers—a procedure that would surely delay and even imperil the movement of the goods.

Under article 4(4) the signature of the operator may be made by electronic or any mechanical means "if not inconsistent with the law of the country where the document is signed". While this paragraph is modeled on a similar provision in the Hamburg Rules (article 14(3)), the United States favors the formulation of the United Nations Convention on International Bills of Exchange and International Promissory Notes (Article 5(k)—"Signature means a handwritten signature, its facsimile or an equivalent authentication effected by any other means; ...") which is intended to facilitate international trade to the greatest possible extent. That provision does not make a qualification regarding consistency with local law.

Article 6: Limits of Liability

The United States accepts the principle that liability should be limited. However, the United States believes that adequate allowance should be made for erosion through inflation. The value of the SDR has declined because of world-wide inflation. The IMF deflator, based on the relative value of currencies making up the SDR basket, went from 1 in 1979 to 1.4936 in 1987 (see IMF International Financial Statistics, 1988). For example, the Multimodal Convention's limits have now been reduced to 73% of their original value in 1980. These limits have declined further in real value during the period 1987-90. Consequently the limitation of liability to be specified in the terminal operators' Convention should make appropriate allowance for inflation erosion of the liability limits set by other conventions.

It is the United States' view that the approaches to establishing liability limits in other liability conventions, for example the Hamburg Rules, are not necessarily appropriate for use in

the Convention on the Liability of Operators of Transport Terminals. The subject matter of the terminal operators' Convention differs from that of the Hamburg Rules and the other liability conventions. For example, there is no issue of negligent navigation in the terminal operators' Convention whereas negligent navigation was a significant bargaining chip in the Hamburg Rules negotiation.

The United States believes that the participating States, in establishing liability limitation, should examine issues such as the value of goods handled by operators, the costs of transport-related services, insurance costs, the average level of damages awarded against operators for loss of or damage to goods or delay in handing over the goods, and the utility expenses of terminal operators; also relevant are the limits of other transport-related conventions. (See article 24(4), criteria in determining whether limits should be amended.)

Finally the actual limitation on liability should depend on resolutions of the issues of burden of proof, breakability of limits and defenses to liability, because limitation of liability is only one of several ways of allocating risks between the terminal operator and his customers.

Article 7: Application [of defenses and liability limits] to non-contractual claims

Article 7(3) provides that the aggregate of compensation recoverable from servants, agents or independent contractors shall not surpass the liability limits under the Convention. A question has arisen whether servants, agents and independent contractors would be bound by an operator's agreement to increase liability limits as provided under article 6(4). The United States is of the view that the servants, agents and independent contractors should not be affected by the operator's contractual agreements to increase liability limits. Thus, it is proposed to add to article 7(3) a sentence stating:

"Such aggregate shall not be affected by the operator's contractual agreements under article 6(4) to increase liability limits."

Article 10: Rights of security in goods

The terminal operator is sometimes disadvantaged by unclaimed goods which occupy valuable space needed for other purposes. Therefore, the United States proposes that a new subparagraph be added as follows:

"(5) The terminal operator may consider goods in its charge abandoned if not claimed within () days after (i) the day until which the operator has agreed to keep the goods, or (ii) if such agreement has not been concluded, the date as of which notice of availability of the goods had been given by the operator to the person entitled to take delivery of the goods."

Article 12: Limitation of actions

To conform with the above-proposed new paragraph (5) to be added to article 10, an adjustment should be made in article 12, paragraph (2), as follows:

"(2) The limitation period commences:

(a) on the day the operator hands over the goods or part thereof to, or places them at the disposal of, a person entitled to take delivery of them, or considers the goods as abandoned in accordance with paragraph (5) of article 10, or"

No change is proposed for subparagraph (b) of paragraph (2).

Article 15: International transport conventions

Article 15, insofar as it refers to "rights or duties which may arise under an international convention relating to the international carriage of goods which is binding on a State which is a party to this Convention", is satisfactory. It is the view of the United States that the proper purpose of this article, like the purpose of similar articles in other UNCITRAL-prepared conventions, is to exclude from the scope of application of this new Convention all matters already covered by existing conventions in order to avoid confusion, conflict and overlapping provisions.

However, the proviso in article 15 "or under any law of such State giving effect to or derived from a convention relating to the international carriage of goods," raises fundamental questions regarding the relationship of treaties to unilaterally enacted domestic law. The proviso as drafted may be used unilaterally to vary the mandatory provisions of this Convention which was designed to be uniform, by applying domestic laws allegedly derived in part from some other multilateral or bilateral transport convention. It is especially important in a convention designed to fill gaps that uncertainty not be introduced through domestic laws derived from international conventions. Accordingly, the United States proposes the deletion of the aforementioned proviso.

Article 22: Entry into Force

The United States shares the view of many countries that this Convention is not linked to the 1978 Hamburg Rules and thus need not require 20 ratifications or accessions to be brought into force as do the Hamburg Rules.

It is relevant at this point to consider other multilateral conventions: The Hague Rules of 1924 required no minimum number of ratifications and entered into force in 1931 with four ratifications; the Visby Amendments of 1968 required 10 ratifications and entered into force in 1977; the SDR Protocol of 1979 required 5 ratifications and came into force in 1984. The Multimodal Convention of 1980 requires 30 ratifications and has not yet come into force. Accordingly, the United States proposes that this Convention enter into force when 5 States have ratified or acceded to it.

B. Intergovernmental organizations

International Labour Office (ILO)

[Original: English]

The International Labour Office communicated to the Executive Secretary of the United Nations Conference on the Liability of Operators of Transport Terminals the following observations by the International Transport Workers' Federation (ITF):

"The ITF, on behalf of employees working in transport terminals, particularly road transport workers, railway workers and dockers, is seriously concerned about the proposed wording in paragraphs 7(2) and 8(2) of the proposed Convention. In particular we object strongly to the inclusion of the words "if he proves that he acted within the scope of his employment or engagement by the operator" in paragraph 7(2). In our view an employee of an operator has no contractual liability towards a consignor or consignee. The employee's obligation is towards his/her employer and is defined by the relevant employment contract and associated labour law. Ideally we would prefer all actions undertaken by a servant or agent of an operator to be covered by the liability limits of the Convention, something which we believe can simply be achieved by the deletion proposed above.

We certainly cannot accept that, as is the case with the proposed wording, the burden of proof should be with the employee to show that he was acting within the scope of his employment rather than with the person bringing the action to show that he was not.

For similar reasons we would prefer the deletion of 8(2). The type of action described here would normally be dealt with under criminal law."

C. Non-governmental organizations

Institute of International Container Lessors

[Original: English]

The Institute of International Container Lessors (IICL)* submits these comments in support of the limitations set forth in article 10(3) on the right of the operator of a transport terminal to sell containers over which he has exercised a right of retention. Under article 10(3) the operator is entitled to sell goods as to which he has exercised a right of retention except for "containers, pallets or similar articles of transport or packaging ... owned by a party other than the carrier or the shipper and ... clearly marked as regards ownership" (with certain exceptions for repairs or improvements).

IICL asks that article 10(3) be approved as written. The present text is a compromise. Originally IICL argued that the operator should have no security in a leased container. In the United States it is not clear whether the operator would have security. There is some authority in the United States that a warehouseman (i.e., the operator) has a lien where the person depositing the property with the warehouseman has such an interest that he could pledge the property for value. A ship line would not have such an interest in a leased container. In some European jurisdictions it appears that there is a right of retention but no right of sale or such a right only after a court order.

The purpose of the compromise is to encourage a negotiation between the operator in possession of the container and the container lessor. Each has an interest in the exchange of the container for payment. A right of sale in the operator would tip the balance against the lessor who had no responsibility for leaving the container with the operator. The present text achieves a proper balance and provides an incentive to benefit both parties.

*IICL is the trade association for the international marine cargo container leasing industry. The container is marked as to leasing company ownership in large letters on each of the four sides and other places as well.

[Original: English]
[13 March 1991]

CONTENTS

	<u>Page</u>
I. INTRODUCTION	42
II. COMPILATION OF COMMENTS AND PROPOSALS	42
A. Governments	42
Mauritius	42
Mexico	43
Morocco	44
Netherlands	44
Poland	46
Sweden	46
B. Intergovernmental organizations	49
Organization of African Unity (OAU)	49
United Nations Environment Programme (UNEP)	49
C. Non-governmental organizations	50
International Road Transport Union (IRU)	50

I. INTRODUCTION

The present addendum 1 to document A/CONF.152/7 sets forth the comments and proposals of Governments and international organizations on the draft Convention on the Liability of Operators of Transport Terminals in International Trade that were received between 18 December 1990 and 6 March 1991. During this period comments and proposals were received from the following Governments and international organizations:

Governments: Mauritius, Mexico, Morocco, Netherlands, Poland and Sweden

Intergovernmental organizations: Organization of African Unity (OAU)
United Nations Environment Programme (UNEP)

Non-governmental organizations: International Road Transport Union (IRU)

II. COMPILATION OF COMMENTS AND PROPOSALS

A. Governments

Mauritius

[Original: English]

The draft Convention only applies to transport-related services and it does not modify any rights or duties which may arise under any international convention relating to international carriage of goods. The Government of Mauritius notes that under Article 5 of the draft Convention "the contributory negligence" is not specified as a defence (either partial or complete) to any liability.

*Incorporating document A/CONF.152/7/Add.1/Corr.1, dated 20 March 1991.

Mexico

[Original: Spanish]

The Mexican Government appreciates UNCITRAL's efforts in preparing the draft Convention. This document is the logical result of work done by UNCITRAL and other international agencies on the international carriage of goods. There is a need for an international convention to regulate the liability of the operators of international transport terminals, since the conventions on carriage are restricted to certain aspects of that activity and since it is, apparently, during the intermediate stages of carriage, and especially before and after carriage, that goods most frequently suffer damage or loss.

Article 1

It is advisable to define the "person entitled to take delivery of the goods". This term is used in articles 3, 4, 5 and 11. In particular, since article 4 also mentions the customer, we need to know who the customer is - the loader, the carrier or the consignee? The person entitled to take delivery of the goods may be a carrier, another operator, the consignee or the bearer of the bill of lading.

It is also necessary to examine the definition of "customer".

Article 4

In connection with paragraph (4), it should be noted that article 14, paragraph (3) of the "Hamburg Rules" contains a definition of signature. There is a similar definition in article 5, paragraph (3) of the Convention on Multimodal Transport. On the other hand, article 5, paragraph (k) of the United Nations Convention on International Bills of Exchange and International Promissory Notes expresses a different view of signature.

The wording adopted in the draft makes a non-handwritten signature dependent on the absence of incompatibility with the law of the country where the document is signed. This proviso is incompatible with uniformity and gives rise to much uncertainty. In any case, it would be preferable to authorize a reservation. The conformity achieved when negotiating the above-mentioned Convention on negotiable instruments shows that this is not necessary.

When this latter Convention was discussed, the initial proposal was for a wording similar to that used in the draft Convention we are currently considering. The idea of a reservation was envisaged. In the course of the work to draft the reservation, the subject was given wide discussion and it was one of the "most controversial questions", since the concept of signature is of substantial importance in matters relating to the law governing negotiable instruments. The definition formulated on that occasion was more satisfactory for the majority of countries than the text similar to that now proposed in article 4.

Recommendation: (i) eliminate the uncertainty surrounding the concept of signature (there are three different definitions); (ii) adopt the definition embodied in the Convention on Bills of Exchange and Promissory Notes because it offers advantages over the previous definitions.

In any event, it is absolutely necessary to eliminate the condition whereby the non-handwritten signature should not be incompatible with the laws of the country where the document is signed. If it is deemed necessary to retain the condition, it will be better to establish a reservation. This would be a step backwards compared with out instruments and with international trade practices.

Article 6

This establishes limits of liability which seem low if one considers the limits which appear in other international conventions, such as article 6 of the "Hamburg Rules" and article 18 of the Convention on Multimodal Transport. Furthermore, experience indicates that loss and damage occur most frequently during the stages covered by the Convention. All this makes it advisable to raise the limits of liability at least to the levels of the other agreements mentioned.

In addition, it is worth noting that considerable time may elapse between an event triggering liability and payment of compensation. It is therefore reasonable to stipulate (e.g. article 70 of the Convention on International Bills of Exchange and International Promissory Notes and article 78 of the Convention on Contracts for the International Sale of Goods) the obligation to pay interest and also to compensate the losses that may be caused by exchange rate fluctuations. Otherwise, even when in compliance with a national law the person suffering damage may demand such facilities, the person liable to argue that the limit of his liability also includes interest and exchange losses.

As regards liability for delay, fixed with reference to the total charges payable to the operator, the limit is very low since the operator only risks his payment and nothing else.

The article mentioned charges to the operator, leading one to think that other additional charges that may be made by the operator do not contribute to forming the limit. This matter should be re-examined.

Article 10

The Mexican Government appreciates the fact that, during the twenty-second session of the UNCITRAL, the criterion that the sale of goods may only be effected if adopted. The criterion previously set out in the draft, whereby the sale could be made if authorized by the law of the State where the operator had his establishment, would have rendered the Convention incompatible with the basic principles of our legal system, which does not allow sale without the legal hearing of the owner. Other States with similar systems might have the same objection.

Morocco

[Original: French]

1. Carriage by air

The definitions in article 1 and the scope of application described in article 2 of the draft indicate that their application does not relate to the national air transport company (RAM) in its capacity of carrier.

Indeed, it emerges from article 1(a) that the status of operator, whose responsibility the text is designed to determine, does not include the persons responsible for the goods by virtue of the rules governing carriage.

Since the responsibility of the national air transport company (RAM) in this regard is governed by the Warsaw Convention, it will thus not be subject to the rules set out in the draft Convention.

2. Carriage by road

Regarding carriage by road, the draft Convention will fill a legal gap at the meeting points between carriage effected by different modes of transport.

The importance of the draft Convention lies in the fact that its scope of application covers the services rendered by the operator of a transport terminal (storage, loading, unloading, stowage, etc.) with reference to goods involved in international carriage.

Netherlands

[Original: English]

General comments

The Netherlands Government has taken note of the draft Convention with much interest and appreciation. The principal reason for unifying the rules relating to the liability of terminal operators is to fill gaps in the liability regimes left by the international transport conventions before, during and after carriage as well as between different stages of the transport. On the one hand the draft Convention gives due protection to persons with interests in cargo and on the other hand it facilitates recourse by carriers, multimodal transport operators, freight forwarders and similar entities against the terminal operator, when they are held liable for loss of or damage to the goods caused by the terminal operator during the period that they are responsible for the goods.

The Netherlands Government is aware that there is room for improvement of the general conditions used by the various terminal branches, but doubts whether this could be achieved through a common system of liability for the following reasons.

The draft Convention is applicable to terminal operators handling goods involved in international carriage by sea, air, road and inland waterway. There exists a wide variety of types of operators dealing with different types of goods and performing different types of services. Furthermore the operators represent a wide range of technical and operational sophistication. In view of these different factual circumstances in which terminal operators perform their services, the Netherlands Government is not convinced that the different branches of terminal operators should necessarily be governed by the same liability system. For instance according to article 5 of the draft Convention the liability system is based on the principle of presumed fault or neglect. The operator is exonerated from liability only if he is able to prove that he, his servants, agents or other persons of whose services he makes use for the performance of transport-related services took all measures that could reasonably be required to avoid the occurrence and its consequences. This reversal of the burden of proof means that under the provisions of the draft Convention it will not be possible for the operator to demonstrate that he is not liable. In practice, operators handle huge amounts of widely varying goods without being in a position to assess their condition and quality. Operators would consequently find it difficult if not impossible to prove that they or their servants, agents or other persons of whose services they make use, had taken all reasonable measures to avoid the occurrence or its consequences. It should also be noted that operators often have difficulty in determining in advance what measures should be taken since documents do not always adequately reveal the specific

nature of individual goods. It would moreover be impossible to expect operators to possess sufficient knowledge about all the goods received for handling to allow appropriate measures to be taken in all cases. Each branch of industry has its own conditions governing liability and these conditions reflect the specific situation in the branch in question. Although the Netherlands Government is convinced that the uniform rules of the draft Convention should mean an improvement in certain branches of the terminal operator's industry, this does not mean that the liability of an ore transshipment company or a cheese warehouse should be increased to the same extent as that of the major container terminal in Rotterdam.

Therefore the draft Convention should leave the possibility to the national legislator to apply the draft Convention according to specific circumstances applicable in each branch. The Netherlands Government would like to make the following proposal:

"Article _____

Any State may declare at the time of signature, ratification, acceptance, approval or accession that it shall restrict the application of the rules of this Convention to certain types of terminal operators."

This article should be inserted after Article 19.

The following comments made on certain articles do not constitute a definitive and final expression of views of the Netherlands Government. The Government reserves the right to make further proposals for changes in these and other articles at the diplomatic conference due to be held in April 1991 in Vienna.

Article 1. Definitions

Article 1. subparagraph (a)

The sentence "However, a person shall not be considered an operator whenever he is responsible for the goods under applicable rules of law governing carriage" is not clear. The result of this sentence should not be that a carrier who has legally--for instance according to the Hague-Visby Rules--exonerated his liability in a before-and-after clause, and who is therefore not responsible for the goods under applicable rules of law governing carriage, is made responsible under the rules governing the liability of terminal operators.

The Netherlands Government would like to propose to replace the sentence by the following sentence:

"However, a person shall not be considered an operator whenever rules of law governing carriage are applicable to him."

Article 1. subparagraph (c)

The uniform rules are applicable when the goods are involved in international carriage. It should be made clear that this is the case whenever in a single contract of carriage the place of departure and the place of destination are located in two different States. The definition as it reads now could mean that goods which are carried under a contract in one State from one place to another and then stored, waiting for carriage to another country under another contract, are governed by the uniform rules.

The Netherlands Government would like to propose to insert in subparagraph (c) after the words "in which": according to the contract.

Article 1. subparagraph (d)

It should be made clear that the term "transport-related service" means the physical handling of the goods and not, for example, financial services with respect to the goods. In practice, operators nowadays already often finance certain services in relation to the transportation of goods. In future this could easily be interpreted as a transport-related service. The Netherlands Government therefore would like to propose to replace the definition of transport-related services by the following definition:

"(d) 'Transport-related services' means services regarding the physical handling of the goods such as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing."

Article 5: Basis of liability

The draft Convention does not contain any specific provisions concerning consequential damages. The UNCITRAL Working Group, which prepared the draft Convention, has found it a matter for national law to determine whether such damage falls under the terms of the Convention. The Netherlands Government is convinced that it should be made clear that Article 5 does not include consequential damages. Therefore we would like to propose to add a new paragraph (5) to Article 5:

"(5) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are according to article 3 delivered, or should have been delivered. The value of the goods shall be fixed according to the commodity

exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference of the normal value of the goods of the same kind and quality."

Article 8: Loss of right to limit liability

The inclusion of servants or agents in article 8 encounters serious objections. Limitation is inherently unfair, but it is assumed that in order to be able to exercise his profession an operator has to be able to assess the risks involved and insure against them. Appeals by operators to limit the extent of their liability are therefore admissible. If these limits were broken, operations would be placed in a precarious and uncertain situation. The whole concept of limitation would become illusory if too many cases existed in which limits might be exceeded, since operators would still have to insure themselves for the full amount of damages. In practice this would often mean that a consignment was doubly insured, since the party interested in the goods would tend to have taken out a transport insurance to cover the goods through the entire transport process.

The increased risk will lead to a corresponding increase in the premium of an operator insuring himself against liability, a factor which will be reflected in the charges. Admittedly, the premiums for transport insurance might fall, but in practice this rarely happens, since the increase in the transport insurer's right of recourse against the liability insurer will not reduce the former's costs. Article 8 of the draft Convention provides that the operator shall not be entitled to limit his liability if the damage resulted from an act or omission of the operator himself or his servants or agents, done with the intent to cause damage, or recklessly and with knowledge that such damage would probably result. This applies even if the servants or agents acted outside the scope of their employment. For the reasons outlined above, the Netherlands Government believes that it should be permissible to break the limits only in exceptional cases, to avoid reducing the significance of the limits set. It should therefore only be possible to break the limits in cases where the operator himself acts with intent to cause damage or with deliberate recklessness.

In respect of paragraph (1) the Netherlands Government would like to propose to delete the words: "himself or his servants or agents."

Article 22: Entry into force

The principal reason for unifying the rules relating to the liability of terminal operators is to fill the gaps in the liability regimes left by the international transport conventions, therefore the convention should enter into force after the deposit of the fifteenth instrument of ratification, acceptance, approval or accession.

Poland

[Original: English]

1. The draft Convention ought to determine clearly its aim. The aim is mentioned indirectly in the report of the United Nations Commission on International Trade Law on the work of its twenty-second session (A/44/17).
2. An operator of a transport terminal and the scope of its liability should be defined more precisely.
3. It is important for the understanding of article 6, paragraph (1) to underline in the text that the Convention refers to transport by rail, or by rail and sea or inland waterways.
4. Article 10, paragraph (4). So as to avoid needless recourse actions related to the decision of the operator about the sale of goods, the paragraph ought to determine precisely the kind and number of reasonable efforts to give notice of the intended sale to the owner of the goods, the person from whom the operator received them and the person entitled to take delivery of them from the operator.
5. Article 12. In our opinion paragraph (3) is not necessary if we take into account the text of paragraph (2).

Sweden*

[Original: English]

General remarks

1. The Swedish Government welcomes and would like to reiterate its general support for the work carried out by the Working Group on International Contract Practices and by the Commission itself

*The observations hereby submitted should not be regarded as exhaustive. The Swedish Government reserves the right to submit further observations or proposals during the Diplomatic Conference in April.

at the twenty-second session. The draft Convention constitutes a solid basis for further negotiations at the forthcoming Diplomatic Conference with the aim of elaborating a liability regime for operators of transport terminals and thereby filling a gap in the chain of transport. The Government also maintains its previous position that a Convention would be the most suitable way of achieving uniformity in this field of transport law.

Comment on specific articles

2. The Swedish Government would like to refer to its comments previously submitted with a letter of 30 November 1988 [...]. These comments concern Articles 1, 2, 3, 5 and 6 of the draft Convention. They are also contained in the compilation of comments by Governments and international organizations prepared for the twenty-second session of the Commission (A/CN.9/319). The Government assumes that it would be unnecessary to repeat its previous comments now, but that the secretariat will find a suitable way of ensuring that they will be published as part of the pre-session documentation for the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade.

[The comments submitted by Sweden for the twenty-second session of the United Nations Commission on International Trade Law, and published in the document entitled "Compilation of comments by Governments and international organizations on the draft Convention on the Liability of Operators of Transport Terminals in International Trade" (A/CN.9/319), are reproduced below, immediately after paragraph 9 of the Swedish comments submitted to the present United Nations Conference.]

3. As a complement to the comments already submitted and in the light of the negotiations at the twenty-second session, the Swedish Government would, however, like to add the following remarks for consideration at the Conference.

Article 6: Limits of liability

4. The present draft Convention does not contain any rules that put an obligation on the operator to take and maintain insurance to cover his liability under the Convention. The Government has previously expressed its concerns about this lacuna in the Convention.

5. Furthermore, the draft Convention does not set any maximum limit as to the aggregate amount of claims that could result from a major accident in a terminal and for which the operator could be mandatorily liable, with or without a right to limit his liability for every individual claim.

6. In many of the major international trade terminals there are being stored or otherwise handled enormous quantities of goods at one and the same time. The value of the goods would be gigantic and very possibly there would be no practical means of establishing the aggregate value of the goods handled at any one occasion.

7. It has been pointed out by representatives for Swedish insurers that there are strong reasons to doubt whether it would at all be possible to find capacity in the liability insurance market to cover such unlimited liability. At the very least one could expect that the interest of insurers to offer liability insurance, concerning the great risks and uncertainties involved in this field, would be very limited - if any - and that the insurance premiums would be very high or even prohibitive. It might prove impossible for the operator to cover his liability with insurance whether he would like to do so or not. Should these concerns come true, the value of the suggested regime would indeed be very limited.

8. With regard to the aforementioned the Conference seems to have good reasons to seriously reflect on the need for complementing the present Article 6 with a maximum limit ("a global limit") for the liability of the operator which can not be exceeded even in case of an accident of a catastrophic nature.

Article 10: Rights of security in goods

9. During the twenty-second session a proposal was made and supported by the Swedish Government that the operator's right of retention over the goods should be extended to cover not only costs and claims that were incurred during his period of responsibility for the goods, but also those which were incurred after his period of responsibility had expired (cf. Article 3). An example given was that of storage fees that had continued to accrue after the time the goods should have been collected by the person entitled to receive them. The proposal was accepted by the Commission and referred to the Drafting Group (cf. the report on the work of the twenty-second session, paragraph 126). This decision was, however, overlooked by the Drafting Group and is not reflected in the present draft Convention. The Swedish Government reiterates its support for the proposal and recommends that the draft Article 10, paragraph (1), be changed accordingly.

[The following comments of Sweden were made to the twenty-second session of the United Nations Commission on International Trade Law (Vienna, 16 May - 2 June 1989). The comments were published in the document entitled "Compilation of comments by Governments and international organizations on the draft Convention on the Liability of Operators of Transport Terminals in International Trade" (A/CN.9/319), and are reproduced here at the request of Sweden (see above, paragraph 2 of the Swedish comments to the present United Nations Conference).]

General observations

The Swedish Government welcomes the work that has been carried out by the Working Group on International Contract Practices. The draft Convention constitutes a solid basis for further negotiations aiming at elaborating a liability regime for operators of transport terminals.

The Swedish Government realizes--and would like to underline--that the draft Convention represents a compromise between different views and between various legal systems. Therefore, the solutions chosen to solve different problems do not necessarily represent the position that the Swedish Government would have preferred in the first place.

The interest of establishing a liability regime in this field of transport law and filling out the existing gaps in the chain of transport must, however, be considered to be of such importance that the draft could basically be accepted.

As regards the form of the proposed regime, the Working Group has recommended a convention. In previous stages of the negotiations within the Working Group, the form of a model law has also been considered.

An important factor, when making the choice between these two alternatives, is the fact that the Hamburg Rules and the Multimodal Convention, which to a great extent have served as models for the proposed Convention, have not yet entered into force. This should not, however, be the determinant factor for the choice to be made. Of major interest is the desirability of achieving the greatest possible uniformity in this field of transport law.

The Swedish Government can accept that the liability regime in question is laid down in the form of a convention. For States which are not prepared to accept this solution and the internationally binding nature of a convention the proposed Convention could serve as a model for national legislation. Such States could later on decide whether or not to ratify the Convention. This could also be a way to reach uniformity.

After these general remarks, the Swedish Government would like to make a few comments on some of the proposed articles of the Convention, keeping in mind as mentioned above their nature of well reasoned compromise solutions.

Comments on specific articles

Article 1

(a) One of the requirements for regarding a person as an operator of a transport terminal is that he undertakes to "take in charge" goods ... etc. The meaning of the expression "take in charge" should be clarified to make it perfectly clear in what situation the regime is applicable or not. Would for instance some activity from the operator be required with regard to the receipt of the goods, or would it be sufficient that the goods are left on the quay for later instructions concerning their destination etc. to make the rules apply?

(b) The definition of "goods" is not entirely clear on some points. Would the definition for instance cover live animals and furniture removal (cf. article 1, paragraph (4), in the CMR)? Some clarification seems to be needed in this respect.

(e) (f) The definitions under these two paragraphs exclude the possibility of using oral notices and requests under several draft articles in the Convention. The Swedish Government is not in favour of this exclusion. It had been preferable to leave it to the parties involved to determine the appropriate form of notice to use in accordance with good commercial practice and to protect their interests. To require a specific form would furthermore create confusion within those legal systems, among them the Swedish one, where it is left to the courts to decide upon the value of the evidence presented before them, whether in writing or orally by a witness.

Article 2

The rules apply only to goods which are involved in international carriage. It could be argued that, for logical reasons, this is not the best solution. Different rules could apply to the same kind of goods in a terminal depending on the place of destination. This could cause confusion and have the result that "national goods" are treated with less care than goods headed abroad. However, the Swedish Government will not oppose the proposed solution.

Article 3

With regard to the use of the words "taken in charge" the same arguments could be put forward as under article 1.

The period of responsibility for the goods expires when the operator has handed them over or "made them available to" the person entitled to take delivery of them. This seems to be a very strict rule from the customer's point of view. It implies that the operator does not have to take care of the goods and has no responsibility for them if there is a delay in collecting the goods within the agreed period of time. It could be argued that the operator's responsibility should not be allowed to expire unless he has notified the recipient and urged him to collect the goods. If the reasoning behind the present stipulation is to avoid terminals being used for lengthy storage, it would of course be possible to counteract such practice by increasing the storage fees.

Article 5

The word "loss" in the opening words of paragraph (1) "The operator is liable for loss resulting from loss of or damage to the goods" might well be and has been interpreted to include consequential loss. Against this background, it has been observed that this makes the extent of the operator's liability uncertain. In the Working Group, however, it was probably thought that whether or not a claimant could recover consequential loss in a particular case would be dependent on the rules of the applicable legal system. Since the wording has given cause for some doubt, it could prove valuable to give the paragraph some further consideration.

Article 6

The Swedish Government can support the approach chosen in paragraph (1) which implies a limitation per kilogramme and not--as an alternative--based on the number of packages or shipping units. As regards the arguments in favour of this solution, the Swedish Government would like to refer to those contained in the report from the tenth session of the Working Group in Vienna (A/CN.9/287, paragraph 34).

The Swedish Government would, for the time being, like to reserve its position with respect to the specific limitation amounts. It should, however, be stressed that the amounts ought to be adjusted to other limitation amounts in the field of transport legislation in order to make recourse actions possible on a back-to-back basis between operators and carriers.

Furthermore, it seems to be important to note that the final decision on the amounts will, among other things, depend on the reservation clauses to be elaborated by the Commission (cf. paragraphs 45 and 96 of the report of the Working Group on its eleventh session, A/CN.9/298).

Final remarks

In the view of the Swedish Government, it would have been preferable, had the draft Convention contained rules that put an obligation on the operator to cover his liability with insurance. Proposals to introduce such an obligation have not, however, met with great sympathy in the Working Group. Unfortunately, the liability regime could prove to be of less value, should the operator turn out to lack the financial means to cover claims that are made against him.

B. Intergovernmental organizations

Organization of African Unity (OAU)

[Original: French]

1. Article 5, paragraph 3, contains vague terms which could give rise to dispute and pose problems of application. In place of "dans un délai raisonnable" (within a reasonable time), it would be advisable to specify the number of days, as is done in other articles.

2. Article 18, paragraph 3, stipulates that: "This Convention is open to accession by all States which are not signatory States as from the date it is open for signature".

We suggest that this wording be slightly corrected to read as follows: "This Convention is open to accession by all States which are not signatory States as from the date on which it comes into force".

United Nations Environment Programme (UNEP)

[Original: English]

1. The scope of liability in the draft Convention on the Liability of Operators of Transport Terminals in International Trade is different from that of a protocol on liability which is being elaborated by the United Nations Environment Programme (UNEP) in accordance with Resolution 3 of the Basel Conference of March 1989. While the draft Convention covers liability for the loss resulting from, or damage to goods, or delay in handling of the goods, the draft elements of a protocol, currently being developed by an ad hoc working group convened by UNEP, does not cover the liability for the goods (hazardous wastes) or delays in handling them: it covers the damage resulting from the hazardous effects of such wastes, e.g., life, injury, environment, properties.

2. Due to the difference in the scope between these two legal instruments, the channeling of liability is also different. In the draft Convention, the liability is channeled to the operator (as defined in Article 1). On the other hand, in the draft elements in a protocol under consideration in UNEP, the liability is channeled to the generator with a possible residual liability on the disposer duly authorized to receive wastes in accordance with the Basel Convention.

3. Because of the differences in the scope as well as in the channeling of liability, the other provisions in these legal instruments, which are developed on the basis of these provisions, are

different from each other. In this context, the draft Convention and the draft elements for a protocol to the Basel Convention are not contradictory, and do not overlap.

4. However, the obligations set out in Article 9 of the draft Convention regarding the special rules on dangerous goods should be paid attention to with respect to the obligations set out under the Basel Convention.

5. Article 9 of the draft convention permits the handling, by the operator, of dangerous goods without being marked, labelled, packaged, or documented in accordance with any law or regulation and even without the knowledge of the operator, of the nature of the goods, being handled by the operator. Due to the lack of such information, i.e., the ignorance of the operator of the nature of goods, the draft Convention, in its Article 9, paragraph (a), permits the operator to take all precautions that circumstances may require, including that of destroying the goods, if harmful to the environment.

6. Under the circumstances, it would appear that Article 9 of the draft Convention is not in accord with the provisions of Article 4(7) of the Basel Convention, which reads as follows:

"Furthermore, each Party shall:

(a) Prohibit all persons under its national jurisdiction from transporting or disposing of hazardous wastes or other wastes, unless such persons are authorized or allowed to perform such types of operations;

(b) Require that hazardous wastes and other wastes that are to be the subject of a transboundary movement, be packaged, labelled, and transported in conformity with generally accepted and recognized international rules and standards in the field of packaging, labelling and transport, and that due account is taken of relevant internationally recognized practices;

(c) Require that hazardous wastes and other wastes be accompanied by a movement document from the point at which a transboundary movement commences, to the point of disposal."

C. Non-governmental organizations

International Road Transport Union (IRU)

[Original: French]

Preamble

"The contracting parties, recognizing the value of regulating in a uniform manner the rights and obligations of operators of international goods transport terminals, particularly with regard to the document issued and their liability, have agreed as follows:"

Article 1: Definitions

(a) Instead of the expression: "in an area under his control or in respect of which he has a right of access or use.", would it not be preferable to define the term: "Terminal": "place where the goods are placed in the charge of the operator"?

New (b) The term: "Person" means both physical and juridical persons.

(b) Replace the term "article" by "vehicle" of transport.

Article 2: Scope of application

(b) and (c) Add: "performed by an operator".

(3) Delete.

Article 3

The operator is responsible for the goods involved in international carriage from the time he has taken them in charge to the time he has handed them over.

Article 4: Issuance of document

(1) It is important for the operator to issue a document acknowledging receipt of the goods because he must first identify the goods (national or international origin) and check their condition. Exemption from issuing such a document (article 4.2) should not be allowed, in order to avoid subsequent disputes.

(a) Without checking by the operator!

(2) In the French text replace "moyen de transport" by "mode de transport".

Article 5: Basis of liability

(1) "The operator is liable for total or partial loss, or damage, occurring from the time he has taken the goods in charge to the time he has handed them over, as well as for delay in handing them over. He is discharged from such liability if he proves that he, his servants, agents or other persons of whose services the operator makes use for the performance of the transport-related services took all measures that could reasonably be required to avoid the detrimental occurrence."

(2) "If the measures referred to in paragraph (1) have not been taken and this failure ..."

(3) "Delay occurs when the goods have not been handed over by the operator within the time agreed or, in the absence of such agreement, within a period of 30 days of receiving a request for the goods."

(4) "Goods which have not been handed over by the operator at the end of a period of 30 days from the agreed date or, in the absence of such agreement, within a period of 30 days from the request for the goods shall be treated as lost."

Article 6: Limits of liability

The indemnification, in the event of loss or damage to the same goods, should be calculated not according to different limits of liability depending on the involvement of one means of transport or another, which leads to unequal legal treatment, but according to the value of the goods at the date and time when the goods were taken in charge by the operator.

This value should be determined by the price ruling on the exchange or, in the absence of such a price, the current market price or, in the absence of either, the normal price of goods of the same nature and quality. In any case, the indemnity due from the operator shall not be lower or higher than that, where applicable, due by the customer to his principal.

If the present draft text of the Convention is retained, there is a case, on grounds of equity, for also taking into consideration goods carried by piggy-back transport and roll-on/roll-off ships.

The addition of the following paragraph is proposed:

(c) "If the goods originate from carriage involving piggy-back transport or roll-on/roll-off ships, the liability of the operator for detriment resulting from losses of or damage to the goods, in accordance with the provisions of article 5, is limited to an amount not exceeding that owing to the customer by the carrier."

Article 10: Rights of security in goods

The guarantees over the goods given to the operator by article 10 are not accompanied by a corresponding guarantee of the liability of the operator in respect of the carrier.

Should there not be a new article including a system of surety or compulsory insurance by the operator similar to that contained in article 13 of the Convention on Liability for Damage Caused during the Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels, of 10 October 1989?

Article 12: Limitation of actions

Delete paragraph (4) of article 12.

Document A/CONF.152/7/Add.2

[Original: English]
[27 March 1991]

CONTENTS

	<u>Page</u>
I. INTRODUCTION	52
II. COMPILATION OF COMMENTS AND PROPOSALS	52
A. Governments	52
Afghanistan	52
China	52
B. Non-governmental organizations	53
Executive Council of the International Maritime Committee (Comité Maritime International (CMI))	53

I. INTRODUCTION

The present addendum 2 to document A/CONF.152/7 sets forth the comments and proposals of Governments and international organizations on the draft Convention on the Liability of Operators of Transport Terminals in International Trade that were received between 6 March and 22 March 1991. During this period comments and proposals were received from the following two Governments and one international organization:

Governments: Afghanistan, China

Non-governmental organizations: Executive Council of the International Maritime Committee (Comité Maritime International (CMI))

II. COMPILATION OF COMMENTS AND PROPOSALS

A. Governments

Afghanistan

[Original: English]

After studying with interest the draft, authorities of the Afghan Government wish to make the following comment. As you are aware that Afghanistan is a land-locked as well as one of the least developed countries, the right to transit and access to a water-course are the first priorities to land-locked countries. The numerous resolutions of the General Assembly on measures for transit of land-locked countries adopted in the last two decades is the best evidence of this.

Taking into consideration the relevant resolutions of the United Nations General Assembly as well as the spirit of the Paris Conference on the least-developed and land-locked countries, the Republic of Afghanistan proposes the following addition to the draft Convention which is to be discussed during the Vienna Conference:

It is the wish of the Republic of Afghanistan that a kind of preference be given to exports and imports of the land-locked countries flowing through International Transport Terminals, and duty-free the other operators of the International Transport Terminals to grant a favoured status to them. This will help the land-locked countries avoid the existing difficulties in this regard.

China

[Original: Chinese]

The Chinese Government appreciates the efforts made and the progress achieved by the United Nations Commission on International Trade Law in developing uniform rules on the liability of operators of international transport terminals.

We consider that a convention on the subject is both desirable and feasible. Such a convention would facilitate the harmonization of laws and practices in this field in various countries and regions, thus closing a gap left by the existing relevant international instruments; at the same time the provisions on the rights and obligations of terminal operators as set out in the draft Convention are essentially enforceable.

We believe that the draft Convention provides a basis for discussion at the forthcoming diplomatic conference to be held in Vienna.

The Chinese Government will send a delegation to attend the conference, where it will make further efforts for the completion and adoption of the draft Convention.

In addition to the above general observations, the Chinese Government wishes to propose the following revisions to some specific provisions of the draft:

I. Title of the Convention:

The title of the Convention should be revised to read: "Convention on the Liability of Operators of Transport Terminals in International Carriage of Goods".

Reasons:

1. "Transport ... in international carriage of goods" has a wider coverage than "transport ... in international trade" and therefore facilitates application of the Convention to transport of non-trade goods (e.g. transport of goods for purposes of aid, donation or exhibition or supplies for diplomatic missions, etc.). Furthermore, at UNCITRAL's twenty-second session, during discussions on article 1 of the draft Convention, most countries regarded the term "goods" used in the draft Convention as including those non-trade goods mentioned above.

2. The revised title is in better conformity with the purpose of the Convention, that is, to fill the gap left by existing international instruments on the carriage of goods - since most of the liability regimes governing carriage are cast in the form of conventions, it is most appropriate to fill the gap left by those instruments by a convention. 1/

II. The preface should clearly state its legislative purposes, which should, at least, include the following elements:

- (1) A new international economic order;
- (2) The principle of equality and mutual benefit; and
- (3) Promotion of uniformity of laws.

The wording of such a preface may follow the preface to the United Nations Convention on Contracts for the International Sale of Goods.

III. In article 4 (1) (a), after "identifies the goods", it is proposed to add: "and states their condition and quantity in so far as they can be ascertained by reasonable means of checking". Alternatively, the corresponding phrase may be taken out of (b) and made a common wording applying to both subparagraphs (a) and (b).

Reason: Such a statement is needed in both (a) and (b). Although in subparagraph (a) the document is presented by the customer, signing by the operator would mean that he confirms the content of the document and that he is also in some way responsible for it.

IV. In article 9 (a), after "precautions", it would be better to insert the words "and remedies", to make the paragraph begin "To take all precautions and remedies the circumstances may require".

Reasons: When considering the duties, rights and interests of an operator handling dangerous goods, one cannot think only of the precautions taken by him (though this point is very important), but should also take into account all the measures adopted by him, including remedial measures adopted after dangers have actually occurred. In order that the operator can do a more effective job in controlling or reducing the loss of the dangerous goods themselves as well as the loss occasioned to other goods, the operator should be entitled to take measures to eliminate a danger that has already occurred and to claim reasonable compensation for the resulting loss.

B. Non-governmental organizations

Executive Council of the International Maritime Committee
(Comité Maritime International (CMI))

[Original: English]

1. General Observations

The CMI took an early interest in the project as appears from CMI Doc. 1975 II, pp. 94-114, where Professor Ramberg introduced the matter to the CMI ("Liability of Sea Terminals--some preliminary thoughts"). Although--as it appears from the report by the working group constituted by UNIDROIT to study the matter--the CMI would prefer model rules to a mandatory international convention, the CMI believes that a convention could become a workable alternative to model rules, provided amendments are made in Art. 13 of the present draft setting forth the important restrictions on contractual stipulations deviating from the provisions of the Convention (see below).

2. Applicability of the Convention

It is always difficult to assess beforehand whether or not a mandatory international convention will become successful. Needless to say, it is much more difficult to induce States to ratify mandatory than non-mandatory conventions. The success of international conventions relating to carriage of goods stems from the difficulties to obtain foreseeability and thus assess the relevant risk distribution when the goods are moved from country to country.

This, makes the objective to unify the law particularly important. The present Convention, however, concerns a domestic activity and, consequently, the incentive to constitute an international instrument is less apparent.

1/ See Official Records of the General Assembly, Forty-fourth Session, Supplement No. 17 (A/44/17), chapter II, section C.

Further, it will be necessary to make a clear distinction between such domestic activity with respect to storage and ancillary services where the Convention should apply and other domestic activity in the same area where the Convention should not apply. Thus, some particular problems to properly delimit the scope of application of the Convention arise. If these are not satisfactorily solved it will be very difficult to ensure the success of the Convention.

The CMI does not consider the present method to clarify the "international element", which brings the mandatory rules into operation, to be satisfactory. It is not always possible to " earmark " goods as "involved in international carriage" when the operator is not concerned with the carriage at all but only with storage and handling of the goods before or after such carriage (Art. 2.1). This, indeed, was well noted by the UNIDROIT working group and explains why model rules were preferred to a mandatory international convention. In order to ensure a correct applicability of the Convention another method than reference to "goods involved in international carriage" is needed. It should be noted that the goods are not "involved" in any such carriage before the carriage has started and the services of the operator in the country of dispatch have been terminated.

The same difficulties would not arise with respect to import goods as they at least could be seen to have been involved in international carriage. But apparent difficulties would arise with respect to export goods, since the operator of the transport terminal frequently would not even know the destination of the goods at the time when the contract of service is entered into. Further, with respect to import goods the "international element" would fade away in cases where the goods are held after import by the operator, pending instructions with respect to further domestic storage or on-carriage as the case may be. For these reasons, the CMI suggests that Art. 13 be amended so that the provisions of the Convention only become mandatory when the operator has opted in the Convention for the contract concerned. Such an approach would, in the view of the CMI, enhance future success of the Convention and thus promote uniformity of the law much better than a convention depending for its mandatory applicability on vague criteria, such as "involved in international carriage".

3. Documents and EDI

It is to be expected that within the field of transport and storage, documentary practices will soon be replaced by Electronic Data Interchange (EDI) messages (see e.g. the revised Incoterms 1990). In order to account for this development it is not enough to stipulate that the document or signature on the document may be issued "in any form" (Art. 4.3) or "by ... electronic means" (Art. 4.4). Art. 4 should provide that the document could be replaced by an equivalent electronic data interchange message (cf. Incoterms 1990 A 8 clauses).

4. Loss of right to limit liability (Art. 8)

It has been an over-riding objective to draft provisions of the Convention in such a manner as to make them compatible with international conventions governing any preceding or subsequent carriage of the goods. This will facilitate for claimants to assess their risk beforehand and also simplify recourse actions by carriers against the operators of transport terminals. However, in this respect, Art. 8 constitutes an important, and therefore unacceptable, exception to the principles governing carriage of goods by sea and multimodal transport. Under the 1978 Hamburg Rules and the 1980 Multimodal Transport Convention, the carrier does not lose his right to limit liability unless the blameworthy behaviour could be attributed to somebody acting on the managerial level in the company. Thus it is necessary to delete the words "or his servants or agents" added after "the operator himself" in Art.8 as drafted.

The CMI is aware of the fact that Art. 8 in this respect reproduces the principle of CMR related to international road carriage. But with respect to such carriage the carrier is normally identical with the operator of the transport terminal and, therefore, the Convention will in practice mainly concern goods involved in maritime carriage and multimodal transport. For this reason, it is in the view of the CMI indispensable to make this important article compatible with the corresponding rules in the Hamburg Rules and the Multimodal Transport Convention.

The CMI expresses its satisfaction with the important work performed so far and expresses the hope that the Convention will materialize in the form suggested above and thus contribute to a better unification of the law in this important field.

E. REPORT OF THE FIRST COMMITTEE

Document A/CONF.152/9

[Original: English]
[18 April 1991]

I. INTRODUCTION

A. Submission of the report

1. The Conference at its third plenary meeting entrusted the First Committee with the consideration of articles 1 to 16 and 20 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (A/CONF.152/5).

2. The present document contains the report of the First Committee to the Conference on its consideration of the draft articles referred to it, and of other proposals made to the First Committee during its deliberations.

B. Election of officers

3. At its third plenary meeting on 3 April 1991, the Conference unanimously elected Mr. Jean Paul Beraudo (France) as Chairman of the First Committee. On 5 April 1991, at the 6th meeting of the First Committee, Mr. Mahmoud Soliman (Egypt) was elected Vice-Chairman of the First Committee and Mr. Abbas Safarian Nematabad (Islamic Republic of Iran) was elected Rapporteur.

C. Meetings, organization of work and structure of this report

(i) Meetings

4. The First Committee held 18 meetings, between 3 April 1991 and 16 April 1991.

(ii) Organization of work

5. At its first meeting on 3 April 1991, the First Committee adopted as its agenda the provisional agenda contained in A/CONF.152/C.1/L.1.

6. The First Committee proceeded mainly by way of an article-by-article discussion of the draft articles before it and of the amendments to those draft articles submitted by representatives during the Conference. The articles were considered in the following order: article 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 2, 13, 14, 20. After initial consideration of an article and amendments by the First Committee, and subject to the decisions taken on those amendments, the article was referred to the Drafting Committee. After consideration of the report of the Drafting Committee to the First Committee on the articles referred to the Drafting Committee, the First Committee referred to the Plenary the articles considered by it.

(iii) Plan of this report

7. This report describes the work of the First Committee relating to each article before it, in accordance with the following scheme:

(a) Text of the draft article as prepared by the United Nations Commission on International Trade Law (UNCITRAL);

(b) Texts of amendments, if any, with a brief description of the manner in which they were dealt with;

(c) Proceedings of the First Committee, subdivided as follows:

(i) Meetings;

(ii) Consideration of the article.

II. CONSIDERATION BY THE FIRST COMMITTEE OF THE DRAFT CONVENTION ON
THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

Article 1

A. UNCITRAL text

8. The text as prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 1

"Definitions

"In this Convention:

"(a) Operator of a transport terminal (hereinafter referred to as 'operator') means a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use. However, a person shall not be considered an operator whenever he is responsible for the goods under applicable rules of law governing carriage;

"(b) Where goods are consolidated in a container, pallet or similar article of transport or where they are packed, 'goods' includes such article of transport or packaging if it was not supplied by the operator;

"(c) 'International carriage' means any carriage in which the place of departure and the place of destination are identified as being located in two different States when the goods are taken in charge by the operator;

"(d) 'Transport-related services' includes such services as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing;

"(e) 'Notice' means a notice given in a form which provides a record of the information contained therein;

"(f) 'Request' means a request made in a form which provides a record of the information contained therein."

B. Amendments

9. Amendments to article 1 were submitted by Germany (A/CONF.152/C.1/L.6), Japan (A/CONF.152/C.1/L.19), Netherlands (A/CONF.152/C.1/L.23), the United States of America (A/CONF.152/C.1/L.4; A/CONF.152/C.1/L.5), Belgium (A/CONF.152/C.1/L.29; A/CONF.152/C.1/61), Sweden (A/CONF.152/C.1/L.28), United Kingdom of Great Britain and Northern Ireland (A/CONF.152/C.1/L.37) the ad hoc working group (A/CONF.152/C.1/L.44/Rev.1) and Australia (A/CONF.152/C.1/L.56/Rev.1).

10. Those amendments were to the following effect:

Subparagraph (a)

(a) Germany (A/CONF.152/C.1/L.6, paragraph 1):
Reword the first sentence of subparagraph (a) as follows:

"'Operator' means a person who, in the course of his business, undertakes to take in charge or to handle goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access."

[Withdrawn: see paragraph 12, below.]

(b) Japan (A/CONF.152/C.1/L.19):
Reword the second sentence of subparagraph (a) as follows:

"However, a person shall not be considered an operator whenever he is responsible as a carrier or multimodal transport operator for the goods under applicable rules of law governing carriage;"

[Rejected: see Consideration, 14, below;
Resubmitted and rejected: see paragraph 17, below.]

(c) Netherlands (A/CONF.152/C.1/L.23):
Replace the second sentence of subparagraph (a) with the following:

"However, a person shall not be considered an operator whenever rules of law governing carriage are applicable to him."

[Withdrawn: see paragraph 15, below.]

(d) Germany (A/CONF.152/C.1/L.6, paragraph 2):
Reword the second sentence of subparagraph (a) as follows:

"However, a person shall not be considered an operator whenever he is responsible for the goods under applicable rules of law governing carriage or forwarding."

[Withdrawn: see paragraph 15, below.]

(e) Belgium (A/CONF.152/C.1/L.29):
Amend the first sentence of subparagraph (a) to read as follows:

"'Operator of a transport terminal' (hereinafter referred to as 'operator') means a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods either in an area under his control or in an area in respect of which he has a right of access or use, provided that he is in a position to exercise effective control over the goods there."

[Not considered by the First Committee: see paragraph 16, below.]

(f) Belgium (A/CONF.152/C.1/L.61):

Replace the phrase "under his control or in respect of which he has a right of access or use" in the first sentence of subparagraph (a) by the phrase "in which he has the possibility to exercise effective control".

[Rejected: see paragraph 17, below.]

Subparagraph (b)

United States (A/CONF.152/C.1/L.4):
Add wording to subparagraph (b) so that the subparagraph would read as follows:

"Where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, 'goods' includes such article of transport or packaging if it was not supplied by the operator; empty containers, in a storage yard for empty containers, are not defined as goods;"

[Withdrawn: see paragraph 18, below.]

Subparagraph (c)

(a) Germany (A/CONF.152/C.1/L.6, paragraph 3):
Reword subparagraph (c) as follows:

"'International carriage' means any carriage in which the place of departure and the place of destination are identified as being located in two different States when the operator takes the goods in charge or takes them over for handling;"

[Withdrawn: see paragraph 19, below.]

(b) Netherlands (A/CONF.152/C.1/L.23):
Insert, after the words "in which", the words "according to the contract of carriage", so that subparagraph (c) would read as follows:

"'International carriage' means any carriage in which according to the contract of carriage the place of departure and the place of destination are identified as being located in two different States when the goods are taken in charge by the operator;"

[Withdrawn: see paragraph 19, below.]

New sentence

Germany (A/CONF.152/C.1/L.6, paragraph 4):
Add the following new sentence at an appropriate place in article 1:

"If goods are accompanied by an international transport document which is known to the operator, such goods shall be deemed to be involved in international carriage; if goods are accompanied by a domestic transport document which is known to the operator, such goods shall be deemed not to be involved in international carriage."

[Rejected as orally amended: see paragraph 20, below.]

Subparagraph (d)

Netherlands (A/CONF.152/C.1/L.23):
Replace subparagraph (d) by the following:

"(d) 'Transport-related services' means services involving physical handling of goods such as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing."

[Rejected: see paragraph 21, below.]

New subparagraphs

(a) United States (A/CONF.152/C.1/L.5):
Add the following in a new subparagraph of article 1:

"'Writing' includes electronic writing."

[Withdrawn: see paragraph 23, below.]

(b) Sweden (A/CONF.152/C.1/L.28):
Add the following in a new subparagraph of article 1:

"'Carrier' means a person who performs or procures the performance of a contract of carriage, including his servants, agents and other persons engaged by him for the performance of the contract of carriage."

[Submitted to ad hoc Working Group: see paragraph, 24, below.]

(c) Ad hoc working group (A/CONF.152/C.1/L.44/Rev.1):
Add the following in a new subparagraph of article 1:

"'Carrier' means a person being a carrier by virtue of an international convention or relevant national law covering carriage of goods."

[Rejected: see paragraph 25, below.]

(d) Australia (A/CONF.152/C.1/L.56/Rev.1):
Add the following in a new subparagraph of article 1:

"'Carrier' means a person who is a carrier by virtue of an international convention on the carriage of goods or a national law implementing or [based on] [derived from] and corresponding with such a convention, but not a non-carrying intermediary unless he shares all the relevant rights and liabilities of a carrier under such a convention or national law."

[Rejected: see paragraph 26, below.]

(e) United Kingdom (A/CONF.152/C.1/L.37):

Add the following in a new subparagraph to article 1:

"'Person' means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions."

[Rejected: see paragraph 26, below.]

C. Proceedings in the First Committee

(i) Meetings

11. The First Committee considered article 1 at its 1st, 2nd, 3rd, 5th, 7th, 11th, 15th and 16th meetings on 3, 4, 6, 8, 10 and 12 April 1991, respectively.

(ii) Consideration

Subparagraph (a)

12. At the 1st meeting, the amendment proposed by Germany (A/CONF.152/C.1/L.6, paragraph 1) was withdrawn.

13. At the 2nd meeting, Germany submitted an oral proposal to amend the second sentence of subparagraph (a) as follows:

"However, a person shall not be considered an operator whenever he is a carrier."

14. This proposed amendment was adopted by 15 votes in favour and 3 against and referred to the Drafting Committee. The adoption of the amendment implied the rejection of the amendment proposed by Japan (A/CONF.152/C.1/L.19; see, also, paragraph 17, below.)

15. At the 2nd meeting, the amendments proposed by Netherlands (A/CONF.152/C.1/L.23) and Germany (A/CONF.152/C.1/L.6, paragraph 2) were withdrawn.

16. The amendment proposed by Belgium (A/CONF.152/C.1/L.29), which was submitted after the First Committee had adopted subparagraph (a), was not considered by the Committee, as a motion pursuant to Rule 33 of the Rules of Procedure of the Conference to reconsider subparagraph (a) was rejected at the third meeting by 16 votes in favour, 12 against and 6 abstentions, and thus failed to receive a majority of two-thirds.

17. At the 15th meeting, a motion to reconsider subparagraph (a) was adopted by 16 votes in favour, 6 against and 10 abstentions. Upon reconsideration of subparagraph (a) at the 16th meeting, the amendment proposed by Belgium (A/CONF.152/C.2/L.61) was rejected by 11 votes in favour, 11 against and 6 abstentions; the amendment proposed by Japan (A/CONF.152/C.1/L.19) was resubmitted and was rejected by 8 votes in favour, 8 against and 12 abstentions. An oral proposal was submitted that the decision to amend the second sentence of subparagraph (a) (see paragraphs 13 and 14, above) should be reversed, and that the second sentence should read as it was set forth in the UNCITRAL text, namely, "However, a person shall not be considered an operator whenever he is responsible for the goods under applicable rules of law governing carriage". That proposal was adopted by 12 votes in favour, 8 against and 8 abstentions.

Subparagraph (b)

18. At the 2nd meeting, the amendment proposed by the United States (A/CONF.152/C.1/L.4) was withdrawn.

Subparagraph (c)

19. At the 2nd meeting, the amendment proposed by Germany (A/CONF.152/C.1/L.6, paragraph 3) was withdrawn in consequence of its withdrawal of a prior proposal (A/CONF.152/C.1/L.6, paragraph 1) (see paragraph 12, above). The amendment proposed by Netherlands (A/CONF.152/C.1/L.23) was withdrawn.

New sentence

20. At the 2nd meeting, the new sentence proposed by Germany to be added to an appropriate place in article 1 (A/CONF.152/C.1/L.6, paragraph 4) was orally amended to read as follows:

"If goods are accompanied by an international transport document which is known to the operator, it shall prima facie be presumed that such goods are involved in international carriage."

The proposal as amended was rejected by 5 votes in favour, 25 against and 1 abstention.

Subparagraph (d)

21. At the third meeting, the amendment proposed by Netherlands (A/CONF.152/C.1/L.23) was rejected by 3 votes in favour, 11 against and 3 abstentions.

Subparagraph (e) and (f)

22. At the third meeting, Germany orally proposed the deletion of subparagraphs (e) and (f). The proposal was rejected by 6 votes in favour, 18 against and 3 abstentions.

New subparagraphs

23. At the third meeting, the amendment proposed by the United States (A/CONF.152/C.1/L.5) was withdrawn. The Drafting Committee was requested to take the proposal into account by ensuring that electronic writing was covered by provisions of the Convention relating to writing, requests and notices.

24. The amendment proposed by Sweden (A/CONF.152/C.1/L.28) was referred to an ad hoc Working Group. The Working Group was requested to consider whether it was necessary to provide a definition of "carrier" and, if so, to formulate a definition.

25. At the 15th meeting, the Committee decided that a definition of "carrier" should not be added to article 1. The vote of the Committee was 8 votes in favour of adding a definition of "carrier", 17 votes against and 6 abstentions. Accordingly, the proposals of the ad hoc working group (A/CONF.152/C.1/L.44/Rev.1) and Australia (A/CONF.152/C.1/L.56/Rev.1) were rejected.

26. At the 7th meeting, consideration of the amendment proposed by the United Kingdom (A/CONF.152/C.1/L.37) was deferred until the consideration of article 4 by the Committee. At the 11th meeting, the amendment was rejected by 5 votes in favour, 24 against and 4 abstentions.

27. The UNCITRAL text for article 1 was adopted and referred to the Drafting Committee.

New article

28. The United Kingdom submitted a proposal (A/CONF.152/C.1/L.31) to include the following new article at an appropriate place in the Convention:

"Notification that goods are involved in international carriage

"(1) A carrier or other person having an interest in the goods may provide the operator with a notice indicating that the goods are involved in international carriage.

"(2) Written acknowledgement by the operator of receipt of a notice provided under paragraph (1) of this article shall be taken as prima facie evidence that the terms of this Convention will apply to the goods when the operator takes them in charge."

29. The United Kingdom subsequently replaced that proposal by a proposal to amend article 4 (A/CONF.152/C.1/L.43), which sought to incorporate the features of the proposal that was replaced. The text of the proposal to amend article 4, and a description of the manner in which it was dealt with by the First Committee, is set forth below in the section dealing with article 4 (see paragraphs 40 and 42, below).

A. UNCITRAL text

30. The text as prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 3

"Period of responsibility

"The operator shall be responsible for the goods from the time he has taken them in charge until the time he has handed them over to or has placed them at the disposal of the person entitled to take delivery of them."

B. Amendments

31. Amendments to article 3 were submitted by Germany (A/CONF.152/C.1/L.9), Belgium (A/CONF.152/C.1/L.33), Finland (A/CONF.152/C.1/L.36), Mexico (A/CONF.152/C.1/L.34) and the United Kingdom (A/CONF.152/C.1/L.38).

32. Those amendments were to the following effect:

(a) Germany (A/CONF.152/C.1/L.9):
Reword article 3 as follows:

"The operator shall be responsible for the goods from the time he has taken them in charge or has taken them over for handling until the time he has handed them over to or has placed them at the disposal of the person entitled to take delivery of them."

[Withdrawn: see paragraph 34, below.]

(b) Belgium (A/CONF.152/C.1/L.33):
Reword article 3 as follows:

"The operator shall be responsible for the goods from the time he has taken them in charge until the time he has handed them over to the person entitled to take delivery of them, provided that person takes delivery of them within a period of 30 days or within the period stipulated in the contract or until such time as he has placed them at the disposal of that person."

[Rejected: see paragraph 34, below.]

(c) Finland (A/CONF.152/C.1/L.36):
Add at the end of article 3 the following words:

[Alternative 1] "and given notice thereof to that person".

[Alternative 2] "and that person has received notice thereof".

[Alternative 1 withdrawn; alternative 2 rejected as orally amended: see paragraph 35, below.]

(d) Mexico (A/CONF.152/C.1/L.34):
Add a new paragraph (2) as follows:

"(2) [Unless there has been no negligence on his part] when the operator is obliged to take the goods in charge, the period of his responsibility shall commence at the moment when the goods are delivered to him."

[Corrected (in English version) and withdrawn: see paragraph 36, below.]

(e) United Kingdom (A/CONF.152/C.1/L.38):
Replace the text of article 3 by the following:

"The operator shall be responsible for the goods from the time the carrier or other person delivers them into his [sole] charge until such time as the operator hands them over to the carrier or other person entitled to collect them."

[Withdrawn: see paragraph 37, below.]

C. Proceedings in the First Committee

(i) Meetings

33. The First Committee considered article 3 at its 4th and 7th meetings on 4 and 8 April 1991.

(ii) Consideration

34. At the fourth meeting, the amendment proposed by Germany (A/CONF.152/C.1/L.9) was withdrawn in consequence of the withdrawal of its proposed amendment to article 1(a) (A/CONF.152/C.1/L.6, paragraphs 1 and 3; see paragraphs 12 and 19, above). The amendment proposed by Belgium (A/CONF.152/C.1/L.33) was rejected by 3 votes in favour, 26 against and 1 abstention.

35. With respect to the alternative amendments proposed by Finland (A/CONF.152/C.1/L.36), alternative 1 was withdrawn. Alternative 2 was orally amended by the United Kingdom to read as follows: "and has given or made reasonable attempts to give prior notice thereof to that person", and was rejected by 8 votes in favour, 22 against and 3 abstentions.

36. The amendment proposed by Mexico (A/CONF.152/C.1/L.34) was corrected, in its English version, by replacing the words "delivered to him" at the end of the amendment with the words "placed at his disposal". The proposed amendment was withdrawn.

37. At the seventh meeting, the amendment proposed by the United Kingdom (A/CONF.152/C.1/L.38) was withdrawn. The UNCITRAL text for article 3 was adopted and referred to the Drafting Committee.

A. UNCITRAL text

38. The text as prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 4

"Issuance of document

"(1) The operator may, and at the customer's request shall, within a reasonable period of time, at the option of the operator, either:

(a) Acknowledge his receipt of the goods by signing and dating a document presented by the customer that identifies the goods, or

(b) Issue a signed document identifying the goods, acknowledging his receipt of the goods and the date thereof, and stating their condition and quantity in so far as they can be ascertained by reasonable means of checking.

"(2) If the operator does not act in accordance with either subparagraph (a) or (b) of paragraph (1), he is rebuttably presumed to have received the goods in apparent good condition. No such presumption applies when the services performed by the operator are limited to the immediate transfer of the goods between means of transport.

"(3) The document referred to in subparagraph (b) of paragraph (1) may be issued in any form which preserves a record of the information contained therein.

"(4) The signature on the document referred to in paragraph (1) may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the document is signed."

B. Amendments

39. Amendments to article 4 were submitted by the United Kingdom (A/CONF.152/C.1/L.43), Japan (A/CONF.152/C.1/L.26), Mexico (A/CONF.152/C.1/L.35) and the United States (A/CONF.152/C.1/L.10).

40. Those amendments were to the following effect:

Article 4 as a whole

United Kingdom (A/CONF.152/C.1/L.43):

Revise article 4 as follows:

"(1) A carrier or other person having an interest in goods which he has placed in charge of an operator may request the operator to:

(a) confirm his identification of the goods;

(b) provide his acknowledgement of their receipt, and

(c) provide his acknowledgement that the goods are involved in international carriage.

"(2) On receipt of a request made under paragraph (1) the operator shall, within a reasonable period of time, either:

(a) acknowledge his receipt of the goods and that they are involved in international carriage by signing and dating a document presented by the customer that identifies the goods and indicates they are involved in international carriage;

(b) issue a signed document identifying the goods, acknowledging his receipt of the goods and the date thereof and that they are involved in international carriage, and stating their condition and quantity insofar as they can be ascertained by reasonable means of checking.

"(3) The operator may issue a signed and dated document as referred to in paragraph (2)(b) without receipt of a specific request made under paragraph (1).

"(4) A signed and dated document under paragraphs (2) and (3) shall be taken as absolute confirmation that the provisions of this Convention apply to the goods identified in the document.

"(5) An operator who on receipt of a request made under paragraph (1) fails to act in accordance with either subparagraph (a) or (b) of paragraph (2) is presumed to have received the goods in good condition unless he can prove otherwise. No such presumption applies when the services performed by the operator are limited to the immediate transfer of the goods between means of transport.

"(6) [Text of article 4(3), A/CONF.152/5, as approved by the Committee]

"(7) [Text of article 4(4), A/CONF.152/5, as approved by the Committee]"

[Rejected: see paragraph 42, below.]

New paragraph (1 bis)

Japan (A/CONF.152/C.1/L.26):

Insert in article 4 a new paragraph (1 bis) as follows:

"Any request by the customer under the preceding paragraph shall be made within a reasonable period of time after the receipt of the goods."

[Withdrawn: see paragraph 43, below.]

Paragraph (3)

Mexico (A/CONF.152/C.1/L.35):

Add the following sentence after the UNCITRAL text for paragraph (3):

"The document may be replaced by an equivalent electronic data interchange message."

[Withdrawn: see paragraph 45, below.]

Paragraph (4)

United States (A/CONF.152/C.1/L.10):

Replace the UNCITRAL text for paragraph (4) with the following:

"(4) The signature referred to in paragraph (1) means a handwritten signature, its facsimile or an equivalent authentication effected by any other means."

[Adopted: see paragraph 46, below.]

C. Proceedings in the First Committee

(i) Meetings

41. The First Committee considered article 4 at its 5th, 6th, 7th and 11th meetings on 5, 8 and 10 April 1991.

(ii) Consideration

Article 4 as a whole

42. At the 11th meeting, the amendment proposed by the United Kingdom (A/CONF.152/C.1/L.43) was rejected by 5 votes in favour, 24 against and 4 abstentions.

New paragraph (1 bis)

43. At the 5th meeting, the amendment proposed by Japan (A/CONF.152/C.1/L.26) was withdrawn.

Paragraph (2)

44. At the 6th meeting, paragraph (2) was adopted by 17 votes in favour, 7 against and 9 abstentions.

Paragraph (3)

45. At the 5th meeting, the amendment proposed by Mexico (A/CONF.152/C.1/L.35) was withdrawn. Italy submitted an oral proposal that the UNCITRAL text for paragraph (3) be amended so as to refer to paragraph (1), instead of referring only to subparagraph (b) of paragraph (1). The proposal was adopted. Italy also submitted an oral proposal to add the following sentence after the UNCITRAL text for paragraph (3): "When the customer and the operator have agreed to communicate electronically, the documents referred to in paragraph (1) may be replaced by an equivalent electronic data interchange message." The amendment was adopted by 14 votes in favour, 12 against and 6 abstentions. The Drafting Committee was requested to ensure that the rule expressed in the second sentence of paragraph (3) as amended was distinct from, and did not alter, the rule expressed in the first sentence.

Paragraph (4)

46. At the 7th meeting, Mexico submitted an oral proposal that the wording of paragraph (4) be replaced by the wording of article 5(k) of the United Nations Convention on International Bills of Exchange and International Promissory Notes. The amendment proposed by the United States (A/CONF.152/C.1/L.10) was adopted, subject to its alignment by the Drafting Committee with the wording of article 5(k) of the United Nations Convention on International Bills of Exchange and International Promissory Notes. The UNCITRAL text for article 4 was adopted with paragraphs (2), (3) and (4) amended as indicated above, and referred to the Drafting Committee.

Article 5

A. UNCITRAL text

47. The text of article 5 as prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 5

"Basis of liability

"(1) The operator is liable for loss resulting from loss of or damage to the goods, as well as for delay in handing over the goods, if the occurrence which caused the loss, damage or delay

took place during the period of the operator's responsibility for the goods as defined in article 3, unless he proves that he, his servants, agents or other persons of whose services the operator makes use for the performance of the transport-related services took all measures that could reasonably be required to avoid the occurrence and its consequences.

"(2) Where a failure on the part of the operator, his servants, agents or other persons of whose services the operator makes use for the performance of the transport-related services to take the measures referred to in paragraph (1) combines with another cause to produce loss, damage or delay, the operator is liable only to the extent that the loss resulting from such loss, damage or delay is attributable to that failure, provided that the operator proves the amount of the loss not attributable thereto.

"(3) Delay in handing over the goods occurs when the operator fails to hand them over to or place them at the disposal of a person entitled to take delivery of them within the time expressly agreed upon or, in the absence of such agreement, within a reasonable time after receiving a request for the goods by such person.

"(4) If the operator fails to hand over the goods to or place them at the disposal of a person entitled to take delivery of them within a period of 30 consecutive days after the date expressly agreed upon or, in the absence of such agreement, within a period of 30 consecutive days after receiving a request for the goods by such person, a person entitled to make a claim for the loss of the goods may treat them as lost."

B. Amendments

48. Amendments to article 5 were submitted by Germany (A/CONF.152/C.1/L.11), Spain (A/CONF.152/C.1/L.20), Egypt (A/CONF.152/C.1/L.42), Netherlands (A/CONF.152/C.1/L.24), Belgium (A/CONF.152/C.1/L.39) and Morocco (A/CONF.152/C.1/L.49).

49. Those amendments were to the following effect:

New paragraph (1 bis)

Germany (A/CONF.152/C.1/L.11):

After paragraph (1), add a new paragraph (1 bis) as follows:

"If, at the time of the occurrence, the customer or other persons acting on behalf of the customer were granted access to the area referred to in article 1, subparagraph (a), to inspect, treat or handle the goods, it is up to the claimant to prove that the operator, his servants, agents or other persons of whose services the operator makes use for the performance of the transport-related services failed to take all measures that could reasonably be required to avoid the occurrence and its consequences."

[Rejected as amended: see paragraph 51, below.]

Paragraph (2)

(a) Spain (A/CONF.152/C.1/L.20):

Relocate paragraph (2) to the end of article 5.

[Referred to the Drafting Committee: see paragraph 52, below.]

(b) Egypt (A/CONF.152/C.1/L.42):

Delete the words "provided that the operator proves the amount of the loss not attributable thereto".

[Rejected: see paragraph 52, below.]

New paragraph (5)

(a) Netherlands (A/CONF.152/C.1/L.24):

Add a new paragraph (5) as follows:

"The total amount recoverable shall be calculated by reference to the value of the goods at the place and time at which the goods are delivered, or should have been delivered, to the person entitled to take delivery of them. The value of the goods shall be fixed according to the commodity exchange price, or, if there is no such price, according to the current market price, or, if there is no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality."

[Withdrawn: see paragraph 54, below.]

(b) Belgium (A/CONF.152/C.1/L.39):

Add a new paragraph (5) as follows:

"Nevertheless, the operator shall assume no liability in respect of goods the delivery of which has not been requested by the person entitled to take delivery of them within a reasonable period of time after the operator has notified him that they have been placed at his disposal."

[Rejected: see paragraph 54, below.]

(c) Morocco (A/CONF.152/C.1/L.49):

Add the following additional paragraph to article 5:

"The operator is exempt from liability for loss or damage due to a cause for which he cannot be held responsible, such as fortuitous events or force majeure, inherent or latent defects in the goods, negligence on the part of the depositor (carriers or shippers) or incorrect indications regarding the weight and markings of the packages or the nature of the goods."

[Not considered: see paragraph 54, below.]

C. Proceedings in the First Committee

(i) Meetings

50. The First Committee considered article 5 at its 7th and 8th meetings on 8 April 1991.

(ii) Consideration

New paragraph (1 bis)

51. At the 7th meeting, the amendment proposed by Germany (A/CONF.152/C.1/L.11) was amended by adding the word "unsupervised", so that the opening words of the proposed new paragraph read: "If, at the time of the occurrence, the customer or other persons acting on behalf of the customer were granted unsupervised access to the area referred to in article 1, subparagraph (a)...." The new paragraph as amended was jointly proposed by Germany and Australia. The proposed new paragraph was rejected by 4 votes in favour, 27 against and 4 abstentions.

Paragraph (2)

52. At the 7th meeting, the amendment proposed by Spain (A/CONF.152/C.1/L.20) was regarded as a drafting matter and referred to the Drafting Committee. The amendment proposed by Egypt (A/CONF.152/C.1/L.42) was rejected by 7 votes in favour, 20 against and 7 abstentions.

53. At the 8th meeting, Morocco submitted an oral proposal that the wording of paragraph (2) should be aligned with the wording of article 5(7) of the United Nations Convention on the Carriage of Goods by Sea, 1978, in particular by replacing the word "failure" with the words "fault or neglect". There being insufficient support for the proposed amendment, it was rejected.

New paragraph (5)

54. At the 7th meeting, the amendment proposed by Netherlands (A/CONF.152/C.1/L.24) was withdrawn. At the 8th meeting, the amendment proposed by Belgium (A/CONF.152/C.1/L.39) was rejected by 13 votes in favour, 17 against and 4 abstentions. The amendment proposed by Morocco (A/CONF.152/C.1/L.49) was not introduced to the Committee and therefore was not considered. The UNCITRAL text for article 5 was adopted and referred to the Drafting Committee.

Article 6

A. UNCITRAL text

55. The text of article 6 as prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 6

"Limits of liability

"(1) (a) The liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding [8.33] units of account per kilogram of gross weight of the goods lost or damaged.

(b) However, if the goods are handed over to the operator immediately after carriage by sea or by inland waterways, or if the goods are handed over, or are to be handed over, by him for such carriage, the liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding [2.75] units of account per kilogram of gross weight of the goods lost or damaged. For the purposes of this paragraph, carriage by sea or by inland waterways includes pick-up and delivery within a port.

"(2) The liability of the operator for delay in handing over the goods according to the provisions of article 5 is limited to an amount equivalent to two and a half times the charges payable to the operator for his services in respect of the goods delayed, but not exceeding the total of such charges in respect of the consignment of which the goods were a part.

"(3) In no case shall the aggregate liability of the operator under both paragraphs (1) and (2) exceed the limitation which would be established under paragraph (1) for total loss of the goods in respect of which such liability was incurred.

"(4) The operator may agree to limits of liability exceeding those provided for in paragraphs (1), (2) and (3)."

B. Amendments

56. Amendments to article 6 were submitted by Germany (A/CONF.152/C.1/L.12), Japan (A/CONF.152/C.1/L.27), Morocco (A/CONF.151/C.1/L.51) and Yugoslavia (A/CONF.152/C.1/L.45).

57. Those amendments were to the following effect:

Paragraph (1)

(a) Germany (A/CONF.152/C.1/L.12, paragraph 1):
Delete subparagraph (b) of paragraph (1).

[Rejected: see paragraph 59, below.]

(b) Morocco (A/CONF.152/C.1/L.51):
In subparagraph (b), replace the figure "2.75" by "2.5".

[Rejected: see paragraph 60, below.]

(c) Germany (A/CONF.152/C.1/L.12, paragraph 2):
Reword paragraph (1) as follows:

"The liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding [...] units of account per package or other shipping unit, or [...] units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher."

[Rejected: see paragraph 61, below.]

(d) Japan (A/CONF.152/C.1/L.27):
Add a new subparagraph (c) as follows:

"Nevertheless, when the loss of or damage to a part of the goods affects the value of another part of the goods, the total weight of the lost or damaged goods and of the goods whose value is affected shall be taken into consideration in determining the limit of liability."

[Adopted: see paragraph 62, below.]

New paragraph (1 bis)

Germany (A/CONF.152/C.1/L.12, paragraph 3):
Add the following new paragraph (1 bis):

"(1 bis) For the purpose of calculating which amount is the higher in accordance with paragraph (1) of this article, the following rules apply:

(a) Where a container, pallet or similar article of transport or packaging is used to consolidate goods, the packages or other shipping units enumerated in the document under article 4, paragraph (1), as packed in such article of transport or packaging are rebuttably presumed to be packages or shipping units. Except as aforesaid, the goods in such article of transport or packaging are deemed one shipping unit.

(b) In cases where the container, pallet or similar article of transport or packaging itself has been lost or damaged, that article of transport or packaging, if not owned or otherwise supplied by the operator, is considered one separate shipping unit."

[Rejected: see paragraph 63, below.]

Paragraph (4)

Yugoslavia (A/CONF.152/C.1/L.45):
Add a second sentence to paragraph (4) as follows:

"The higher limits of liability agreed to by the operator apply also to the operator's servants, agents or other persons of whose services the operator makes use for the performance of the transport-related services."

[Rejected: see paragraph 64, below.]

C. Proceedings in the First Committee

(i) Meetings

58. The First Committee considered article 6 at its 8th, 9th and 10th meetings on 8 and 9 April 1991, respectively.

(ii) Consideration

Paragraph (1)

59. At the 8th meeting, the amendment proposed by Germany (A/CONF.152/C.1/L.12, paragraph 1) was rejected by 4 votes in favour, 27 against and 4 abstentions.

60. At the 9th meeting, the amendment proposed by Morocco (A/CONF.152/C.1/L.51) was rejected by 8 votes in favour, 13 against and 4 abstentions. An oral proposal was submitted to the effect that the amounts of the limits of liability should be higher than those set forth within square brackets in paragraph (1) as prepared by UNCITRAL. The proposal was rejected by 8 votes in favour, 19 against and 4 abstentions. Accordingly, the amounts in paragraph (1) as prepared by UNCITRAL were adopted and the square brackets surrounding them were removed.

61. At the 10th meeting, Germany declared that, in view of the rejection of its proposal that subparagraph (b) should be deleted (A/CONF.152/C.1/L.12, paragraph 1) (see paragraph 59, above), its proposal to add to the text of paragraph (1), as a basis for calculating the limits of liability, a reference to a number of units of account per package or shipping unit (A/CONF.152/C.1/L.12, paragraph 2) applied to both subparagraph (a) and subparagraph (b) of paragraph (1). The proposal was rejected by 14 votes in favour, 19 against and 4 abstentions.

62. At the 8th meeting, the amendment proposed by Japan (A/CONF.152/C.1/L.27) was adopted by 12 votes in favour, 7 against and 15 abstentions.

New paragraph (1 bis)

63. The rejection of the proposal of Germany to add to the text of paragraph (1), as a basis for calculating the limits of liability, a reference to a number of units of account per package or shipping unit (A/CONF.152/C.1/L.12, paragraph 2; see paragraph 61, above), also implied the rejection of the proposal of Germany to add a new paragraph (1 bis) to article 6 (A/CONF.152/C.1/L.12, paragraph 3).

Paragraph (4)

64. An indicative vote taken at the 9th meeting on the amendment proposed by Yugoslavia (A/CONF.152/C.1/L.45) showed little support for the amendment; it was accordingly rejected. An oral proposal was submitted to the effect that the Convention should set forth an express rule stipulating whether or not higher limits of liability agreed to by the operator with its customer would also apply to the servants or agents of the operator. Sixteen States favoured setting forth a rule that higher limits of liability agreed to by the operator would also apply to its servants and agents; 15 States favoured setting forth a rule that higher limits of liability agreed to by the operator would not apply to its servants and agents; 4 States abstained. The vote was regarded as insufficiently definitive to set forth an express rule; accordingly, the text of paragraph (4) as prepared by UNCITRAL was retained unchanged. The UNCITRAL text for article 6 was adopted subject to the amendment by Japan (A/CONF.152/C.1/L.27; see paragraph 62, above), and referred to the Drafting Committee.

New article (6 bis)

65. At the 10th meeting, a proposal was submitted by Germany (A/CONF.152/C.1/L.13) that, after article 6, a new article 6 bis should be added, as follows:

"In no case shall the aggregate liability of the operator resulting from all claims arising out of a single occurrence exceed 10 million units of account. If the aggregate liability exceeds 10 million units of account, the amount payable by the operator shall be distributed among the claimants in proportion to their claims."

66. At the 10th meeting, Germany orally amended the first sentence of the proposed new article to read as follows:

"The aggregate liability of the operator resulting from all claims arising out of a single occurrence shall not exceed [...] units of account."

67. That sentence was voted on separately, and was rejected by 9 votes in favour, 18 against and 8 abstentions. The rejection of that sentence implied the rejection of the proposal in its entirety.

Article 7

A. UNCITRAL text

68. The text of article 7 as prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 7

"Application to non-contractual claims

"(1) The defences and limits of liability provided for in this Convention apply in any action against the operator in respect of loss of or damage to the goods, as well as delay in handing over the goods, whether the action is founded in contract, in tort or otherwise.

"(2) If such an action is brought against a servant or agent of the operator, or against another person of whose services the operator makes use for the performance of the transport-related services, such servant, agent or person, if he proves that he acted within the scope of his employment or engagement by the operator, is entitled to avail himself of the defences and limits of liability which the operator is entitled to invoke under this Convention.

"(3) Except as provided in article 8, the aggregate of the amounts recoverable from the operator and from any servant, agent or person referred to in the preceding paragraph shall not exceed the limits of liability provided for in this Convention."

B. Amendment

69. An amendment to article 7 was submitted by the United States (A/CONF.152/C.1/L.14).

70. That amendment was to the following effect:
Add to paragraph (3) the following sentence:

"Such aggregate liability shall not be affected by the operator's agreement under article 6(4) to increase the limits of liability."

[Withdrawn: see paragraph 72, below.]

C. Proceedings in the First Committee

(i) Meetings

71. The First Committee considered article 7 at its 11th meeting on 10 April 1991.

(ii) Consideration

72. At the 11th meeting, the amendment proposed by the United States (A/CONF.152/C.1/L.14) was withdrawn. The UNCITRAL text for article 7 was adopted and referred to the Drafting Committee.

Article 8

A. UNCITRAL text

73. The text of article 8 as prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 8

"Loss of right to limit liability

"(1) The operator is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission of the operator himself or his servants or agents done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

"(2) Notwithstanding the provision of paragraph (2) of article 7, a servant or agent of the operator or another person of whose services the operator makes use for the performance of the transport-related services is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission of such servant, agent or person done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result."

B. Amendments

74. Amendments to article 8 were submitted by Netherlands (A/CONF.152/C.1/L.25) and Germany (A/CONF.152/C.1/L.3).

75. Those amendments were to the following effect:

(a) Netherlands (A/CONF.152/C.1/L.25):

Delete from paragraph (1) the words "himself or his servants or agents".

[Rejected: See paragraph 77, below.]

(b) Germany (A/CONF.152/C.1/L.3):

(i) Delete from paragraph (1) the words "or his servants or agents"

[Withdrawn: see paragraph 77, below.]

(ii) In the event that the foregoing amendment is not adopted, add at the end of paragraph (1) the following:

"...; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent [acted] [was acting] within the scope of his employment."

[Rejected: see paragraph 77, below.]

C. Proceedings in the First Committee

(i) Meetings

76. The First Committee considered article 8 at its 11th meeting on 10th April 1991.

(ii) Consideration

77. At the 11th meeting, the amendment proposed by Netherlands (A/CONF.152/C.1/L.25) was rejected by 8 votes in favour, 21 against and 4 abstentions. In view of the rejection of that amendment, the amendment proposed by Germany to delete from paragraph (1) the words "or his servants or agents" (A/CONF.152/C.1/L.3) was withdrawn. The amendment proposed by Germany to add wording at the end of paragraph (1) (A/CONF.152/C.1/L.3) was rejected by 10 votes in favour, 22 against and 3 abstentions. The UNCITRAL text for article 8 was adopted and referred to the Drafting Committee.

Article 9

A. UNCITRAL text

78. The text of article 9 as prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 9

"Special rules on dangerous goods

"If dangerous goods are handed over to an operator without being marked, labelled, packaged or documented in accordance with any law or regulation relating to dangerous goods applicable in the country where the goods are handed over and if, at the time the goods are handed over to him, the operator does not otherwise know of their dangerous character, he is entitled:

"(a) To take all precautions the circumstances may require, including, when the goods pose an imminent danger to any person or property, destroying the goods, rendering them innocuous, or disposing of them by any other lawful means, without payment of compensation for damage to or destruction of the goods resulting from such precautions, and

"(b) To receive reimbursement for all costs incurred by him in taking the measures referred to in subparagraph (a) from the person who failed to meet any obligation under such applicable law or regulation to inform him of the dangerous character of the goods."

B. Amendments

79. Amendments to article 9 were submitted by Belgium (A/CONF.152/C.1/L.40), Finland (A/CONF.152/C.1/L.55), Spain (A/CONF.152/C.1/L.21), and the United Nations Environment Programme (submission of the proposal endorsed by Sweden) (A/CONF.152/C.1/L.50).

80. Those amendments were to the following effect:

(a) Belgium (A/CONF.152/C.1/L.40):

Delete the following words from paragraph (1):

"and if, at the time the goods are handed over to him, the operator does not otherwise know of their dangerous character".

[Rejected: see paragraph 82, below.]

(b) Finland (A/CONF.152/C.1/L.55):

Insert before the first sentence of paragraph (1) the following:

"Where dangerous goods are handed over to the operator, he must be informed of the dangerous character of the goods and, if necessary, of the precautions to be taken."

[Rejected: see paragraph 82, below.]

(c) Spain (A/CONF.152/C.1/L.21):

Change the words "handed over to an operator" in the chapeau of article 9 to "taken in charge by an operator".

[Referred to Drafting Committee: see paragraph 83, below.]

(d) United Nations Environment Programme (A/CONF.152/C.1/L.50):

Revise article 9 as follows:

"If dangerous goods are handed over to an operator without being marked, labelled, packaged or documented in conformity with international or domestic rules and regulations applicable in the country where the goods are handed over, the operator is entitled:

"(a) To take all precautions the circumstances may require in accordance with those international or national rules and regulations, without payment of compensation for damage resulting from such precautions, and

"(b) To receive reimbursement for all costs incurred by him in taking the precautions referred to in subparagraph (a) from the person who failed to meet any obligation under such applicable rules and regulations."

[Rejected: see paragraph 84, below.]

C. Proceedings in the First Committee

(i) Meetings

81. The First Committee considered article 9 at its 11th and 12th meetings on 10 April 1991.

(ii) Consideration

82. At the 11th meeting, the amendment proposed by Belgium (A/CONF.152/C.1/L.40) was rejected by 3 votes in favour, 29 against and 1 abstention. The amendment proposed by Finland (A/CONF.152/C.1/L.55) was rejected by 15 votes in favour, 15 against and 4 abstentions.

83. At the 12th meeting, the amendment proposed by Spain (A/CONF.152/C.1/L.21) was regarded as a drafting matter and referred to the Drafting Committee.

84. At the 12th meeting, Sweden endorsed the submission to the Committee of the revision of article 9 proposed by the United Nations Environment Programme (A/CONF.152/C.1/L.50). The chapeau of the proposed revised article was rejected by 6 votes in favour, 21 against and 4 abstentions. Subparagraph (a) of the proposed revised article was rejected by 9 votes in favour, 19 against and 2 abstentions. Subparagraph (b) of the proposed revised article was rejected by 4 votes in favour, 21 against and 6 abstentions. Accordingly, the proposal as a whole was rejected. The UNCITRAL text for article 9 was adopted and referred to the Drafting Committee.

Article 10

A. UNCITRAL text

85. The text of article 10 as prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 10

"Rights of security in goods

"(1) The operator has a right of retention over the goods for costs and claims which are due in connection with the transport-related services performed by him in respect of the goods during the period of his responsibility for them. However, nothing in this Convention shall affect the validity under the applicable law of any contractual arrangements extending the operator's security in the goods.

"(2) The operator is not entitled to retain the goods if a sufficient guarantee for the sum claimed is provided or if an equivalent sum is deposited with a mutually accepted third party or with an official institution in the State where the operator has his place of business.

"(3) In order to obtain the amount necessary to satisfy his claim, the operator is entitled, to the extent permitted by the law of the State where the goods are located, to sell all or part of the goods over which he has exercised the right of retention provided for in this article. The preceding sentence does not apply to containers, pallets or similar articles of transport or packaging which are owned by a party other than the carrier or the shipper and which are clearly marked as regards ownership except in respect of claims by the operator for the cost of repairs or improvements to the containers, pallets or similar articles of transport or packaging.

"(4) Before exercising any right to sell the goods, the operator shall make reasonable efforts to give notice of the intended sale to the owner of the goods, the person from whom the operator received them and the person entitled to take delivery of them from the operator. The operator shall account appropriately for the balance of the proceeds of the sale in excess of the sums due to the operator plus the reasonable costs of the sale. The right of sale shall in all other respects be exercised in accordance with the law of the State where the goods are located."

B. Amendments

86. Amendments to article 10 were submitted by Germany (A/CONF.152/L.16), Morocco (A/CONF.152/C.1/L.54) and the United States (A/CONF.152/C.1/L.15).

87. Those amendments were to the following effect:

Paragraph (1)

Germany (A/CONF.152/L.16):

Add to the first sentence of paragraph (1) the words "or after", so that the sentence would read as follows:

"The operator has a right of retention over the goods for costs and claims which are due in connection with the transport-related services performed by him in respect of the goods during or after the period of his responsibility for them."

[Adopted: see paragraph 89, below.]

Paragraph (3)

(a) Germany (A/CONF.152/C.1/L.16):
Delete paragraph (3).

[Rejected: see paragraph 90, below.]

(b) Morocco (A/CONF.152/C.1/L.54):
Insert at the beginning of the second sentence the following:

"With the exception of empty containers, which are deemed to be goods for the purposes of this Convention ..."

[Withdrawn: see paragraph 90, below.]

(c) United States of America (A/CONF.152/C.1/L.15):

[see under "New paragraph (6)", below.]

Paragraph (4)

Morocco (A/CONF.152/C.1/L.54):

Amend the first sentence to read as follow:

"Before exercising any right to sell the goods, the operator shall make reasonable efforts to give notice of the intended sale to the owner of the goods or the person from whom the operator received them or the person entitled to take delivery of them from the operator."

[Rejected: see paragraph 91, below.]

New paragraph (5)

United States (A/CONF.152/C.1/L.15):

Add a new paragraph (5) as follows:

"(5) The terminal operator may consider goods in its charge abandoned if the goods are not claimed within (...) days after the day until which the operator has agreed to keep the goods, or, if such agreement has not been concluded, after the day as of which notice has been given by the operator to the person entitled to take delivery of the goods that the goods have been placed at the disposal of that person."

[Rejected: see paragraph 92, below.]

New paragraph (6)

United States (A/CONF.152/C.1/L.15):

Delete the second sentence of paragraph (3) and incorporate into a new paragraph (6), as follows:

"(6) Paragraph (3) and (5) do not apply to containers, pallets or similar articles of transport or packaging which are owned by a party other than the carrier or the shipper and which are clearly marked as regards ownership except in respect of claims by the operator for the cost of repairs of or improvements to the containers, pallets or similar articles of transport or packaging."

[Withdrawn: see paragraph 92, below.]

C. Proceedings in the First Committee

(i) Meetings

88. The Committee considered article 10 at its 12th and 13th meeting on 10 and 11 April 1991.

(ii) Consideration

Paragraph (1)

89. At the 12th meeting, the amendment proposed by Germany (A/CONF.152/C.1/L.16) was adopted by 21 votes in favour, 7 against and 8 abstentions.

Paragraph (3)

90. At the 12th meeting, the proposal by Germany to delete paragraph (3) was rejected by 9 votes in favour, 21 against and 3 abstentions. At the 13th meeting, the proposal by Morocco (A/CONF.152/C.1/L.54) was withdrawn. With respect to the proposal by the United States (A/CONF.152/C.1/L.15), see paragraph 92, below.

Paragraph (4)

91. At the 13th meeting, the amendment proposed by Morocco (A/CONF.152/C.1/L.54) was rejected by 2 votes in favour, 21 against and 6 abstentions.

New paragraphs (5) and (6)

92. At the 13th Meeting, the proposal by the United States to add a new paragraph (5) (A/CONF.152/C.1/L.15) was rejected by 11 votes in favour, 12 against and 9 abstentions. In view of the rejection of that proposal, the proposal by the United States to delete the second sentence of paragraph (3) and incorporate it into a new paragraph (6) (A/CONF.152/C.1/L.15) was withdrawn. The UNCITRAL text for article 10, with the amendment to paragraph (1), was referred to the Drafting Committee.

Article 11

A. UNCITRAL text

93. The text of article 11 as prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 11

"Notice of loss, damage or delay

"(1) Unless notice of loss or damage, specifying the general nature of the loss or damage, is given to the operator not later than the third working day after the day when the goods were handed over by the operator to the person entitled to take delivery of them, the handing over is prima facie evidence of the handing over by the operator of the goods as described in the document issued by the operator pursuant to paragraph (1)(b) of article 4 or, if no such document was issued, in good condition.

"(2) Where the loss or damage is not apparent, the provisions of paragraph (1) apply correspondingly if notice is not given to the operator within 15 consecutive days after the day when the goods reached the final recipient, but in no case later than 60 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them.

"(3) If the operator participated in a survey or inspection of the goods at the time when they were handed over to the person entitled to take delivery of them, notice need not be given to the operator of loss or damage ascertained during that survey or inspection.

"(4) In the case of any actual or apprehended loss of or damage to the goods, the operator and the person entitled to take delivery of the goods shall give all reasonable facilities to each other for inspecting and tallying the goods.

"(5) No compensation shall be payable for loss resulting from delay in handing over the goods unless notice has been given to the operator within 21 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them."

B. Amendments

94. Amendments to article 11 were submitted by Morocco (A/CONF.152/C.1/L.52), Turkey (A/CONF.152/C.1/L.46) and Japan (A/CONF.152/C.1/L.41).

95. Those amendments were to the following effect:

(a) Morocco (A/CONF.152/C.1/L.52):

(i) Delete paragraph (1), (2), (3) and (5)

[Rejected: see paragraph 97, below.]

(ii) If paragraphs (1), (2), (3) and (5) are not deleted, reword them as follows:

"(1) Unless notice of loss or damage, specifying the general nature of the loss or damage, is given to the operator not later than the third working day after the day when the goods were handed over to or placed at the disposal of the person entitled to take delivery of them by the operator, the goods are presumed to have been handed over to or placed at the disposal of such person by the operator as they are described in the document issued by the operator pursuant to paragraph (1) (b) of article 4 or, if no such document was issued, in good condition.

"(2) Where the loss or damage is not apparent, the provisions of paragraph (1) apply correspondingly if notice is not given to the operator within 15 consecutive days after the day when the goods reached the final recipient, but in no case later than 60 consecutive days after the day when the goods were handed over to or placed at the disposal of the person entitled to take delivery of them.

"(3) If the operator participated in a survey or inspection of the goods at the time when they were handed over to or placed at the disposal of the person entitled to take delivery of them, notice need not be given to the operator of loss or damage ascertained during that survey or inspection.

...

"(5) No compensation shall be payable for loss resulting from delay in handing over the goods to or placing them at the disposal of the person entitled to take delivery of them unless notice has been given to the operator within 21 consecutive days after the day when the goods were handed over to or placed at the disposal of such person."

[Rejected: see paragraph 97, below.]

(iii) Amend paragraph (4) by:

(a) Inserting the words "the carrier", and

(b) Adding at the end of the paragraph the words "at the place of storage or at any other place decided on by common agreement" so that paragraph (4) would read as follows:

"In the case of any actual or apprehended loss of or damage to the goods, the operator, the carrier and the person entitled to take delivery of the goods shall give all reasonable facilities to each other for inspecting and tallying the goods at the place of storage or at any other place decided on by common agreement."

[Adopted in part and rejected in part: see paragraph 97, below.]

(b) Turkey (A/CONF.152/C.1/L.46):

In paragraph (2), replace "15" with "7" and replace "60" with "30".

[Rejected: see paragraph 98, below.]

(c) Japan (A/CONF.152/C.1/L.41):

In paragraph (2), insert, after the words "final recipient", the words "who is in a position to inspect them".

[Withdrawn: see paragraph 98, below.]

C. Proceedings in the First Committee

(i) Meetings

96. The First Committee considered article 11 at its 13th and 14th meetings on 11 April 1991.

(ii) Consideration

97. With respect to the amendments proposed by Morocco (A/CONF.152/C.1/L.52), at the 13th meeting: (a) the proposal that paragraphs (1), (2), (3) and (5) should be deleted was rejected; (b) the proposal that paragraphs (1), (2), (3) and (5) should be reworded was rejected by 4 votes in favour, 18 against and 11 abstentions; (c) with respect to the proposed amendments to paragraph (4), the proposal to insert the words "the carrier" was adopted by 17 votes in favour, 11 against and 6 abstentions, and the proposal to add the words at the end of the paragraph was rejected by 5 votes in favour, 19 against and 9 abstentions.

98. At the 14th meeting, the amendment proposed by Turkey (A/CONF.152/C.1/L.46) was rejected by 4 votes in favour, 22 against and 9 abstentions. The amendment proposed by Japan (A/CONF.152/C.1/L.41) was withdrawn. The UNCITRAL text for article 11, with the amendment to paragraph (4), was referred to the Drafting Committee.

Article 12

A. UNCITRAL text

99. The text of article 12 as prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 12

"Limitation of actions

"(1) Any action under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

"(2) The limitation period commences:

(a) On the day the operator hands over the goods or part thereof to, or places them at the disposal of, a person entitled to take delivery of them, or

(b) In cases of total loss of the goods, on the day the operator notifies the person entitled to make a claim that the goods are lost, or on the day that person may treat the goods as lost in accordance with paragraph (4) of article 5, whichever is earlier.

"(3) The day on which the limitation period commences is not included in the period.

"(4) The operator may at any time during the running of the limitation period extend the period by a declaration in writing to the claimant. The period may be further extended by another declaration or declarations.

"(5) A recourse action by a carrier or another person against the operator may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if it is instituted within 90 days after the carrier or other person has been held liable in an action against himself or has settled the claim upon which such action was based and if, within a reasonable period of time after the filing of a claim against a carrier or other person that may result in a recourse action against the operator, notice of the filing of such a claim has been given to the operator."

B. Amendments

100. Amendments to article 12 were submitted by Morocco (A/CONF.152/C.1/L.53), Turkey (A/CONF.152/C.1/L.47), Germany (A/CONF.152/C.1/L.17), the United States (A/CONF.152/C.1/L.18) and Egypt (A/CONF.152/C.1/L.58).

101. Those amendments were to the following effect:

Paragraph (1)

Morocco (A/CONF.152/C.1/L.53) and Turkey (A/CONF.152/C.1/L.47):
Replace the period of "two years" by a period of "one year".

[Rejected: see paragraph 103, below.]

Paragraph (2)

(a) United States (A/CONF.152/C.1/L.18):
Reword subparagraph (a) as follows:

"on the day the operator hands over the goods or part thereof to, or places them at the disposal of, a person entitled to take delivery of them, or considers the goods as abandoned in accordance with paragraph (5) of article 10, or"

[Withdrawn: see paragraph 104, below.]

(b) Germany (A/CONF.152/C.1/L.17):
Reword subparagraph (b) as follows:

"In cases of total loss of the goods, on the day the person entitled to make a claim receives notice from the operator that the goods are lost, or on the day that person may treat the goods as lost in accordance with paragraph (4) of article 5, whichever is earlier."

[Withdrawn, subsequently reintroduced and adopted in substance: see paragraph 104, below.]

(c) Egypt (A/CONF.152/C.1/L.58):
Reword paragraph (2) as follows:

"(2) The limitation period commences:

(a) on the day following the day on which the operator hands over the goods or part thereof to, or placed them at the disposal of a person entitled to take delivery of them, or

(b) in cases of total loss of the goods, on the day following the day on which the operator notifies the person entitled to make a claim that the goods are lost, or on the day that person may treat the goods as lost in accordance with paragraph (4) of article 5, whichever is earlier."

[Not considered: see paragraph 104, below.]

Paragraph (3)

Egypt (A/CONF.152/C.1/L.58):
Delete paragraph (3)

[Not considered: see paragraph 105, below.]

Paragraph (5)

Morocco (A/CONF.152/C.1/L.53):
Amend paragraph (5) to read as follows:

"A recourse action by a carrier or another person against the operator may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if it is instituted within 30 days after the carrier or other person has been sued in an action against himself or has settled the claim upon which such suit was based."

[Withdrawn: see paragraph 107, below.]

C. Proceedings in the First Committee

(i) Meetings

102. The First Committee considered article 12 at its 14th meeting on 11 April 1991.

(ii) Consideration

Paragraph (1)

103. At the 14th meeting, the amendments proposed by Morocco (A/CONF.152/C.1/L.53) and Turkey (A/CONF.152/C.1/L.47) were considered concurrently and were rejected by 10 votes in favour, 19 against and 5 abstentions.

Paragraph (2)

104. At the 14th meeting, the amendment proposed by the United States (A/CONF.152/C.1/L.18) was withdrawn in view of the rejection of its proposal to add a new paragraph (5) to article 10 (A/CONF.152/C.1/L.15). The proposal by Germany (A/CONF.152/C.1/L.17) was withdrawn; however, it was subsequently reintroduced and its substance, namely, that, in cases of total loss of the goods, the limitation period commences on the day the person entitled to make a claim receives the notice from the operator, was adopted by 13 votes in favour, 11 against and 11 abstentions. The proposal by Egypt (A/CONF.152/C.1/L.58) was not considered as it was submitted after article 12 had been adopted.

Paragraph (3)

105. The proposal by Egypt (A/CONF.152/C.1/L.58) was not considered as it was submitted after article 12 had been adopted.

Paragraph (4)

106. At the 14th meeting, the United States submitted an oral proposal that the reference in the first sentence of paragraph (4) to "a declaration in writing" be changed to "giving notice", so that the sentence would read along the following lines: "The operator may at any time during the running of the limitation period extend the period by giving notice to the claimant." The proposed amendment was adopted and referred to the Drafting Committee.

Paragraph (5)

107. At the 14th meeting, the proposal by Morocco (A/CONF.152/C.1/L.53) was withdrawn. An oral proposal was submitted to the effect that paragraph (5) should be redrafted so as to conform with article 20(5) of the United Nations Convention on the Carriage of Goods by Sea, 1978. That proposal was rejected by 5 votes in favour, 14 against and 4 abstentions.

108. Mexico submitted an oral proposal to the effect that an overall time limit of 10 years for bringing a recourse action against the operator should be added to the text of paragraph (5) as prepared by UNCITRAL. That proposal was rejected by 6 votes in favour, 12 against and 12 abstentions. The UNCITRAL text for article 12, with the amendments to paragraphs (2) and (4), was adopted and referred to the Drafting Committee.

Article 15

A. UNCITRAL text

109. The text of article 15 as prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 15

"International transport conventions

"This Convention does not modify any rights or duties which may arise under an international convention relating to the international carriage of goods which is binding on a State which is a party to this Convention or under any law of such State giving effect to or derived from a convention relating to the international carriage of goods."

B. Amendments

110. Alternative amendments to article 15 were submitted by Australia (A/CONF.152/C.1/L.57).

111. Those amendments were to the following effect:

It was proposed that, if relevant issues could be satisfactorily resolved under article 1 and/or article 2, article 15 should be deleted.

Alternatively, it was proposed that article 15 should be redrafted as follows:

"This Convention does not modify any rights or duties which may arise under an international convention relating to the carriage of goods or a national law giving effect to or derived from and corresponding with such a convention."

[Withdrawn: see paragraphs 113 and 114, below.]

C. Proceedings in the First Committee

(i) Meetings

112. The First Committee considered article 15 at its 14th and 15th meetings on 11 and 12 April 1991.

(ii) Consideration

113. At the 14th meeting, it was decided that the alternative amendments proposed by Australia (A/CONF.152/C.1/L.57) would be considered in the light of the eventual decision by the Committee on the proposals by the ad hoc working group (A/CONF.152/C.1/L.44/Rev.1) and by Australia (A/CONF.152/C.1/L.56/Rev.1) that a definition of "carrier" should be added to article 1.

114. At the 15th meeting, an oral proposal was submitted that article 15 should be amended by deleting the words "or derived from". The proposed amendment was adopted by 20 votes in favour, 4 against and 9 abstentions. The alternative amendments proposed by Australia were withdrawn. The UNCITRAL text for article 15, as amended by the oral proposal, was adopted and referred to the Drafting Committee.

Article 16

A. UNCITRAL text

115. The text as prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 16

"Unit of account

"(1) The unit of account referred to in article 6 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be expressed in the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The equivalence between the national currency of a State Party which is a member of the International Monetary Fund and the Special Drawing Right is to be

calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The equivalence between the national currency of a State Party which is not a member of the International Monetary Fund and the Special Drawing Right is to be calculated in a manner determined by that State.

"(2) The calculation mentioned in the last sentence of the preceding paragraph is to be made in such a manner as to express in the national currency of the State Party as far as possible the same real value for amounts in article 6 as is expressed there in units of account. States Parties must communicate to the depositary the manner of calculation at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession and whenever there is a change in the manner of such calculation."

B. Amendments

116. No amendments to article 16 were submitted.

C. Proceedings in the First Committee

(i) Meetings

117. The First Committee considered article 16 at its 14th meeting on 11 April 1991.

(ii) Consideration

118. At the 14th meeting, the UNCITRAL text for article 16 was adopted and referred to the Drafting Committee.

Article 2

A. UNCITRAL text

119. The text of article 2 prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 2

"Scope of application

"(1) This Convention applies to transport-related services performed in relation to goods which are involved in international carriage:

(a) When the transport-related services are performed by an operator whose place of business is located in a State Party, or

(b) When the transport-related services are performed in a State Party, or

(c) When, according to the rules of private international law, the transport-related services are governed by the law of a State Party.

"(2) If the operator has more than one place of business, the place of business is that which has the closest relationship to the transport-related services as a whole.

"(3) If the operator does not have a place of business, reference is to be made to the operator's habitual residence."

B. Amendments

120. Amendments to article 2 were submitted by Germany (A/CONF.152/C.1/L.8) and Egypt (A/CONF.152/C.1/L.32). A proposal was submitted by the United States (A/CONF.152/C.1/L.7).

121. Those amendments and the proposal were to the following effect:

(a) Germany (A/CONF.152/C.1/L.8):

Reword the chapeau of paragraph (1) to read as follows:

"This Convention applies to transport-related services performed or procured in relation to goods which are involved in international carriage: ..."

[Referred to Drafting Committee: see paragraph 123, below.]

(b) Egypt (A/CONF.152/C.1/L.32):

After the words "State Party" in subparagraphs (a), (b) and (c), add "to the Convention".

[Referred to the Drafting Committee: see paragraph 123, below.]

(c) United States (A/CONF.152/C.1/L.7):

This proposal did not contain specific suggestions for amending the text of article 2; its purpose was to reserve the right of the United States delegation to return to the issue of scope of application of the Convention during the consideration of article 15.

[Withdrawn: see paragraph 124, below.]

C. Proceedings in the First Committee

(i) Meetings

122. The First Committee considered article 2 at its 15th and 16th meetings on 12 April 1991.

(ii) Consideration

123. At the 15th meeting, the amendments proposed by Germany (A/CONF.152/C.1/L.8) and Egypt (A/CONF.152/C.1/L.32) were regarded as matters of drafting and referred to the Drafting Committee.

124. At the 16th meeting, the proposal by the United States (A/CONF.152/C.1/L.7) was withdrawn. The UNCITRAL text for article 2 was adopted and referred to the Drafting Committee.

Article 13

A. UNCITRAL text

125. The text of article 13 as prepared by the United Nations Commission on International Trade Law provided as follows:

"Article 13

"Contractual stipulations

"(1) Unless otherwise provided in this Convention, any stipulation in a contract concluded by an operator or in any document signed or issued by the operator pursuant to article 4 is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part.

"(2) Notwithstanding the provisions of the preceding paragraph, the operator may agree to increase his responsibilities and obligations under this Convention."

B. Amendments

126. An amendment to article 13 was submitted by Spain (A/CONF.152/C.1/L.22).

127. That amendment was to the following effect:

Delete from paragraph (1) the words "Unless otherwise provided in this Convention".

[Withdrawn: see paragraph 129, below.]

C. Proceedings in the First Committee

(i) Meetings

128. The First Committee considered article 13 at its 16th meeting on 12 April 1991.

(ii) Consideration

129. At the 16th meeting, the amendment proposed by Spain (A/CONF.152/C.1/L.22) was withdrawn. Australia requested leave to submit an oral proposal; however, an exception was not granted to the requirement of Rule 30 of the Rules of Procedure adopted by the Conference that proposals and amendments shall normally be submitted in writing and copies thereof circulated to all delegations not later than the day preceeding the meeting at which a proposal or amendment is discussed. The UNCITRAL text of article 13 was adopted and referred to the Drafting Committee.

Article 14

A. UNCITRAL text

130. The text of article 14 as prepared by the United Nations Commission on International Trade Law provided as follows:

"Interpretation of the Convention

"In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application."

B. Amendments

131. No amendments to article 14 were submitted.

C. Proceedings in the First Committee

(i) Meetings

132. The First Committee considered article 14 at its 17th meeting on 15th April 1991.

(ii) Consideration

133. The UNCITRAL text for article 14 was adopted and referred to the Drafting Committee.

Article 20

A. UNCITRAL text

134. The text of article 20 as prepared by the United Nations Commission on International Trade Law provided as follows:

"Reservations

"No reservations may be made to this Convention."

B. Amendments

135. Amendments to article 20 were submitted by Netherlands (A/CONF.152/C.1/L.59), Belgium (A/CONF.152/C.1/L.30) and Iran (A/CONF.152/C.1/L.60).

136. Those amendments were to the following effect:

(a) Netherlands (A/CONF.152/C.1/L.59):
Amend article 20 to read as follows:

"(1) Any State may declare at the time of signature, ratification, acceptance, approval or accession that it will restrict the application of the rules of this Convention to certain types of operators of transport terminals.

"(2) No other reservations may be made to this Convention."

[Rejected: see paragraph 138, below.]

(b) Belgium (A/CONF.152/C.1/L.30):
Amend article 20 to read as follows:

"(1) Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that it will not apply this Convention in cases where the goods are deposited in an area in which the operator is not in a position to exercise effective control over the goods.

"(2) No other reservations may be made to this Convention."

[Rejected: see paragraph 138, below.]

(c) Iran (A/CONF.152/C.1/L.60):
Amend article 20 to read as follows:

"No reservations may be made to this Convention except in the case of an express contradiction with a national law or national laws of a State."

[Rejected: see paragraph 138, below.]

C. Proceedings in the First Committee

(i) Meetings

137. The First Committee considered article 20 at its 16th meeting on 12 April 1991.

(ii) Consideration

138. At the 16th meeting, the amendment proposed by Netherlands (A/CONF.152/C.1/L.59) was rejected by 5 votes in favour, 18 against and 10 abstentions. The amendment proposed by Belgium (A/CONF.152/C.1/L.30) was rejected by 3 votes in favour, 21 against and 7 abstentions. The amendment proposed by Islamic Republic of Iran (A/CONF.152/C.1/L.60) was rejected by 2 votes in favour, 23 against and 7 abstentions. The UNCITRAL text for article 20 was adopted and referred to the Drafting Committee.

New article

139. The United Kingdom proposed (A/CONF.152/C.1/L.48) that the following new article be included in the Convention:

"Competent Jurisdiction

"Any action under this Convention shall only be brought, at the option of the claimant, before one of the courts listed below, provided that such court is located in a State Party to this Convention:

"(a) The court of the place where [the loss, damage or delay occurred] [the transport-related services were performed]; or

"(b) The court of the principal place of business of the defendant."

140. At the 16th meeting on 12 April 1991, the proposed amendment was withdrawn.

III. CONSIDERATION OF DRAFT ARTICLES SUBMITTED
BY THE DRAFTING COMMITTEE

141. At its 17th meeting on 15 April 1991, the First Committee considered draft articles 1 to 16 of the draft Convention on the Liability of Operators of Transport Terminals in International Trade, as submitted to the First Committee by the Drafting Committee (A/CONF.152/C.1/L.62). The First Committee referred to the Plenary articles 1 to 16 as set forth in document A/CONF.152/11.

F. REPORT OF THE SECOND COMMITTEE

Document A/CONF.152/10 and Add.1

Document A/CONF.152/10

[Original: English]
[12 April 1991]

I. INTRODUCTION

A. Submission of the report

1. The Conference at its third plenary meeting entrusted the Second Committee with the consideration of articles 17 to 19, and 21 to 25, of the draft Convention on the Liability of Operators of Transport Terminals in International Trade (A/CONF.152/5).

2. The present document contains the report of the Second Committee to the Conference on its consideration of the draft articles referred to it, and of other proposals made to the Second Committee during its deliberations.

B. Election of officers

3. At its fourth plenary meeting on 5 April 1991, the Conference unanimously elected Ms. Jelena Vilus (Yugoslavia) as Chairman of the Second Committee. On 10 April 1991, at the second meeting of the Second Committee, Mr. Ken Fujishita (Japan) was elected Vice-President, and Ms. Sylvia Strolz (Austria) was elected Rapporteur of the Second Committee.

C. Meetings, organization of work and structure of this report

(i) Meetings

4. The Second Committee held 4 meetings, on 8, 10, 12 and 15 April 1991.

(ii) Organization of work

5. At its first meeting on 8 April 1991, the Second Committee adopted as its agenda the provisional agenda contained in A/CONF.152/C.2/L.1.

6. The Second Committee proceeded by way of an article-by-article discussion of the draft articles before it and of the amendments to those draft articles submitted by representatives during the Conference. After initial consideration of an article and amendments by the Second Committee, and subject to the decisions taken on those amendments, the article was referred to the Drafting Committee. After consideration of the report of the Drafting Committee to the Second Committee on the articles referred to the Drafting Committee, the Second Committee referred to the Plenary the articles considered by it.

(iii) Plan of this report

7. This report describes the work of the Second Committee relating to each article before it, in accordance with the following scheme:

- (a) Text of the draft article as prepared by the United Nations Commission on International Trade Law (UNCITRAL);
- (b) Texts of amendments, if any, with a brief description of the manner in which they were dealt with;
- (c) Proceedings of the Second Committee, subdivided as follows:
 - (i) Meetings;
 - (ii) Consideration of the article.

II. CONSIDERATION BY THE SECOND COMMITTEE OF THE DRAFT CONVENTION ON
THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

Article 17

A. UNCITRAL text

8. The text of the United Nations Commission on International Trade Law provided as follows:

"Article 17

"Depositary

"The Secretary-General of the United Nations is the depositary of this Convention."

B. Amendments

9. No amendments were submitted to article 17.

C. Proceedings in the Second Committee

(i) Meetings

10. The Second Committee considered article 17 at its first meeting on 8 April 1991.

(ii) Consideration

11. The UNCITRAL text for article 17 was adopted and referred to the Drafting Committee.

Article 18

A. UNCITRAL text

12. The text of the United Nations Commission on International Trade Law provided as follows:

"Article 18

"Signature, ratification, acceptance, approval, accession

"(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on ... and will remain open for signature by all States at the Headquarters of the United Nations, New York, until

"(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

"(3) This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.

"(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations."

B. Amendments

13. No amendments were submitted to article 18.

C. Proceedings in the Second Committee

(i) Meetings

14. The Second Committee considered article 18 at its first meeting on 8 April 1991.

(ii) Consideration

Paragraph (1)

15. The United States made an oral proposal that paragraph (1) provide that the Convention remain open until 30 April 1992. That proposal was adopted by 14 votes in favour and none against. The UNCITRAL text for paragraph (1) was adopted and referred to the Drafting Committee.

Paragraphs (2) to (4)

16. The UNCITRAL texts for paragraphs (2) to (4) were adopted and referred to the Drafting Committee.

Article 19

A. UNCITRAL text

17. The text of the United Nations Commission on International Trade Law provided as follows:

"Article 19

"Application to territorial units

"(1) If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may at any time substitute another declaration for its earlier declaration.

"(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

"(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a State Party, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a State Party, unless it is in a territorial unit to which the Convention extends.

"(4) If a State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State."

B. Amendments

18. An amendment was submitted to article 19 by Canada (A/CONF.152/C.2/L.7).

19. The amendment was to the following effect:

Paragraph (3)

Canada (A/CONF.152/C.2/L.7):
Amend paragraph (3) to read as follows:

"(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a State Party, this Convention shall be applicable only if

(a) the transport-related services are performed by an operator whose place of business is located in a territorial unit to which the Convention extends, or

(b) if the transport-related services are performed in such a territorial unit, or

(c) according to the rules of private international law, the transport-related services are governed by the law in force in a territorial unit to which the Convention extends."

[Adopted: see paragraph 22, below.]

C. Proceedings in the Second Committee

(i) Meetings

20. The Second Committee considered article 19 at its second meeting on 10 April 1991.

(ii) Consideration

Paragraph (1) and (2)

21. The UNCITRAL texts for paragraphs (1) and (2) were adopted and referred to the Drafting Committee.

Paragraph (3)

22. The amendment proposed by Canada (A/CONF.152/C.2/L.7) was adopted by a vote of nine votes in favour, one vote against, and three abstentions. The UNCITRAL text for paragraph (3), as amended by the Second Committee, was adopted and referred to the Drafting Committee. Since the purpose of the amendment to paragraph (3) had been to align it with article 2 of the UNCITRAL text, the Drafting Committee was requested to align paragraph (3) with article 2 as adopted by the First Committee.

Paragraph (4)

23. The UNCITRAL text for paragraph (4) was adopted and referred to the Drafting Committee.

Article 21

A. UNCITRAL text

24. The text of the United Nations Commission on International Trade Law provided as follows:

"Article 21

"Effect of declaration

"(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

"(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

"(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

"(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary."

B. Amendments

25. Amendments were submitted to article 21 by Japan (A/CONF.152/C.2/L.6) and Philippines (A/CONF.152/L.8)

26. Those amendments were to the following effect:

Article 21 in its entirety

Philippines (A/CONF.152/C.2/L.8):
Delete article 21.

[Withdrawn: see paragraph 28, below.]

Paragraphs (1) and (4)

Japan (A/CONF.152/C.2/L.6):
Replace the words "made under this Convention" by the words "made under article 19".

[Adopted: see paragraph 29, below].

C. Proceedings in the Second Committee

(i) Meetings

27. The Second Committee considered article 21 at its second meeting on 10 April 1991.

(ii) Consideration

Article 21 in its entirety

28. The proposal by the Philippines to delete article 21 (A/CONF.152/C.2/L.8) was withdrawn. The Drafting Committee was requested to consider inverting the order of articles 20 and 21, so that the provisions on the effect of declaration would appear immediately following article 19.

Paragraphs (1) and (4)

29. The amendment by Japan was adopted by a vote of nine votes in favour and five votes against. The UNCITRAL texts for those paragraphs, as amended by the Second Committee, were adopted and referred to the Drafting Committee.

Paragraphs (2) and (3)

30. The UNCITRAL texts for paragraphs (2) and (3) were adopted and referred to the Drafting Committee.

Article 22

A. UNCITRAL text

31. The text of the United Nations Commission on International Trade Law provided as follows:

"Article 22

"Entry into force

"(1) This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.

"(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.

"(3) Each State Party shall apply the provisions of this Convention to transport-related services with respect to goods taken in charge by the operator on or after the date of the entry into force of this Convention in respect of that State."

B. Amendments

32. Amendments were submitted to article 1 by Germany (A/CONF.152/C.2/L.4), and Netherlands (A/CONF.152/C.2/L.5).

33. Those amendments were to the following effect:

Paragraph (1)

Germany (A/CONF.152/C.2/L.4) and Netherlands (A/CONF.152/C.2/L.5):
In Article 22, paragraph (i), the word "fifth" should be replaced by the word "fifteenth".

[Rejected: see paragraph 35, below]

C. Proceedings in the Second Committee

(i) Meetings

34. The Second Committee considered article 22 at its first meeting on 8 April 1991.

(ii) Consideration

Paragraph (1)

35. The amendment by Germany (A/CONF.152/C.2/L.4) and Netherlands (A/CONF.152/C.2/L.5) was rejected by a vote of 5 votes in favour and 8 votes against. The UNCITRAL text for paragraph (1) was adopted and referred to the Drafting Committee.

Paragraphs (2) and (3)

36. The UNCITRAL texts for paragraphs (2) and (3) were adopted and referred to the Drafting Committee.

Article 23

A. UNCITRAL text

37. The text of the United Nations Commission on International Trade Law provided as follows:

"Article 23

"Revision and amendment

"(1) At the request of not less than one third of the States Parties to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

"(2) Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended."

B. Amendments

38. No amendments were submitted to article 23.

C. Proceedings in the Second Committee

(i) Meetings

39. The Second Committee considered article 23 at its first meeting on 8 April 1991.

(ii) Consideration

40. The UNCITRAL text for article 23 was adopted and referred to the Drafting Committee.

Article 24

A. UNCITRAL text

41. The text of the United Nations Commission on International Trade Law provided as follows:

"Article 24

"Revision of limitation amounts

"(1) At the request of at least one quarter of the States Parties, the depositary shall convene a meeting of a Committee composed of a representative from each Contracting State to consider increasing or decreasing the amounts in article 6.

"(2) If this Convention enters into force more than five years after it was opened for signature, the depositary shall convene a meeting of the Committee within the first year after it enters into force.

"(3) The meeting of the Committee shall take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law.

"(4) In determining whether the limits should be amended, and if so, by what amount, the following criteria, determined on an international basis, and any other criteria considered to be relevant, shall be taken into consideration:

- (a) The amount by which the limits of liability in any transport-related convention have been amended;
- (b) The value of goods handled by operators;
- (c) The cost of transport-related services;
- d) Insurance rates, including for cargo insurance, liability insurance for operators and insurance covering job-related injuries to workmen;
- (e) The average level of damages awarded against operators for loss of or damage to goods or delay in handing over goods; and
- (f) The costs of electricity, fuel and other utilities.

"(5) Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting.

"(6) No amendment of the limits of liability under this article may be considered less than five years from the date on which this Convention was opened for signature.

"(7) Any amendment adopted in accordance with paragraph (5) shall be notified by the depositary to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of 18 months after it has been notified, unless within that period not less than one third of the States that were States Parties at the time of the adoption of the amendment by the Committee have communicated to the depositary that they do not accept the amendment. An amendment deemed to have been accepted in accordance with this paragraph shall enter into force for all States Parties 18 months after its acceptance.

"(8) A State Party which has not accepted an amendment shall nevertheless be bound by it, unless such State denounces the present Convention at least one month before the amendment enters into force. Such denunciation shall take effect when the amendment enters into force.

"(9) When an amendment has been adopted in accordance with paragraph (5) but the 18-month period for its acceptance has not yet expired, a State which becomes a State Party to this Convention during that period shall be bound by the amendment if it enters into force. A State which becomes a State Party after that period shall be bound by any amendment which has been accepted in accordance with paragraph (7).

"(10) The applicable limit of liability shall be that which, in accordance with the preceding paragraphs, is in effect on the date of the occurrence which caused the loss, damage or delay."

B. Amendments

42. No amendments were submitted to article 24.

C. Proceedings in the Second Committee

(i) Meetings

43. The Second Committee considered article 24 at its first meeting on 8 April 1991.

(ii) Consideration

Paragraph (1)

44. The UNCITRAL text for paragraph (1) was adopted and referred to the Drafting Committee.

Subparagraph (2)

45. The United Kingdom of Great Britain and Northern Ireland made an oral proposal to delete subparagraph (2). That proposal was withdrawn and the UNCITRAL text for paragraph (2) was adopted and referred to the Drafting Committee.

Subparagraph (3) to (6)

46. The UNCITRAL texts for paragraphs (3) to (6) were adopted and referred to the Drafting Committee.

Paragraph (7)

47. The Islamic Republic of Iran made a proposal for the addition, at the end of paragraph (7), of a sentence to the effect that the Secretary-General as depositary would notify Contracting States of the entry into force of an amendment under article 24. That proposal was withdrawn and the UNCITRAL text for paragraph (7) was adopted and referred to the Drafting Committee.

Paragraphs (8) to (10)

48. The UNCITRAL texts for paragraphs (8) to (10) were adopted and referred to the Drafting Committee.

Article 25

A. UNCITRAL text

49. The text of the United Nations Commission on International Trade Law provided as follows:

"Article 25

"Denunciation

"(1) A State Party may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

"(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary."

B. Amendments

50. No amendments were submitted to article 25.

C. Proceedings in the Second Committee

(i) Meetings

51. The Second Committee considered article 25 at its first meeting on 8 April 1991.

(ii) Consideration

52. The UNCITRAL text for article 25 was adopted and referred to the Drafting Committee.

Final, formal clauses of the Convention

A. UNCITRAL text

53. The text of the United Nations Commission on International Trade Law provided as follows:

"DONE at ..., this ... day of ... one thousand nine hundred and ..., in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention."

B. Amendments

54. No amendments were submitted concerning the final, formal clauses of the Convention.

C. Proceedings in the Second Committee

(i) Meetings

55. The Second Committee considered the final, formal clauses of the Convention at its second meeting on 10 April 1991.

(ii) Consideration

56. The Committee decided to indicate the date and place of adoption of the Convention.

Document A/CONF.152/10/Add.1

[Original: English]
[15 April 1991]

III. CONSIDERATION OF THE REPORT OF THE
DRAFTING COMMITTEE TO THE COMMITTEE

57. At its fourth meeting, held on 15 April 1991, the Second Committee received the Report of the Drafting Committee to the Second Committee containing the texts of articles 17 to 25, as approved by the Drafting Committee (A/CONF.152/C.2/L.9). The Second Committee referred those articles to the Plenary.

G. DRAFT ARTICLES 1 TO 16 OF THE DRAFT CONVENTION ON THE LIABILITY OF
OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE
AS ADOPTED BY THE FIRST COMMITTEE

Document A/CONF.152/11

[Original: English]
[15 April 1991]

Article 1

Definitions

In this Convention:

(a) "Operator of a transport terminal" (hereinafter referred to as "operator") means a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use. However, a person is not considered an operator whenever he is responsible for the goods under applicable rules of law governing carriage.

(b) Where goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if it was not supplied by the operator;

(c) "International carriage" means any carriage in which the place of departure and the place of destination are identified as being located in two different States when the goods are taken in charge by the operator;

(d) "Transport-related services" includes such services as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing;

(e) "Notice" means a notice given in a form which provides a record of the information contained therein;

(f) "Request" means a request made in a form which provides a record of the information contained therein.

Article 2

Scope of application

(1) This Convention applies to transport-related services performed in relation to goods which are involved in international carriage:

(a) When the transport-related services are performed by an operator whose place of business is located in a State Party, or

(b) When the transport-related services are performed in a State Party, or

(c) When, according to the rules of private international law, the transport-related services are governed by the law of a State Party.

(2) If the operator has more than one place of business, the place of business is that which has the closest relationship to the transport-related services as a whole.

(3) If the operator does not have a place of business, reference is to be made to the operator's habitual residence.

Article 3

Period of responsibility

The operator is responsible for the goods from the time he has taken them in charge until the time he has handed them over to or has placed them at the disposal of the person entitled to take delivery of them.

Article 4

Issuance of document

(1) The operator may, and at the customer's request shall, within a reasonable period of time, at the option of the operator, either:

(a) Acknowledge his receipt of the goods by signing and dating a document presented by the customer that identifies the goods, or

(b) Issue a signed document identifying the goods, acknowledging his receipt of the goods and the date thereof, and stating their condition and quantity in so far as they can be ascertained by reasonable means of checking.

(2) If the operator does not act in accordance with either subparagraph (a) or (b) of paragraph (1), he is presumed to have received the goods in apparent good condition, unless he proves otherwise. No such presumption applies when the services performed by the operator are limited to the immediate transfer of the goods between means of transport.

(3) A document referred to in paragraph (1) may be issued in any form which preserves a record of the information contained therein. When the customer and the operator have agreed to communicate electronically, a document referred to in paragraph (1) may be replaced by an equivalent electronic data interchange message.

(4) The signature referred to in paragraph (1) means a handwritten signature, its facsimile or an equivalent authentication effected by any other means.

Article 5

Basis of liability

(1) The operator is liable for loss resulting from loss of or damage to the goods, as well as from delay in handing over the goods, if the occurrence which caused the loss, damage or delay took place during the period of the operator's responsibility for the goods as defined in article 3, unless he proves that he, his servants or agents or other persons of whose services the operator makes use for the performance of the transport-related services took all measures that could reasonably be required to avoid the occurrence and its consequences.

(2) Where a failure on the part of the operator, his servants or agents or other persons of whose services the operator makes use for the performance of the transport-related services to take the measures referred to in paragraph (1) combines with another cause to produce loss, damage or delay, the operator is liable only to the extent that the loss resulting from such loss, damage or delay is attributable to that failure, provided that the operator proves the amount of the loss not attributable thereto.

(3) Delay in handing over the goods occurs when the operator fails to hand them over to or place them at the disposal of a person entitled to take delivery of them within the time expressly agreed upon or, in the absence of such agreement, within a reasonable time after receiving a request for the goods by such person.

(4) If the operator fails to hand over the goods to or place them at the disposal of a person entitled to take delivery of them within a period of 30 consecutive days after the date expressly agreed upon or, in the absence of such agreement, within a period of 30 consecutive days after receiving a request for the goods by such person, a person entitled to make a claim for the loss of the goods may treat them as lost.

Article 6

Limits of liability

(1) (a) The liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding 8.33 units of account per kilogram of gross weight of the goods lost or damaged.

(b) However, if the goods are handed over to the operator immediately after carriage by sea or by inland waterways, or if the goods are handed over, or are to be handed over, by him for such carriage, the liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding 2.75 units of account per kilogram of gross weight of the goods lost or damaged. For the purposes of this paragraph, carriage by sea or by inland waterways includes pick-up and delivery within a port.

(c) When the loss of or damage to a part of the goods affects the value of another part of the goods, the total weight of the lost or damaged goods and of the goods whose value is affected shall be taken into consideration in determining the limit of liability.

(2) The liability of the operator for delay in handing over the goods according to the provisions of article 5 is limited to an amount equivalent to two and a half times the charges payable to the operator for his services in respect of the goods delayed, but not exceeding the total of such charges in respect of the consignment of which the goods were a part.

(3) In no case shall the aggregate liability of the operator under both paragraphs (1) and (2) exceed the limitation which would be established under paragraph (1) for total loss of the goods in respect of which such liability was incurred.

(4) The operator may agree to limits of liability exceeding those provided for in paragraphs (1), (2) and (3).

Article 7

Application to non-contractual claims

(1) The defences and limits of liability provided for in this Convention apply in any action against the operator in respect of loss of or damage to the goods, as well as delay in handing over the goods, whether the action is founded in contract, in tort or otherwise.

(2) If such an action is brought against a servant or agent of the operator, or against another person of whose services the operator makes use for the performance of the transport-related services, such servant, agent or person, if he proves that he acted within the scope of his employment or engagement by the operator, is entitled to avail himself of the defences and limits of liability which the operator is entitled to invoke under this Convention.

(3) Except as provided in article 8, the aggregate of the amounts recoverable from the operator and from any servant, agent or person referred to in the preceding paragraph shall not exceed the limits of liability provided for in this Convention.

Article 8

Loss of right to limit liability

(1) The operator is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission of the operator himself or his servants or agents done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

(2) Notwithstanding the provision of paragraph (2) of article 7, a servant or agent of the operator or another person of whose services the operator makes use for the performance of the transport-related services is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission of such servant, agent or person done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Article 9

Special rules on dangerous goods

If dangerous goods are handed over to the operator without being marked, labelled, packaged or documented in accordance with any law or regulation relating to dangerous goods applicable in

the country where the goods are handed over and if, at the time the goods are taken in charge by him, the operator does not otherwise know of their dangerous character, he is entitled:

(a) To take all precautions the circumstances may require, including, when the goods pose an imminent danger to any person or property, destroying the goods, rendering them innocuous, or disposing of them by any other lawful means, without payment of compensation for damage to or destruction of the goods resulting from such precautions, and

(b) To receive reimbursement for all costs incurred by him in taking the measures referred to in subparagraph (a) from the person who failed to meet any obligation under such applicable law or regulation to inform him of the dangerous character of the goods.

Article 10

Rights of security in goods

(1) The operator has a right of retention over the goods for costs and claims which are due in connection with the transport-related services performed by him in respect of the goods both during the period of his responsibility for them and thereafter. However, nothing in this Convention affects the validity under the applicable law of any contractual arrangements extending the operator's security in the goods.

(2) The operator is not entitled to retain the goods if a sufficient guarantee for the sum claimed is provided or if an equivalent sum is deposited with a mutually accepted third party or with an official institution in the State where the operator has his place of business.

(3) In order to obtain the amount necessary to satisfy his claim, the operator is entitled, to the extent permitted by the law of the State where the goods are located, to sell all or part of the goods over which he has exercised the right of retention provided for in this article. This right to sell does not apply to containers, pallets or similar articles of transport or packaging which are owned by a party other than the carrier or the shipper and which are clearly marked as regards ownership except in respect of claims by the operator for the cost of repairs of or improvements to the containers, pallets or similar articles of transport or packaging.

(4) Before exercising any right to sell the goods, the operator shall make reasonable efforts to give notice of the intended sale to the owner of the goods, the person from whom the operator received them and the person entitled to take delivery of them from the operator. The operator shall account appropriately for the balance of the proceeds of the sale in excess of the sums due to the operator plus the reasonable costs of the sale. The right of sale shall in all other respects be exercised in accordance with the law of the State where the goods are located.

Article 11

Notice of loss, damage or delay

(1) Unless notice of loss or damage, specifying the general nature of the loss or damage, is given to the operator not later than the third working day after the day when the goods were handed over by the operator to the person entitled to take delivery of them, the handing over is prima facie evidence of the handing over by the operator of the goods as described in the document issued by the operator pursuant to paragraph (1)(b) of article 4 or, if no such document was issued, in good condition.

(2) Where the loss or damage is not apparent, the provisions of paragraph (1) apply correspondingly if notice is not given to the operator within 15 consecutive days after the day when the goods reached the final recipient, but in no case later than 60 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them.

(3) If the operator participated in a survey or inspection of the goods at the time when they were handed over to the person entitled to take delivery of them, notice need not be given to the operator of loss or damage ascertained during that survey or inspection.

(4) In the case of any actual or apprehended loss of or damage to the goods, the operator, the carrier and the person entitled to take delivery of the goods shall give all reasonable facilities to each other for inspecting and tallying the goods.

(5) No compensation is payable for loss resulting from delay in handing over the goods unless notice has been given to the operator within 21 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them.

Article 12

Limitation of actions

(1) Any action under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

(2) The limitation period commences:

(a) On the day the operator hands over the goods or part thereof to, or places them at the disposal of, a person entitled to take delivery of them, or

(b) In cases of total loss of the goods, on the day the person entitled to make a claim receives notice from the operator that the goods are lost, or on the day that person may treat the goods as lost in accordance with paragraph (4) of article 5, whichever is earlier.

(3) The day on which the limitation period commences is not included in the period.

(4) The operator may at any time during the running of the limitation period extend the period by a notice to the claimant. The period may be further extended by another notice or notices.

(5) A recourse action by a carrier or another person against the operator may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if it is instituted within 90 days after the carrier or other person has been held liable in an action against himself or has settled the claim upon which such action was based and if, within a reasonable period of time after the filing of a claim against a carrier or other person that may result in a recourse action against the operator, notice of the filing of such a claim has been given to the operator.

Article 13

Contractual stipulations

(1) Unless otherwise provided in this Convention, any stipulation in a contract concluded by an operator or in any document signed or issued by the operator pursuant to article 4 is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part.

(2) Notwithstanding the provisions of the preceding paragraph, the operator may agree to increase his responsibilities and obligations under this Convention.

Article 14

Interpretation of the Convention

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application.

Article 15

International transport conventions

This Convention does not modify any rights or duties which may arise under an international convention relating to the international carriage of goods which is binding on a State which is a party to this Convention or under any law of such State giving effect to a convention relating to the international carriage of goods.

Article 16

Unit of account

(1) The unit of account referred to in article 6 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be expressed in the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The equivalence between the national currency of a State Party which is a member of the International Monetary Fund and the Special Drawing Right is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The equivalence between the national currency of a State Party which is not a member of the International Monetary Fund and the Special Drawing Right is to be calculated in a manner determined by that State.

(2) The calculation mentioned in the last sentence of the preceding paragraph is to be made in such a manner as to express in the national currency of the State Party as far as possible the same real value for amounts in article 6 as is expressed there in units of account. States Parties must communicate to the depositary the manner of calculation at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession and whenever there is a change in the manner of such calculation.

H. DRAFT ARTICLES 17 TO 25 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE AS PREPARED BY THE DRAFTING COMMITTEE AND APPROVED BY THE SECOND COMMITTEE

Document A/CONF.152/12

FINAL CLAUSES

[Original: English]
[15 April 1991]

Article 17

Depositary

The Secretary-General of the United Nations is the depositary of this Convention.

Article 18

Signature, ratification, acceptance, approval, accession

- (1) This Convention is open for signature at the concluding meeting of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade and will remain open for signature by all States at the Headquarters of the United Nations, New York, until 30 April 1992.
- (2) This Convention is subject to ratification, acceptance or approval by the signatory States.
- (3) This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.
- (4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 19

Application to territorial units

- (1) If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may at any time substitute another declaration for its earlier declaration.
- (2) These declarations are to state expressly the territorial units to which the Convention extends.
- (3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a State Party, this Convention shall be applicable only if
 - (a) The transport-related services are performed by an operator whose place of business is located in a territorial unit to which the Convention extends, or
 - (b) The transport-related services are performed in a territorial unit to which the Convention extends, or
 - (c) According to the rules of private international law, the transport-related services are governed by the law in force in a territorial unit to which the Convention extends.
- (4) If a State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 20

Effect of declaration

- (1) Declarations made under article 19 at the time of signature are subject to confirmation upon ratification, acceptance or approval.
- (2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.
- (3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.
- (4) Any State which makes a declaration under article 19 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 21

Reservations

No reservations may be made to this Convention.

Article 22

Entry into force

- (1) This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.

(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.

(3) Each State Party shall apply the provisions of this Convention to transport-related services with respect to goods taken in charge by the operator on or after the date of the entry into force of this Convention in respect of that State.

Article 23

Revision and amendment

(1) At the request of not less than one third of the States Parties to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

(2) Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 24

Revision of limitation amounts

(1) At the request of at least one quarter of the States Parties, the depositary shall convene a meeting of a Committee composed of a representative from each Contracting State to consider increasing or decreasing the amounts in article 6.

(2) If this Convention enters into force more than five years after it was opened for signature, the depositary shall convene a meeting of the Committee within the first year after it enters into force.

(3) The meeting of the Committee shall take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law.

(4) In determining whether the limits should be amended, and if so, by what amount, the following criteria, determined on an international basis, and any other criteria considered to be relevant, shall be taken into consideration:

(a) The amount by which the limits of liability in any transport-related convention have been amended;

(b) The value of goods handled by operators;

(c) The cost of transport-related services;

(d) Insurance rates, including for cargo insurance, liability insurance for operators and insurance covering job-related injuries to workmen;

(e) The average level of damages awarded against operators for loss of or damage to goods or delay in handing over goods; and

(f) The costs of electricity, fuel and other utilities.

(5) Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting.

(6) No amendment of the limits of liability under this article may be considered less than five years from the date on which this Convention was opened for signature.

(7) Any amendment adopted in accordance with paragraph (5) shall be notified by the depositary to all Contracting States. The amendment is deemed to have been accepted at the end of a period of 18 months after it has been notified, unless within that period not less than one third of the States that were States Parties at the time of the adoption of the amendment by the Committee have communicated to the depositary that they do not accept the amendment. An amendment deemed to have been accepted in accordance with this paragraph enters into force for all States Parties 18 months after its acceptance.

(8) A State Party which has not accepted an amendment is nevertheless bound by it, unless such State denounces the present Convention at least one month before the amendment enters into force. Such denunciation takes effect when the amendment enters into force.

(9) When an amendment has been adopted in accordance with paragraph (5) but the 18-month period for its acceptance has not yet expired, a State which becomes a State Party to this Convention during that period is bound by the amendment if it enters into force. A State which becomes a State Party after that period is bound by any amendment which has been accepted in accordance with paragraph (7).

(10) The applicable limit of liability is that which, in accordance with the preceding paragraphs, is in effect on the date of the occurrence which caused the loss, damage or delay.

Article 25

Denunciation

(1) A State Party may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

(2) Subject to paragraph (8) of article 24, the denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this ... day of April one thousand nine hundred and ninety-one, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

I. DRAFT ARTICLES OF THE DRAFT CONVENTION ON THE LIABILITY
OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE
PREPARED OR APPROVED BY THE DRAFTING COMMITTEE

1. Changes in articles 1, 3, 4, 5 and 6
adopted by the First Committee through 8 April 1991

Document A/CONF.152/DC/L.2

[Original: English]
[9 April 1991]

1. The second sentence of article 1(a) reads as follows:

"However, a person shall not be considered to be an operator whenever he is a carrier."

2. In article 4(3) the words "in subparagraph (b)" were deleted.

3. A second sentence, modelled on INCOTERMS 1990, was added to article 4(3) as follows:

"When the customer and the operator have agreed to communicate electronically, the document referred to in paragraph (1) may be replaced by an equivalent electronic data interchange message."

4. Article 4(4) was replaced by the text of article 5(k) of the United Nations Convention on International Bills of Exchange and International Promissory Notes as follows:

"Signature" means a handwritten signature, its facsimile or an equivalent authentication effected by any other means.

5. The suggestions of Spain in A/CONF.152/C.1/L.20 were referred to the Drafting Group.

6. A new article 6(1)(c) was adopted as contained in A/CONF.152/C.1/L.27.

2. Articles 1, 3, 4 and 5

Document A/CONF.152/DC/L.3

[Original: English]
[10 April 1991]

Article 1

Definitions

In this Convention:

(a) "Operator of a transport terminal" (hereinafter referred to as "operator") means a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use. However, a person shall not be considered an operator whenever he is a carrier;

(b) Where goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if it was not supplied by the operator;

(c) "International carriage" means any carriage in which the place of departure and the place of destination are identified as being located in two different States when the goods are taken in charge by the operator;

(d) "Transport-related services" includes such services as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing;

(e) "Notice" means a notice given in a form which provides a record of the information contained therein;

(f) "Request" means a request made in a form which provides a record of the information contained therein.

Article 3

Period of responsibility

The operator is responsible for the goods from the time he has taken them in charge until the time he has handed them over to or has placed them at the disposal of the person entitled to take delivery of them.

Article 4

Issuance of document

(1) The operator may, and at the customer's request shall, within a reasonable period of time, at the option of the operator, either:

(a) Acknowledge his receipt of the goods by signing and dating a document presented by the customer that identifies the goods, or

(b) Issue a signed document identifying the goods, acknowledging his receipt of the goods and the date thereof, and stating their condition and quantity in so far as they can be ascertained by reasonable means of checking.

(2) If the operator does not act in accordance with either subparagraph (a) or (b) of paragraph (1), he is rebuttably presumed to have received the goods in apparent good condition. No such presumption applies when the services performed by the operator are limited to the immediate transfer of the goods between means of transport.

(3) A document referred to in paragraph (1) may be issued in any form which preserves a record of the information contained therein. When the customer and the operator have agreed to communicate electronically, a document referred to in paragraph (1) may be replaced by an equivalent electronic data interchange message.

(4) The signature referred to in paragraph (1) means a handwritten signature, its facsimile or an equivalent authentication effected by any other means.

Article 5

Basis of liability

(1) The operator is liable for loss resulting from loss of or damage to the goods, as well as for delay in handing over the goods, if the occurrence which caused the loss, damage or delay took place during the period of the operator's responsibility for the goods as defined in article 3, unless he proves that he, his servants or agents or other persons of whose services the operator makes use for the performance of the transport-related services took all measures that could reasonably be required to avoid the occurrence and its consequences.

(2) Where a failure on the part of the operator, his servants or agents or other persons of whose services the operator makes use for the performance of the transport-related services to take the measures referred to in paragraph (1) combines with another cause to produce loss, damage or delay, the operator is liable only to the extent that the loss resulting from such loss, damage or delay is attributable to that failure, provided that the operator proves the amount of the loss not attributable thereto.

(3) Delay in handing over the goods occurs when the operator fails to hand them over to or place them at the disposal of a person entitled to take delivery of them within the time expressly agreed upon or, in the absence of such agreement, within a reasonable time after receiving a request for the goods by such person.

(4) If the operator fails to hand over the goods to or place them at the disposal of a person entitled to take delivery of them within a period of 30 consecutive days after the date expressly agreed upon or, in the absence of such agreement, within a period of 30 consecutive days after receiving a request for the goods by such person, a person entitled to make a claim for the loss of the goods may treat them as lost.

3. Changes in articles 18, 19, 21, 23 and 25 adopted by the Second Committee

Document A/CONF.152/DC/L.4

[Original: English]
[10 April 1991]

1. Article 18(a) should indicate the date of the concluding meeting of the Conference and that the Convention will remain open for signature until 30 April 1992.
2. Article 19(3) reads as follows:
"(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a State Party, this Convention shall be applicable only if
 - (a) the transport-related services are performed by an operator whose place of business is located in a territorial unit to which the Convention extends, or
 - (b) if the transport-related services are performed in such a territorial unit, or
 - (c) according to the rules of private international law, the transport-related services are governed by the law in force in a territorial unit to which the Convention extends.
3. The Second Committee requested the Drafting Committee to align article 19(3) with article 2 as adopted by the First Committee.
4. In article 21(1) and (4), replace the words "made under this Convention" by the words "made under article 19".
5. It was suggested in the Second Committee that consideration be given to inverting the order of articles 20 and 21, so that the provision on effect of declaration appears immediately following article 19.
6. It was suggested that a cross-reference to article 24(6) be added to article 23(1) since article 24(6) prohibits amendment of limitation amounts during the five-year period following opening of the Convention for signature, a restriction not applicable to amendments generally.
7. It was suggested that article 25(2) should include a cross-reference to article 24(8) since article 24(8) appeared to present an exception to the rule laid down in article 25(2) as to the effective date of denunciations.
8. The final, formal clauses of the Convention should indicate the place (Vienna) and the date of adoption of the Convention.

4. Articles 4, 6 to 9, 17, 18, 21 to 25

Document A/CONF.152/DC/L.5*

[Original: English]
[10 April 1991]

Article 4

Issuance of document

- (1) The operator may, and at the customer's request shall, within a reasonable period of time, at the option of the operator, either:
 - (a) Acknowledge his receipt of the goods by signing and dating a document presented by the customer that identifies the goods, or
 - (b) Issue a signed document identifying the goods, acknowledging his receipt of the goods and the date thereof, and stating their condition and quantity in so far as they can be ascertained by reasonable means of checking.
- (2) If the operator does not act in accordance with either subparagraph (a) or (b) of paragraph (1), he is presumed to have received the goods in apparent good condition, unless he proves otherwise. No such presumption applies when the services performed by the operator are limited to the immediate transfer of the goods between means of transport.
- (3) A document referred to in paragraph (1) may be issued in any form which preserves a record of the information contained therein. When the customer and the operator have agreed to communicate electronically, a document referred to in paragraph (1) may be replaced by an equivalent electronic data interchange message.
- (4) The signature referred to in paragraph (1) means a handwritten signature, its facsimile or an equivalent authentication effected by any other means.

*Incorporating document A/CONF.152/DC/L.6/Corr.1, dated 11 April 1991 (English only).

Article 6

Limits of liability

(1) (a) The liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding 8.33 units of account per kilogram of gross weight of the goods lost or damaged.

(b) However, if the goods are handed over to the operator immediately after carriage by sea or by inland waterways, or if the goods are handed over, or are to be handed over, by him for such carriage, the liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding 2.75 units of account per kilogram of gross weight of the goods lost or damaged. For the purposes of this paragraph, carriage by sea or by inland waterways includes pick-up and delivery within a port.

(c) When the loss of or damage to a part of the goods affects the value of another part of the goods, the total weight of the lost or damaged goods and of the goods whose value is affected shall be taken into consideration in determining the limit of liability.

(2) The liability of the operator for delay in handing over the goods according to the provisions of article 5 is limited to an amount equivalent to two and a half times the charges payable to the operator for his services in respect of the goods delayed, but not exceeding the total of such charges in respect of the consignment of which the goods were a part.

(3) In no case shall the aggregate liability of the operator under both paragraphs (1) and (2) exceed the limitation which would be established under paragraph (1) for total loss of the goods in respect of which such liability was incurred.

(4) The operator may agree to limits of liability exceeding those provided for in paragraphs (1), (2) and (3).

Article 7

Application to non-contractual claims

(1) The defences and limits of liability provided for in this Convention apply in any action against the operator in respect of loss of or damage to the goods, as well as delay in handing over the goods, whether the action is founded in contract, in tort or otherwise.

(2) If such an action is brought against a servant or agent of the operator, or against another person of whose services the operator makes use for the performance of the transport-related services, such servant, agent or person, if he proves that he acted within the scope of his employment or engagement by the operator, is entitled to avail himself of the defences and limits of liability which the operator is entitled to invoke under this Convention.

(3) Except as provided in article 8, the aggregate of the amounts recoverable from the operator and from any servant, agent or person referred to in the preceding paragraph shall not exceed the limits of liability provided for in this Convention.

Article 8

Loss of right to limit liability

(1) The operator is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission of the operator himself or his servants or agents done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

(2) Notwithstanding the provision of paragraph (2) of article 7, a servant or agent of the operator or another person of whose services the operator makes use for the performance of the transport-related services is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission of such servant, agent or person done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Article 9

Special rules on dangerous goods

If dangerous goods are handed over to the operator without being marked, labelled, packaged or documented in accordance with any law or regulation relating to dangerous goods applicable in the country where the goods are handed over and if, at the time the goods are taken in charge by him, the operator does not otherwise know of their dangerous character, he is entitled:

(a) To take all precautions the circumstances may require, including, when the goods pose an imminent danger to any person or property, destroying the goods, rendering them innocuous, or disposing of them by any other lawful means, without payment of compensation for damage to or destruction of the goods resulting from such precautions, and

(b) To receive reimbursement for all costs incurred by him in taking the measures referred to in subparagraph (a) from the person who failed to meet any obligation under such applicable law or regulation to inform him of the dangerous character of the goods.

FINAL CLAUSES

Article 17

Depositary

The Secretary-General of the United Nations is the depositary of this Convention.

Article 18

Signature, ratification, acceptance, approval, accession

- (1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Liability of Operators of Transport Terminals in International Trade and will remain open for signature by all States at the Headquarters of the United Nations, New York, until 30 April 1992.
- (2) This Convention is subject to ratification, acceptance or approval by the signatory States.
- (3) This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.
- (4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 21

Effect of declaration

- (1) Declarations made under article 19 at the time of signature are subject to confirmation upon ratification, acceptance or approval.
- (2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.
- (3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.
- (4) Any State which makes a declaration under article 19 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 22

Entry into force

- (1) This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.
- (2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.
- (3) Each State Party shall apply the provisions of this Convention to transport-related services with respect to goods taken in charge by the operator on or after the date of the entry into force of this Convention in respect of that State.

Article 23

Revision and amendment

- (1) At the request of not less than one third of the States Parties to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.
- (2) Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 24

Revision of limitation amounts

- (1) At the request of at least one quarter of the States Parties, the depositary shall convene a meeting of a Committee composed of a representative from each Contracting State to consider increasing or decreasing the amounts in article 6.
- (2) If this Convention enters into force more than five years after it was opened for signature, the depositary shall convene a meeting of the Committee within the first year after it enters into force.
- (3) The meeting of the Committee shall take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law.
- (4) In determining whether the limits should be amended, and if so, by what amount, the following criteria, determined on an international basis, and any other criteria considered to be relevant, shall be taken into consideration:
 - (a) The amount by which the limits of liability in any transport-related convention have been amended;
 - (b) The value of goods handled by operators;
 - (c) The cost of transport-related services;
 - (d) Insurance rates, including for cargo insurance, liability insurance for operators and insurance covering job-related injuries to workmen;
 - (e) The average level of damages awarded against operators for loss of or damage to goods or delay in handing over goods; and
 - (f) The costs of electricity, fuel and other utilities.
- (5) Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting.
- (6) No amendment of the limits of liability under this article may be considered less than five years from the date on which this Convention was opened for signature.
- (7) Any amendment adopted in accordance with paragraph (5) shall be notified by the depositary to all Contracting States. The amendment is deemed to have been accepted at the end of a period of 18 months after it has been notified, unless within that period not less than one third of the States that were States Parties at the time of the adoption of the amendment by the Committee have communicated to the depositary that they do not accept the amendment. An amendment deemed to have been accepted in accordance with this paragraph enters into force for all States Parties 18 months after its acceptance.
- (8) A State Party which has not accepted an amendment is nevertheless bound by it, unless such State denounces the present Convention at least one month before the amendment enters into force. Such denunciation takes effect when the amendment enters into force.
- (9) When an amendment has been adopted in accordance with paragraph (5) but the 18-month period for its acceptance has not yet expired, a State which becomes a State Party to this Convention during that period is bound by the amendment if it enters into force. A State which becomes a State Party after that period is bound by any amendment which has been accepted in accordance with paragraph (7).
- (10) The applicable limit of liability is that which, in accordance with the preceding paragraphs, is in effect on the date of the occurrence which caused the loss, damage or delay.

Article 25

Denunciation

- (1) A State Party may denounce this Convention at any time by means of a notification in writing addressed to the depositary.
- (2) Subject to paragraph (8) of article 24, the denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this ... day of April one thousand nine hundred and ninety-one, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

5. Changes in articles 19 and 21 adopted by the Second Committee

Document A/CONF.152/DC/L.6

[Original: English]
[12 April 1991]

During the adoption of the report of the Second Committee, it was suggested that the amendment of article 21(1) to refer specifically to declarations made under article 19 had resulted in an overlap between articles 19(2) and 21(2) with respect to formal requirements for declarations made under article 19. Accordingly, the following drafting changes to articles 19 to 21 were suggested:

- (i) in article 19(2), add the words "in writing" after the words "are to be notified";
- (ii) in article 21(2), delete the words "Declaration and", and move the remainder of paragraph (2) to paragraph (1), as the second sentence of paragraph (1).

J. PROPOSALS AND AMENDMENTS SUBMITTED TO THE PLENARY CONFERENCE

China

Document A/CONF.152/L.2

[Original: Chinese]
[12 April 1991]

Title of Convention

The title of the draft Convention should read: "Convention on the Liability of Operators of Transport Terminals in International Carriage of Goods".

China

Document A/CONF.152/L.3

[Original: Chinese]
[12 April 1991]

Article 9

1. It is proposed that a new subparagraph (c) should be added to article 9, modelled on article 13 (4) of the Hamburg Rules, as follows:

"(c) If, in cases where the provisions of subparagraph (a) of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be removed, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation."

2. If it is not possible to have the above subparagraph added, it is proposed to revise subparagraph (a) as follows:

- (i) After the words "to take all precautions", insert the words "and emergency measures";
- (ii) After the words "pose an imminent danger", insert the words "or become an actual danger";
- (iii) Replace the words "resulting from such precautions" by the words "resulting from such measures".

Netherlands and the United Kingdom of Great Britain and Northern Ireland

Document A/CONF.152/L.4

[Original: English]
[15 April 1991]

Article 22(1)

It is proposed to replace the word "firth" in paragraph (1) by "tenth".

Australia, Germany, Italy and Japan

Document A/CONF.152/L.5

[Original: English]
[15 April 1991]

Article 1(a)

Second sentence of subparagraph (a) of article 1 should read:

"However, a person shall not be considered an operator whenever he is a carrier under applicable rules of law governing carriage."

China, Mexico, Spain, Union of Soviet Socialist Republics,
United States of America

Document A/CONF.152/L.6

[Original: English]
[16 April 1991]

Preamble

The Contracting States:

Considering the problems created by the uncertainties as to the legal regime applicable with regard to goods in international carriage when the goods are not in the charge of carriers nor in the charge of cargo-owning interests but while they are in the charge of operators of transport terminals in international trade;

Intending to facilitate the movement of goods by establishing uniform rules concerning liability for the loss, damage or delay to such goods while they are in the charge of operators of transport terminals and are not covered by the laws of carriage arising out of conventions applicable to the various modes of transport;

Reaffirming its conviction that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would significantly contribute to universal economic cooperation among all States on a basis of equality, equity and common interest and to the elimination of discrimination in international trade and, thereby, to the well-being of all peoples,

Have agreed as follows:

United States of America

Document A/CONF.152/L.7

[Original: English]
[16 April 1991]

Article 21

The following text of article 21 is proposed:

- "(1) States may determine not to apply the provisions of this Convention to stevedores whose rights and liabilities are determined by applicable rules of law governing carriage.
- (2) No other reservation may be made to this Convention."

FINAL ACT OF THE UNITED NATIONS CONFERENCE ON THE
LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE
AND THE UNITED NATIONS CONVENTION ON THE LIABILITY OF OPERATORS OF
TRANSPORT TERMINALS IN INTERNATIONAL TRADE

Document A/CONF.152/13

1. The General Assembly of the United Nations, having considered chapter II of the report of the United Nations Commission on International Trade Law on the work of its twenty-second session, in 1989 (A/44/17), and annex I to that report, which contained a draft Convention on the Liability of Operators of Transport Terminals in International Trade, decided by its resolution 44/33 of 4 December 1989, that an international conference of plenipotentiaries should be convened at Vienna from 2 to 19 April 1991 to consider the draft Convention prepared by the Commission and to embody the results of its work in an international convention on the liability of operators of transport terminals in international trade.

2. The United Nations Conference on the Liability of Operators of Transport Terminals in International Trade was held at Vienna, Austria, from 2 to 19 April 1991.

3. Forty-eight States were represented at the Conference, as follows: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Denmark, Egypt, Finland, France, Gabon, Germany, Guinea, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Italy, Japan, Lesotho, Libyan Arab Jamahiriya, Mexico, Morocco, Netherlands, Nigeria, Oman, Philippines, Republic of Korea, Saudi Arabia, Spain, Sweden, Switzerland, Thailand, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United States of America, Viet Nam, Yemen and Yugoslavia.

4. The General Assembly requested the Secretary-General to invite representatives of organizations that had received a standing invitation from the General Assembly to participate in the sessions and the work of all international conferences convened under its auspices in the capacity of observers in accordance with General Assembly resolutions 3237 (XXIX) of 22 November 1974 and 31/152 of 20 December 1976; to invite representatives of the national liberation movements recognized by the Organization of African Unity in its region to participate in the conference in the capacity of observers in accordance with General Assembly resolution 3280 (XXIX) of 10 December 1974; and to invite the specialized agencies and the International Atomic Energy Agency, as well as interested organs of the United Nations and other interested international organizations, to be represented at the Conference by observers. In addition, interested non-governmental organizations were invited to be represented at the Conference by observers. The following intergovernmental and non-governmental organizations accepted these invitations and were represented by observers at the Conference:

United Nations Secretariat

United Nations Conference on Trade and Development
United Nations Environment Programme

Specialized agencies

International Maritime Organization

Other intergovernmental organizations

Central Commission for the Navigation of the Rhine
Intergovernmental Organization for International Carriage by Rail
International Institute for the Unification of Private Law
League of Arab States

Liberation movements

Pan Africanist Congress of Azania

Non-governmental organizations

Argentine-Uruguayan Institute of Commercial Law
European Shippers' Councils
Latin American and Caribbean Federation of National Associations of Cargo
Institute of International Container Lessors
International Air Transport Association
International Association of Ports and Harbors
International Chamber of Shipping
International Maritime Committee
International Road Transport Union
International Union of Marine Insurance
Regional Center for International Commercial Arbitration Cairo

5. The Conference elected Mr. José María Abascal (Mexico) as President.

6. The Conference elected as Vice-Presidents the representatives of the following States: Argentina, Australia, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, China, Egypt, Gabon, Iran (Islamic Republic of), Italy, Japan, Morocco, Nigeria, Philippines, Spain, Sweden, Thailand, Union of Soviet Socialist Republics, Yugoslavia.

7. The following Committees were established by the Conference:

General Committee

Chairman: The President of the Conference

Members: The President and Vice-Presidents of the Conference, and the Chairmen of the First and the Second Committees and the Chairman of the Drafting Committee

First Committee

Chairman: Mr. Jean-Paul Beraudo (France)

Vice-Chairman: Mr. Mahmoud Soliman (Egypt)

Rapporteur: Mr. Abbas Safarian Nematabad (Islamic Republic of Iran)

Second Committee

Chairman: Ms. Jelena Vilus (Yugoslavia)

Vice-Chairman: Mr. Ken Fujishita (Japan)

Rapporteur: Ms. Sylvia Strolz (Austria)

Drafting Committee

Chairman: Mr. P.C. Rao (India)

Members: China, Egypt, France, Germany, Guinea, Mexico, Morocco, Nigeria, Philippines, Spain, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America.

Credentials Committee

Chairman: Mr. Ross Hornby (Canada)

Members: Argentina, Canada, China, Guinea, Iran (Islamic Republic of), Lesotho, Mexico, Ukrainian Soviet Socialist Republic and United States of America.

8. The Secretary-General of the United Nations was represented by Mr. Carl-August Fleischhauer, Under-Secretary-General for Legal Affairs, the Legal Counsel, Office of Legal Affairs of the United Nations. Mr. Eric E. Bergsten, Chief of the International Trade Law Branch of the Office of Legal Affairs of the United Nations, acted as Executive Secretary.

9. The General Assembly, by its resolution 44/33 of 4 December 1989 convening the Conference, referred to the Conference, as the basis for its consideration of the liability of operators of transport terminals in international trade, the draft Convention on the Liability of Operators of Transport Terminals in International Trade contained in annex I to the report of the United Nations Commission on International Trade Law on the work of its twenty-second session (A/CONF.152/5).

10. The Conference assigned to the First Committee the text of articles 1 to 16, and 20, of the draft Convention on the Liability of Operators of Transport Terminals in International Trade. The Conference assigned to the Second Committee articles 17 to 19, and 21 to 25, of the draft Convention.

11. On the basis of the deliberations recorded in the summary records of the Conference (A/CONF.152/SR.1-8), the summary records of the First Committee (A/CONF.152/C.1/SR.1-18) and its report (A/CONF.152/9), and the summary records of the Second Committee (A/CONF.152/C.2/SR.1-4) and its report (A/CONF.152/10 and Add.1), the Conference drew up the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade.

12. That Convention, the text of which is annexed to this Final Act, was adopted by the Conference on 17 April 1991 and was opened for signature at the concluding meeting of the Conference, on 19 April 1991. It will remain open for signature at United Nations Headquarters in New York until 30 April 1992. It was also opened for accession on 19 April 1991.

13. The Convention is deposited with the Secretary-General of the United Nations.

DONE at Vienna, Austria, this nineteenth day of April, one thousand nine hundred and ninety-one, in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

IN WITNESS WHEREOF the representatives have signed this Final Act.

President

Executive Secretary

Annex

UNITED NATIONS CONVENTION ON THE LIABILITY OF
OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

PREAMBLE

THE CONTRACTING STATES:

REAFFIRMING THEIR CONVICTION that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would significantly contribute to universal economic cooperation among all States on a basis of equality, equity and common interest and to the elimination of discrimination in international trade and, thereby, to the well-being of all peoples;

CONSIDERING the problems created by the uncertainties as to the legal regime applicable with regard to goods in international carriage when the goods are not in the charge of carriers nor in the charge of cargo-owning interests but while they are in the charge of operators of transport terminals in international trade;

INTENDING to facilitate the movement of goods by establishing uniform rules concerning liability for loss of, damage to or delay in handing over such goods while they are in the charge of operators of transport terminals and are not covered by the laws of carriage arising out of conventions applicable to the various modes of transport,

HAVE AGREED AS FOLLOWS:

Article 1

Definitions

In this Convention:

(a) "Operator of a transport terminal" (hereinafter referred to as "operator") means a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to procure the performance of transport-related services with respect to the goods in an area under his control or in respect of which he has a right of access or use. However, a person is not considered an operator whenever he is a carrier under applicable rules of law governing carriage;

(b) Where goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if it was not supplied by the operator;

(c) "International carriage" means any carriage in which the place of departure and the place of destination are identified as being located in two different States when the goods are taken in charge by the operator;

(d) "Transport-related services" includes such services as storage, warehousing, loading, unloading, stowage, trimming, dunnaging and lashing;

(e) "Notice" means a notice given in a form which provides a record of the information contained therein;

(f) "Request" means a request made in a form which provides a record of the information contained therein.

Article 2

Scope of application

(1) This Convention applies to transport-related services performed in relation to goods which are involved in international carriage:

(a) When the transport-related services are performed by an operator whose place of business is located in a State Party, or

(b) When the transport-related services are performed in a State Party, or

(c) When, according to the rules of private international law, the transport-related services are governed by the law of a State Party.

- (2) If the operator has more than one place of business, the place of business is that which has the closest relationship to the transport-related services as a whole.
- (3) If the operator does not have a place of business, reference is to be made to the operator's habitual residence.

Article 3

Period of responsibility

The operator is responsible for the goods from the time he has taken them in charge until the time he has handed them over to or has placed them at the disposal of the person entitled to take delivery of them.

Article 4

Issuance of document

- (1) The operator may, and at the customer's request shall, within a reasonable period of time, at the option of the operator, either:
 - (a) Acknowledge his receipt of the goods by signing and dating a document presented by the customer that identifies the goods, or
 - (b) Issue a signed document identifying the goods, acknowledging his receipt of the goods and the date thereof, and stating their condition and quantity in so far as they can be ascertained by reasonable means of checking.
- (2) If the operator does not act in accordance with either subparagraph (a) or (b) of paragraph (1), he is presumed to have received the goods in apparent good condition, unless he proves otherwise. No such presumption applies when the services performed by the operator are limited to the immediate transfer of the goods between means of transport.
- (3) A document referred to in paragraph (1) may be issued in any form which preserves a record of the information contained therein. When the customer and the operator have agreed to communicate electronically, a document referred to in paragraph (1) may be replaced by an equivalent electronic data interchange message.
- (4) The signature referred to in paragraph (1) means a handwritten signature, its facsimile or an equivalent authentication effected by any other means.

Article 5

Basis of liability

- (1) The operator is liable for loss resulting from loss of or damage to the goods, as well as from delay in handing over the goods, if the occurrence which caused the loss, damage or delay took place during the period of the operator's responsibility for the goods as defined in article 3, unless he proves that he, his servants or agents or other persons of whose services the operator makes use for the performance of the transport-related services took all measures that could reasonably be required to avoid the occurrence and its consequences.
- (2) Where a failure on the part of the operator, his servants or agents or other persons of whose services the operator makes use for the performance of the transport-related services to take the measures referred to in paragraph (1) combines with another cause to produce loss, damage or delay, the operator is liable only to the extent that the loss resulting from such loss, damage or delay is attributable to that failure, provided that the operator proves the amount of the loss not attributable thereto.
- (3) Delay in handing over the goods occurs when the operator fails to hand them over to or place them at the disposal of a person entitled to take delivery of them within the time expressly agreed upon or, in the absence of such agreement, within a reasonable time after receiving a request for the goods by such person.
- (4) If the operator fails to hand over the goods to or place them at the disposal of a person entitled to take delivery of them within a period of 30 consecutive days after the date expressly agreed upon or, in the absence of such agreement, within a period of 30 consecutive days after receiving a request for the goods by such person, a person entitled to make a claim for the loss of the goods may treat them as lost.

Article 6

Limits of liability

- (1) (a) The liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding 8.33 units of account per kilogram of gross weight of the goods lost or damaged.
 - (b) However, if the goods are handed over to the operator immediately after carriage by sea or by inland waterways, or if the goods are handed over, or are to be handed over, by him for such

carriage, the liability of the operator for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount not exceeding 2.75 units of account per kilogram of gross weight of the goods lost or damaged. For the purposes of this paragraph, carriage by sea or by inland waterways includes pick-up and delivery within a port.

(c) When the loss of or damage to a part of the goods affects the value of another part of the goods, the total weight of the lost or damaged goods and of the goods whose value is affected shall be taken into consideration in determining the limit of liability.

(2) The liability of the operator for delay in handing over the goods according to the provisions of article 5 is limited to an amount equivalent to two and a half times the charges payable to the operator for his services in respect of the goods delayed, but not exceeding the total of such charges in respect of the consignment of which the goods were a part.

(3) In no case shall the aggregate liability of the operator under both paragraphs (1) and (2) exceed the limitation which would be established under paragraph (1) for total loss of the goods in respect of which such liability was incurred.

(4) The operator may agree to limits of liability exceeding those provided for in paragraphs (1), (2) and (3).

Article 7

Application to non-contractual claims

(1) The defences and limits of liability provided for in this Convention apply in any action against the operator in respect of loss of or damage to the goods, as well as delay in handing over the goods, whether the action is founded in contract, in tort or otherwise.

(2) If such an action is brought against a servant or agent of the operator, or against another person of whose services the operator makes use for the performance of the transport-related services, such servant, agent or person, if he proves that he acted within the scope of his employment or engagement by the operator, is entitled to avail himself of the defences and limits of liability which the operator is entitled to invoke under this Convention.

(3) Except as provided in article 8, the aggregate of the amounts recoverable from the operator and from any servant, agent or person referred to in the preceding paragraph shall not exceed the limits of liability provided for in this Convention.

Article 8

Loss of right to limit liability

(1) The operator is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission of the operator himself or his servants or agents done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

(2) Notwithstanding the provision of paragraph (2) of article 7, a servant or agent of the operator or another person of whose services the operator makes use for the performance of the transport-related services is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay resulted from an act or omission of such servant, agent or person done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Article 9

Special rules on dangerous goods

If dangerous goods are handed over to the operator without being marked, labelled, packaged or documented in accordance with any law or regulation relating to dangerous goods applicable in the country where the goods are handed over and if, at the time the goods are taken in charge by him, the operator does not otherwise know of their dangerous character, he is entitled:

(a) To take all precautions the circumstances may require, including, when the goods pose an imminent danger to any person or property, destroying the goods, rendering them innocuous, or disposing of them by any other lawful means, without payment of compensation for damage to or destruction of the goods resulting from such precautions, and

(b) To receive reimbursement for all costs incurred by him in taking the measures referred to in subparagraph (a) from the person who failed to meet any obligation under such applicable law or regulation to inform him of the dangerous character of the goods.

Article 10

Rights of security in goods

(1) The operator has a right of retention over the goods for costs and claims which are due in connection with the transport-related services performed by him in respect of the goods both

during the period of his responsibility for them and thereafter. However, nothing in this Convention affects the validity under the applicable law of any contractual arrangements extending the operator's security in the goods.

(2) The operator is not entitled to retain the goods if a sufficient guarantee for the sum claimed is provided or if an equivalent sum is deposited with a mutually accepted third party or with an official institution in the State where the operator has his place of business.

(3) In order to obtain the amount necessary to satisfy his claim, the operator is entitled, to the extent permitted by the law of the State where the goods are located, to sell all or part of the goods over which he has exercised the right of retention provided for in this article. This right to sell does not apply to containers, pallets or similar articles of transport or packaging which are owned by a party other than the carrier or the shipper and which are clearly marked as regards ownership except in respect of claims by the operator for the cost of repairs of or improvements to the containers, pallets or similar articles of transport or packaging.

(4) Before exercising any right to sell the goods, the operator shall make reasonable efforts to give notice of the intended sale to the owner of the goods, the person from whom the operator received them and the person entitled to take delivery of them from the operator. The operator shall account appropriately for the balance of the proceeds of the sale in excess of the sums due to the operator plus the reasonable costs of the sale. The right of sale shall in all other respects be exercised in accordance with the law of the State where the goods are located.

Article 11

Notice of loss, damage or delay

(1) Unless notice of loss or damage, specifying the general nature of the loss or damage, is given to the operator not later than the third working day after the day when the goods were handed over by the operator to the person entitled to take delivery of them, the handing over is prima facie evidence of the handing over by the operator of the goods as described in the document issued by the operator pursuant to paragraph (1)(b) of article 4 or, if no such document was issued, in good condition.

(2) Where the loss or damage is not apparent, the provisions of paragraph (1) apply correspondingly if notice is not given to the operator within 15 consecutive days after the day when the goods reached the final recipient, but in no case later than 60 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them.

(3) If the operator participated in a survey or inspection of the goods at the time when they were handed over to the person entitled to take delivery of them, notice need not be given to the operator of loss or damage ascertained during that survey or inspection.

(4) In the case of any actual or apprehended loss of or damage to the goods, the operator, the carrier and the person entitled to take delivery of the goods shall give all reasonable facilities to each other for inspecting and tallying the goods.

(5) No compensation is payable for loss resulting from delay in handing over the goods unless notice has been given to the operator within 21 consecutive days after the day when the goods were handed over to the person entitled to take delivery of them.

Article 12

Limitation of actions

(1) Any action under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

(2) The limitation period commences:

(a) On the day the operator hands over the goods or part thereof to, or places them at the disposal of, a person entitled to take delivery of them, or

(b) In cases of total loss of the goods, on the day the person entitled to make a claim receives notice from the operator that the goods are lost, or on the day that person may treat the goods as lost in accordance with paragraph (4) of article 5, whichever is earlier.

(3) The day on which the limitation period commences is not included in the period.

(4) The operator may at any time during the running of the limitation period extend the period by a notice to the claimant. The period may be further extended by another notice or notices.

(5) A recourse action by a carrier or another person against the operator may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if it is instituted within 90 days after the carrier or other person has been held liable in an action against himself or has settled the claim upon which such action was based and if, within a reasonable period of time after the filing of a claim against a carrier or other person that may result in a recourse action against the operator, notice of the filing of such a claim has been given to the operator.

Article 13

Contractual stipulations

(1) Unless otherwise provided in this Convention, any stipulation in a contract concluded by an operator or in any document signed or issued by the operator pursuant to article 4 is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part.

(2) Notwithstanding the provisions of the preceding paragraph, the operator may agree to increase his responsibilities and obligations under this Convention.

Article 14

Interpretation of the Convention

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application.

Article 15

International transport conventions

This Convention does not modify any rights or duties which may arise under an international convention relating to the international carriage of goods which is binding on a State which is a party to this Convention or under any law of such State giving effect to a convention relating to the international carriage of goods.

Article 16

Unit of account

(1) The unit of account referred to in article 6 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be expressed in the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The equivalence between the national currency of a State Party which is a member of the International Monetary Fund and the Special Drawing Right is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The equivalence between the national currency of a State Party which is not a member of the International Monetary Fund and the Special Drawing Right is to be calculated in a manner determined by that State.

(2) The calculation mentioned in the last sentence of the preceding paragraph is to be made in such a manner as to express in the national currency of the State Party as far as possible the same real value for amounts in article 6 as is expressed there in units of account. States Parties must communicate to the depositary the manner of calculation at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession and whenever there is a change in the manner of such calculation.

FINAL CLAUSES

Article 17

Depositary

The Secretary-General of the United Nations is the depositary of this Convention.

Article 18

Signature, ratification, acceptance, approval, accession

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade and will remain open for signature by all States at the Headquarters of the United Nations, New York, until 30 April 1992.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 19

Application to territorial units

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may at any time substitute another declaration for its earlier declaration.

(2) These declarations are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a State Party, this Convention shall be applicable only if

(a) The transport-related services are performed by an operator whose place of business is located in a territorial unit to which the Convention extends, or

(b) The transport-related services are performed in a territorial unit to which the Convention extends, or

(c) According to the rules of private international law, the transport-related services are governed by the law in force in a territorial unit to which the Convention extends.

(4) If a State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 20

Effect of declaration

(1) Declarations made under article 19 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

(4) Any State which makes a declaration under article 19 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

Article 21

Reservations

No reservations may be made to this Convention.

Article 22

Entry into force

(1) This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.

(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.

(3) Each State Party shall apply the provisions of this Convention to transport-related services with respect to goods taken in charge by the operator on or after the date of the entry into force of this Convention in respect of that State.

Article 23

Revision and amendment

(1) At the request of not less than one third of the States Parties to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

(2) Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

Article 24

Revision of limitation amounts

- (1) At the request of at least one quarter of the States Parties, the depositary shall convene a meeting of a Committee composed of a representative from each Contracting State to consider increasing or decreasing the amounts in article 6.
- (2) If this Convention enters into force more than five years after it was opened for signature, the depositary shall convene a meeting of the Committee within the first year after it enters into force.
- (3) The meeting of the Committee shall take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law.
- (4) In determining whether the limits should be amended, and if so, by what amount, the following criteria, determined on an international basis, and any other criteria considered to be relevant, shall be taken into consideration:
 - (a) The amount by which the limits of liability in any transport-related convention have been amended;
 - (b) The value of goods handled by operators;
 - (c) The cost of transport-related services;
 - (d) Insurance rates, including for cargo insurance, liability insurance for operators and insurance covering job-related injuries to workmen;
 - (e) The average level of damages awarded against operators for loss of or damage to goods or delay in handing over goods; and
 - (f) The costs of electricity, fuel and other utilities.
- (5) Amendments shall be adopted by the Committee by a two-thirds majority of its members present and voting.
- (6) No amendment of the limits of liability under this article may be considered less than five years from the date on which this Convention was opened for signature.
- (7) Any amendment adopted in accordance with paragraph (5) shall be notified by the depositary to all Contracting States. The amendment is deemed to have been accepted at the end of a period of 18 months after it has been notified, unless within that period not less than one third of the States that were States Parties at the time of the adoption of the amendment by the Committee have communicated to the depositary that they do not accept the amendment. An amendment deemed to have been accepted in accordance with this paragraph enters into force for all States Parties 18 months after its acceptance.
- (8) A State Party which has not accepted an amendment is nevertheless bound by it, unless such State denounces the present Convention at least one month before the amendment enters into force. Such denunciation takes effect when the amendment enters into force.
- (9) When an amendment has been adopted in accordance with paragraph (5) but the 18-month period for its acceptance has not yet expired, a State which becomes a State Party to this Convention during that period is bound by the amendment if it enters into force. A State which becomes a State Party after that period is bound by any amendment which has been accepted in accordance with paragraph (7).
- (10) The applicable limit of liability is that which, in accordance with the preceding paragraphs, is in effect on the date of the occurrence which caused the loss, damage or delay.

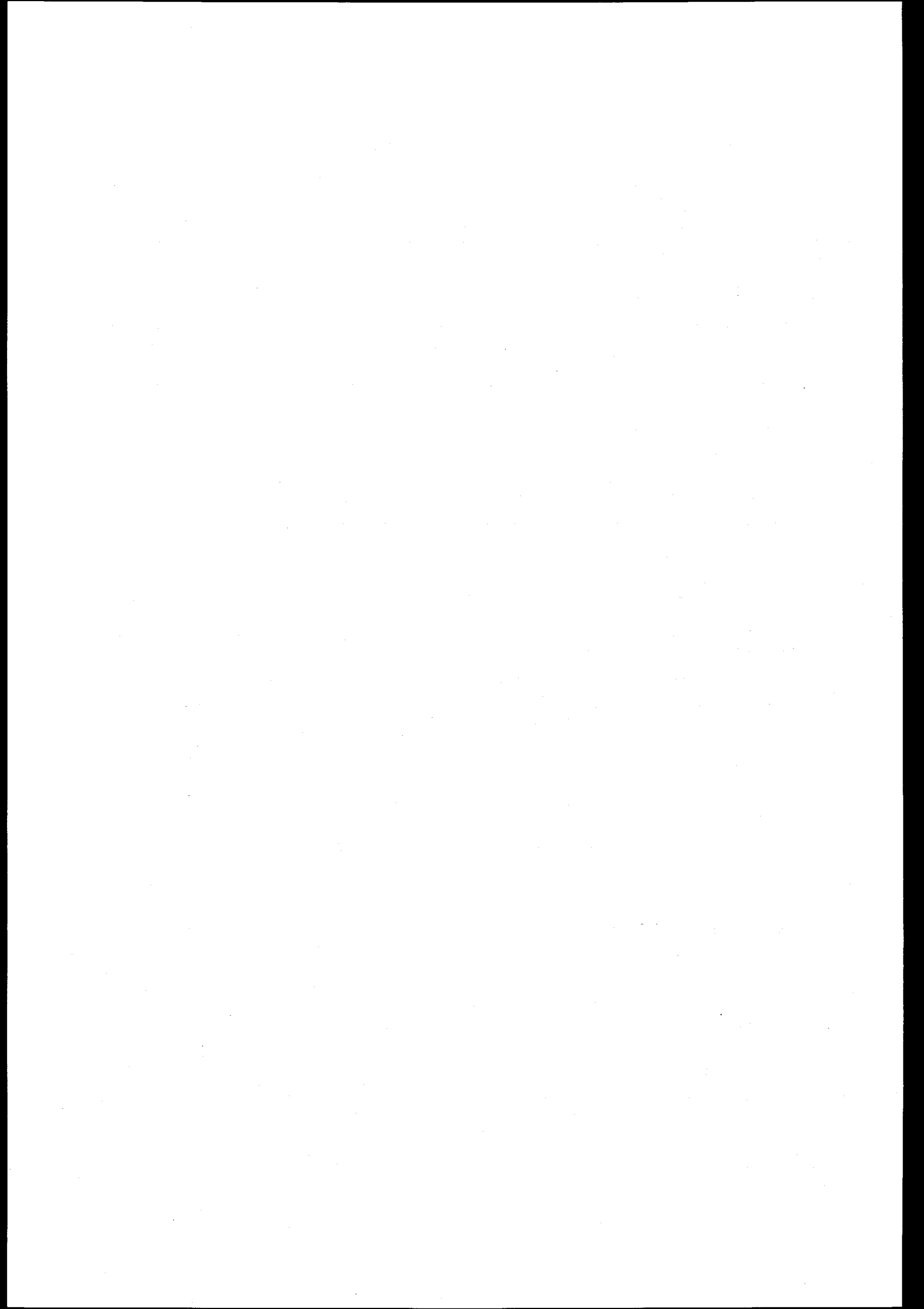
Article 25

Denunciation

- (1) A State Party may denounce this Convention at any time by means of a notification in writing addressed to the depositary.
- (2) Subject to paragraph (8) of article 24, the denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

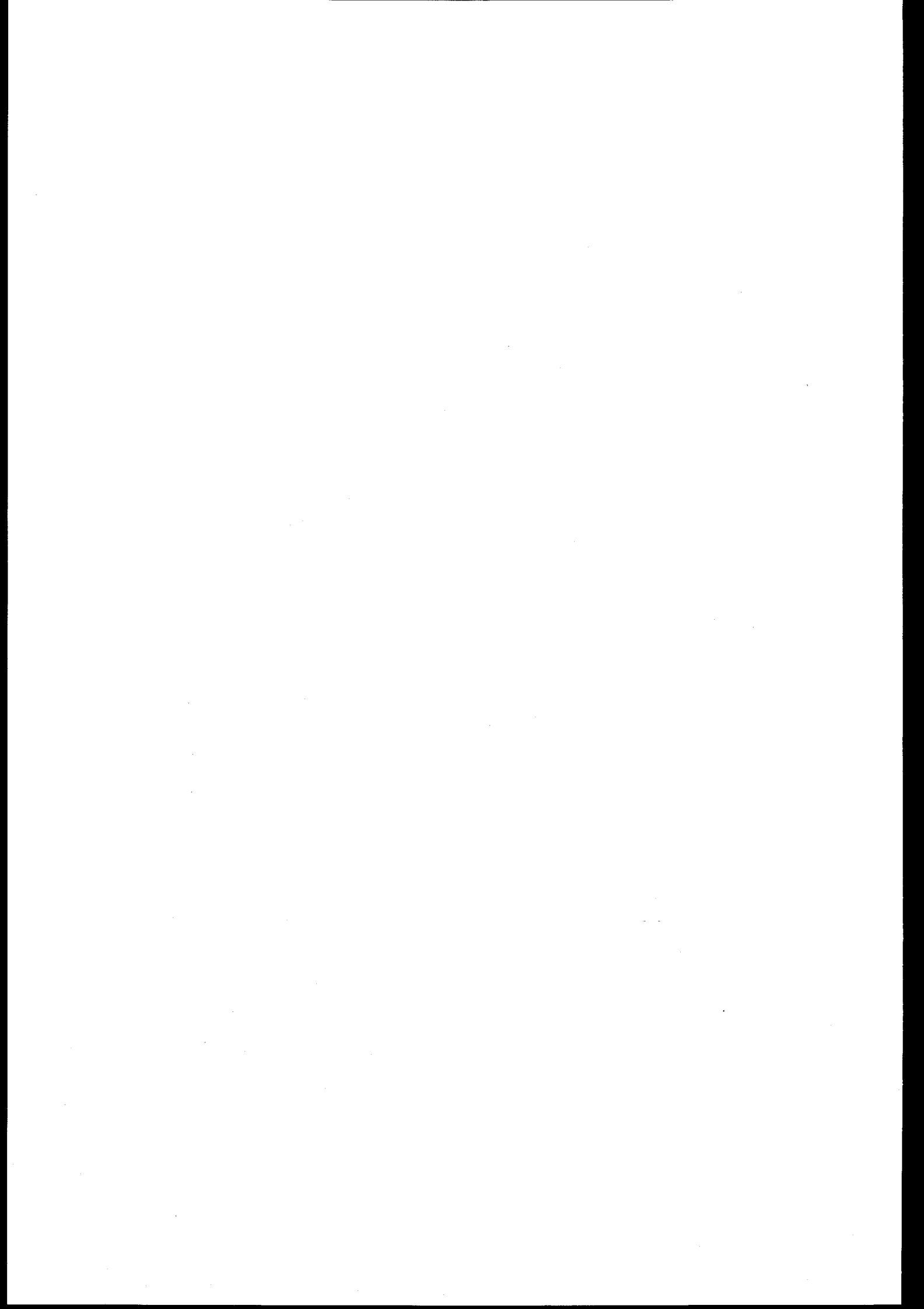
DONE at Vienna, this nineteenth day of April one thousand nine hundred and ninety-one, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.



Part II

SUMMARY RECORDS



SUMMARY RECORDS OF THE PLENARY MEETINGS

1st plenary meeting
Tuesday, 2 April 1991, at 10.30 a.m.

Temporary President: Mr. BERGSTEN
(Executive Secretary of the Conference, representing the Secretary-General)

President: Mr. ABASCAL (Mexico)

A/CONF.152/SR.1

OPENING OF THE CONFERENCE (item 1 of the provisional agenda)

1. The TEMPORARY PRESIDENT declared open the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, convened pursuant to General Assembly resolution 44/33 of 4 December 1989.

2. He then read out the following message from Mr. Carl-August Fleischhauer, Under-Secretary-General for Legal Affairs, the Legal Counsel, representing the Secretary-General:

"I am very pleased to be able to address these greetings to you at the opening of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade. It is with great regret that, due to other pressing responsibilities resulting in particular from the situation in the Gulf, I am unable to do so in person.

"The preparatory work for this Conference has been carried out by the United Nations Commission on International Trade Law (UNCITRAL). In accordance with the resolution of the General Assembly convening the Conference, the draft Convention on the Liability of Operators of Transport Terminals in International Trade, adopted by the Commission at its twenty-second session in 1989 (A/CONF.152/5), will serve as a basis for your deliberations.

"The draft Convention is evidence of the continuing commitment of the Commission to promoting the development of international trade through unification of law. It is the most recent legal text prepared or adopted by UNCITRAL directed to that end. Of the four international conventions previously elaborated by the Commission, two have recently entered into force and are already having an impact. These are the United Nations Convention on Contracts for the International Sale of Goods and the Convention on the Limitation Period in the International Sale of Goods. A third Convention, the United Nations Convention on the Carriage of Goods by Sea, is poised to enter into force very soon, having received nineteen of the necessary twenty ratifications and accessions.

"Other texts that have met with widespread usage and popularity are the UNCITRAL Arbitration Rules and the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works. Mention must also be made of the UNCITRAL Model Law on International Commercial Arbitration, which is being implemented in a growing number of jurisdictions.

"The success of these texts elaborated by UNCITRAL is a tribute to the dedication and professionalism with which the Commission approaches its tasks. The overriding concern of the Commission has been, from the beginning, to ensure that its legal texts are juridically sound, of practical benefit to traders throughout the world and responsive to the needs of States of all legal systems, geographic regions and levels of economic development.

"This same dedication and professionalism has produced the draft Convention that is now before you. I am confident that, with the constructive efforts of all participants, and a willingness to look beyond the confines of domestic legal systems in order to achieve the goal of uniformity of law, this Conference will fulfil its mandate to adopt a convention on the liability of operators of transport terminals in international trade. I am also confident that the quality and global acceptability of the Convention will enable it to meet with the same success as the other texts elaborated by UNCITRAL.

"I wish you every success in your endeavours. You may be assured that the Office of Legal Affairs and the Secretariat of the United Nations will do their utmost to assist you in any possible way."

ELECTION OF THE PRESIDENT (item 2 of the provisional agenda)

3. Mr. TAIANA (Argentina) nominated Mr. ABASCAL (Mexico) for the office of President.

4. Mr. LEBEDEV (Union of Soviet Socialist Republics), Mr. ARIAS-SALGADO (Spain), Mr. LAVIÑA (Philippines) and Mr. SAFARIAN (Islamic Republic of Iran) seconded the nomination.

5. Mr. ABASCAL (Mexico) was elected President by acclamation and took the Chair.

6. The PRESIDENT thanked the participants in the Conference for thus honouring his country and himself and expressed the hope that, with the cooperation of all concerned, the Conference would be successful.

The meeting rose at 12.30 p.m.

2nd plenary meeting

Tuesday, 2 April 1991, at 2.30 p.m.

President: Mr. ABASCAL (Mexico)

A/CONF.152/SR.2*

ADOPTION OF THE AGENDA (item 3 of the provisional agenda)

1. The provisional agenda (A/CONF.152/2) was adopted.

ADOPTION OF THE RULES OF PROCEDURE (agenda item 4)

2. The provisional rules of procedure (A/CONF.152/3) were adopted.

ELECTION OF VICE-PRESIDENTS OF THE CONFERENCE AND OF A CHAIRMAN OF EACH OF THE MAIN COMMITTEES (agenda item 5)

3. Mr. ROMAN (Belgium), speaking on behalf of the group of Western European and other States, nominated the representatives of Australia, Belgium, Italy, Japan, Spain and Sweden for 6 of the 22 posts of Vice-President of the Conference.

4. Mr. LAVIÑA (Philippines), speaking on behalf of the group of Asian States, nominated the representatives of China, Indonesia, the Islamic Republic of Iran and the Philippines for four of the posts of Vice-President of the Conference.

5. The PRESIDENT said that discussion of the item would continue when the other regional groups had decided on their nominations.

CREDENTIALS OF REPRESENTATIVES TO THE CONFERENCE (agenda item 6)

(a) APPOINTMENT OF THE CREDENTIALS COMMITTEE

6. The PRESIDENT suggested that the meeting should be suspended to allow delegations to hold informal consultations on nominations for the membership of the Credentials Committee.

ORGANIZATION OF WORK (agenda item 8)

7. Mr. BERGSTEN (Executive Secretary) drew attention to an aspect of General Assembly resolution 44/33 convening the Conference which had a bearing on its rules of procedure. Under paragraph 6 (d) of the resolution, the Secretary-General had been requested to invite the specialized agencies and the International Atomic Energy Agency, as well as interested organs of the United Nations and interested international organizations, to be represented at the Conference by observers. The term "interested international organizations" had been understood by the drafters of the resolution to apply to both intergovernmental and non-governmental organizations. Subsequently, however, when the draft rules of procedure for the Conference had been submitted to the Office of the Legal Counsel, that Office had advised that, although the intention in drafting the resolution had been to include non-governmental organizations, the form of words appropriate for that purpose had not been used and accordingly paragraph 6 (d) of the resolution covered only intergovernmental bodies. The Legal Counsel had therefore suggested that the Executive Secretary should invite those non-governmental organizations which normally participated in the work of UNCITRAL to attend the Conference but that no provision should be made in the rules of procedure for their participation. Invitations had been issued to that end and representatives of some of the bodies invited were present. It could be expected that they might wish to make general statements on the subject-matter of the draft Convention and in some cases to comment on specific points. To allow them to do so the Conference would have to suspend its rules of procedure whenever the representative of a non-governmental organization wished to take the floor. That could be done, on each such occasion, by the President, or the Chairman of the Committee concerned, indicating that such a representative wished to speak, whereupon the representative would be able to do so unless any representative entitled by the rules of procedure to participate in the Conference objected.

The meeting was suspended at 3.20 p.m. and resumed at 4.10 p.m.

CONSIDERATION OF THE QUESTION OF THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 44/33 OF 4 DECEMBER 1989 (agenda item 9) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

8. Mr. RAMBERG (Observer, International Maritime Committee) expressed the satisfaction of the International Maritime Committee that the draft Convention had been prepared and a conference convened to discuss it. The Committee hoped that, in agreeing on a final text, the Conference would pay due attention to the very difficult question of the scope of application of the Convention. It was extremely important that the scope of any mandatory convention should be

*Incorporating document A/CONF.152/SR.2-8/Corr.1, dated 1 April 1992.

clearly defined. The problem of goods involved in international transport had been discussed at length in the International Institute for the Unification of Private Law (UNIDROIT), where the difficulty of determining the scope of application had led UNIDROIT to prefer model rules on the subject to an international convention. The Committee hoped that the Conference would address the subject in detail and formulate the Convention in the most precise possible language.

9. The Conference should also seek to ensure that the Convention was as compatible as possible with the United Nations Convention on the Carriage of Goods by Sea (the Hamburg Rules), particularly in view of the significant difference between the latter, the draft Convention and the United Nations Convention on International Multimodal Transport of Goods with regard to loss of the right to limit liability. It was gratifying that many States seemed in favour of full compatibility between the Hamburg Rules and the new Convention in that respect.

10. Mr. ZHAO (China) said that his Government fully appreciated the contribution which the United Nations Commission on International Trade Law (UNCITRAL) and its Working Group on International Contract Practices had made to the draft Convention. The text now before the Conference was basically acceptable, although some parts required further discussion. The Convention would fill gaps in world transport rules and contribute to the management and operation of terminals and the development of international trade.

11. Mr. LARSEN (United States of America) said that his delegation's approach to the Conference was a positive one, given the wide and active support for a convention on the subject among United States stevedoring companies, ports and container owners. The text as it stood required some improvement, however, in order to ensure that the gap between existing transport conventions was adequately filled; that something was done to facilitate the movement of containers; that documentation, notably in the form of electronic data interchange and electronic contracting, was properly catered for; and that more satisfactory provision was made in regard to liability and liability limits. His country had been considerably frustrated by the lack of entry into force of important transport conventions due to excessively high number of ratifications required for entry into force; for example the multimodal convention may not enter into force because it requires 30 ratifications. He therefore believed that there should be a low number of ratifications for the entry into force of the Convention about to be discussed.

12. Mr. WALL (United Kingdom of Great Britain and Northern Ireland) said that his Government was still concerned about the justification for proceeding to an international convention on the liability of operators of transport terminals, since it was not a matter amenable to international uniformity. If nevertheless it was shown that international uniformity was required, significant improvements would be needed to the text before the Conference in order to ensure that there was no confusion over precisely whom the Convention would cover and what the liability of operators might be. Although his delegation approached the work with some scepticism, it would participate actively in the debates, make appropriate proposals to improve the drafting of the Convention and, if the Convention merited support, consider its position on the matter when the time came. From the outset, however, it urged delegations to consider seriously whether the Conference could produce an international convention capable of easy understanding and wide and international applicability. Mention had been made of filling the gaps between international transport conventions, yet many of those gaps had arisen because the conventions had not secured support, particularly from major trading nations. His delegation also urged that the cost of insurance implied by the proposed Convention should be carefully considered, particularly with a view to limiting the number of persons upon whom it would impose a significant insurance burden.

13. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his delegation saw the draft Convention as a useful means of arriving at an internationally acceptable system of regulating transport as a whole. It should not be forgotten that the development of the draft had been considered necessary because it had been found that goods were extensively damaged in transport terminals before loading, during transfer operations or after offloading, and consequently were not covered by any existing international transport convention. A number of problems had arisen with regard to the terminology involved. The draft might need to be worded more precisely on issues such as the scope of the Convention, the definition of the operations it covered and the individuals to whom it would apply.

The meeting rose at 4.50 p.m.

3rd plenary meeting
Wednesday, 3 April 1991, at 9.30 a.m.

President: Mr. ABASCAL (Mexico)

A/CONF.152/SR.3*

ELECTION OF VICE-PRESIDENTS OF THE CONFERENCE AND OF A CHAIRMAN OF EACH OF THE MAIN COMMITTEES
(agenda item 5) (continued)

Election of the Chairman of the First Committee

1. Mr. MORAN BOVIO (Spain) nominated Mr. BERAUDO (France) for the office of Chairman of the First Committee.

2. Mr. ROMAN (Belgium), speaking on behalf of the Western Group of States, supported the nomination.
3. Mr. Beraudo (France) was elected Chairman of the First Committee by acclamation.

The meeting rose at 10 a.m.

4th plenary meeting

Friday, 5 April 1991, at 4.55 p.m.

President: Mr. ABASCAL (Mexico)

A/CONF.152/SR.4

ELECTION OF VICE-PRESIDENTS OF THE CONFERENCE AND OF A CHAIRMAN OF EACH OF THE MAIN COMMITTEES (agenda item 5) (continued)

1. The PRESIDENT observed that only 10 nominations for the 22 posts of Vice-President of the Conference had been made at the 2nd meeting. He invited the Conference to fill the outstanding vacancies in the list of nominations.
2. Mr. POPOV (Bulgaria), speaking on behalf of the Eastern European States, nominated Bulgaria, the Byelorussian Soviet Socialist Republic, the Union of Soviet Socialist Republics and Yugoslavia.
3. Ms. MOTJOLOPANE (Lesotho), speaking on behalf of the African States, nominated Egypt, Morocco and Nigeria. She reserved the right of those States to submit a fourth nomination later.
4. Ms. MUNGUIA ALDARACA (Mexico), speaking on behalf of the Latin American States, nominated Argentina. Those States had agreed not to submit any further nominations.
5. Mr. LAVIÑA (Philippines) announced that the Asian States had agreed to replace Indonesia, which they had nominated at the 2nd meeting, by Thailand.
6. The PRESIDENT noted that rule 6 of the rules of procedure provided for 22 Vice-Presidents. He asked whether it was the wish of the Conference to amend that provision to take account of the fact that only 19 nominations had been declared, and to consider the heads of delegations or representatives of the States so nominated to be elected as the Vice-Presidents of the Conference.
7. It was so decided.
8. Mr. POPOV (Bulgaria) nominated the representative of Yugoslavia for the office of Chairman of the Second Committee.
9. Mr. LAVIÑA (Philippines) supported that nomination.
10. Ms. Vilus (Yugoslavia) was elected Chairman of the Second Committee by acclamation.

APPOINTMENT OF MEMBERS OF THE DRAFTING COMMITTEE (agenda item 7)

11. Mr. LAVIÑA (Philippines) nominated Mr. Rao (India) for the office of Chairman of the Drafting Committee.
12. Mr. Rao (India) was elected Chairman of the Drafting Committee by acclamation.

CREDENTIALS OF REPRESENTATIVES TO THE CONFERENCE (agenda item 6) (continued)

(a) APPOINTMENT OF THE CREDENTIALS COMMITTEE (continued)

13. The PRESIDENT observed that rule 4 of the rules of procedure provided for a Credentials Committee of nine members, with a composition based on that of the Credentials Committee of the General Assembly of the United Nations at its forty-fifth session. According to that criterion, the Credentials Committee of the Conference should comprise Botswana, China, Côte d'Ivoire, Ireland, Jamaica, Nepal, the Union of Soviet Socialist Republics, the United States of America and Uruguay. However, since Botswana, Côte d'Ivoire, Ireland, Jamaica, Nepal and Uruguay were not represented at the Conference, replacements for them would have to be found. He invited the corresponding nominations.
14. Ms. MOTJOLOPANE (Lesotho) nominated Guinea and Lesotho.
15. Mr. ROMAN (Belgium) nominated Canada.
16. Mr. POPOV (Bulgaria) nominated the Ukrainian Soviet Socialist Republic.
17. The PRESIDENT pointed out that no replacement appeared necessary with regard to the group of Eastern European States.

18. Mr. ILYTCHEV (Union of Soviet Socialist Republics) said that he would have no objection to the Ukrainian SSR serving on the Credentials Committee instead of the Soviet Union.

19. Mr. LAVIÑA (Philippines) nominated Saudi Arabia.

20. Ms. MUNGUJA ALDARACA (Mexico) nominated Argentina and Mexico.

21. The PRESIDENT said that if there was no objection, he would take it that the Credentials Committee of the Conference would comprise the representatives of Argentina, Canada, China, Guinea, Lesotho, Mexico, Saudi Arabia, the Ukrainian Soviet Socialist Republic and the United States of America.

22. It was so decided.

The meeting rose at 5.15 p.m.

5th plenary meeting
Monday, 8 April 1991, at 4.35 p.m.

President: Mr. ABASCAL (Mexico)

A/CONF.152/SR.5

APPOINTMENT OF MEMBERS OF THE DRAFTING COMMITTEE (agenda item 7) (concluded)

1. The PRESIDENT said that the General Committee had proposed that the Drafting Committee should consist of the following 14 members: the representatives of China, Egypt, France, Germany, Guinea, Mexico, Morocco, Nigeria, Philippines, Spain, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America. They had been selected with the aim of ensuring a satisfactory linguistic balance. In the absence of an objection, he would take it that the Conference wished to consider the Drafting Committee so established.

2. It was so decided.

CREDENTIALS OF REPRESENTATIVES TO THE CONFERENCE (agenda item 6) (continued)

(a) APPOINTMENT OF THE CREDENTIALS COMMITTEE (concluded)

3. The PRESIDENT said that the representative of Saudi Arabia, who had been appointed as a member of the Credentials Committee at the previous meeting, would be unable to serve on that body. The Asian States had agreed to nominate the representative of the Islamic Republic of Iran to replace him. He took it that the Conference endorsed that nomination and approved the appointment.

4. It was so decided.

ELECTION OF VICE-PRESIDENTS OF THE CONFERENCE AND OF A CHAIRMAN OF EACH OF THE MAIN COMMITTEES (agenda item 5) (concluded)

5. Ms. MOTJOLOPANE (Lesotho), speaking on behalf of the African States, nominated Gabon for the remaining vacant post of Vice-President.

6. The PRESIDENT took it that the Conference wished to consider the head of delegation or representative of Gabon to be elected a Vice-President of the Conference.

7. It was so decided.

The meeting rose at 4.40 p.m.

6th plenary meeting
Tuesday, 16 April 1991, at 9.30 p.m.

President: Mr. ABASCAL (Mexico)

A/CONF.152/SR.6*

CONSIDERATION OF THE QUESTION OF THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 44/33 OF 4 DECEMBER 1989 (agenda item 9) (continued)

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (A/CONF.152/11, A/CONF.152/12)

1. The PRESIDENT invited the Conference to consider the title and the text of the draft Convention on the Liability of Operators of Transport Terminals in International Trade. Suggested

*Incorporating document A/CONF.152/SR.2-8/Corr.1, dated 1 April 1992.

titles were set out in the draft prepared by the United Nations Commission on International Trade Law (UNCITRAL) (A/CONF.152/5) and in a proposal submitted by China (A/CONF.152/L.2). The text of articles 1 to 16, as approved by the First Committee, was reproduced in document A/CONF.152/11 and that of articles 17 to 25, as approved by the Second Committee, was set out in document A/CONF.152/12. A proposal had been submitted by Australia, Germany, Italy and Japan in regard to article 1 (a) (A/CONF.152/L.5). He reminded the Conference that all substantive decisions required to be taken by a two-thirds majority.

Title of the Convention (A/CONF.152/5, A/CONF.152/L.2)

2. Mr. ZHAO Chengbi (China) said that his delegation had explained the thinking behind its proposal (A/CONF.152/L.2) during the discussion in the First Committee of article 1 (c) (A/CONF.152/C.1/SR.2, para. 47). It suggested that the title of the Convention should read "Convention on the Liability of Operators of Transport Terminals in International Carriage of Goods", for two reasons. First, the substantive articles of the Convention should apply not only to goods for trade but to non-trade goods as well. Secondly, although the Convention had to do with international trade, its intention was to achieve a close relationship with, and fill gaps in, existing international instruments on the carriage of goods - in particular the 1978 United Nations Convention on the Carriage of Goods by Sea - which were not confined to international trade.
3. Mr. LAVIÑA (Philippines) said that, unless convincing arguments were put forward against the Chinese proposal, his delegation was prepared to support it. "International carriage" was defined in paragraph (c) of article 1 without reference to international trade, and although it involved international trade, the expression "international carriage of goods" was perhaps more relevant to the Convention.
4. The PRESIDENT invited the Conference to vote on the proposal in document A/CONF.152/L.2.
5. There were 6 votes in favour, 7 against and 18 abstentions. Having failed to obtain the required two-thirds majority, the proposal was not adopted.
6. The PRESIDENT invited the Conference to vote on the title "Convention on the Liability of Operators of Transport Terminals in International Trade" which appeared in the Commission's draft (A/CONF.152/5).
7. The title proposed in document A/CONF.152/5 was adopted by 21 votes to none, with 9 abstentions.
8. The PRESIDENT invited the Conference to consider article by article the texts approved by the First Committee (A/CONF/152/11).
9. Mr. SMITH (Australia), introducing the proposal by Australia, Germany, Italy and Japan to amend the second sentence of subparagraph (a) (A/CONF.152/L.5), said that it attempted to overcome problems of which the Conference was by now well aware. His own delegation considered it most important to clarify the position under the Convention of stevedores who operated pursuant to a "Himalaya clause" or similar clause in a bill of lading. The intention of the proposal was to make clear the fact that using the carrier's defences and limitations of liability without being subject to the full liability of a carrier could not be employed as a device to escape liability under the Convention. He recalled that stevedores constituted perhaps 90 per cent of operators in the area of activity covered by the Convention. Although it had been argued that not all stevedores would use a "Himalaya" or similar clause solely to attract the carrier's limits of liability, it was worth bearing in mind that not all ports were equally competitive and that stevedores had great bargaining power because they often exercised a monopoly. It was safe to say that, in a number of jurisdictions, if the option of opting out of the regime established by the Convention was available to stevedores it would probably be exercised. Secondly, not all "Himalaya" and similar clauses necessarily confined themselves to offering stevedores the defences and limits of liability of the carrier; in a number of common law jurisdictions they had been held wide enough to exclude stevedores from all liability. In that situation there was no incentive for stevedores to improve their performance. His own understanding had always been that one of the primary aims of the Convention was to provide uniform rules in an area of activity where much damage to goods was occurring - not so much in transit as in handling, loading and storage. He stressed that the proposal would not create the need for double insurance. If stevedores were made subject to the mandatory rules of the Convention they would require their own insurance, but would have no incentive to seek to be also covered by the insurance of carriers through contractual arrangements.
10. The PRESIDENT observed that the term "stevedores" did not appear in the Convention. Its use during the Conference had caused some confusion because, as translated into certain languages, it referred to a worker who physically handled goods and not to his employer. For English-speaking people, "stevedore" meant the employer as well as the employee, and from that standpoint a stevedore could be considered the operator of a transport terminal.
11. Mr. LARSEN (United States of America) endorsed the President's interpretation, pointing out that a stevedore was a company that loaded and unloaded vessels. The people who worked for a stevedore were called longshoremen in the United States and dockers in the United Kingdom; the Conference was talking about stevedores that were commercial companies.
12. With regard to the four-nation proposal (A/CONF.152/L.5), he recalled that in 1989 UNCITRAL, in its definition of an operator of a transport terminal, had said that a person would not be

considered an operator when he was responsible for goods under applicable rules of law governing carriage (A/44/17, paras. 29-31). In his view, that formulation was the maximum practical unification of law that could be achieved at the Conference. It preserved the operation of the "Himalaya clause" under which a stevedore could choose to be under the regime of the maritime bill of lading or that of the Convention. Under United States law the stevedore could not exculpate himself from liability; that would be contrary to public policy. United States stevedores needed the flexibility offered by the text of article 1 (a) reproduced in document A/CONF.152/11. With it, they had use for the Convention; without it they had no use for it. The four-nation proposal led the Conference back into the cul-de-sac in which it had found itself in trying to decide whether to include in the Convention a definition of the term "carrier". That step having proved impossible, the only feasible approach was the one taken in the text approved by the First Committee (A/CONF.152/11), which he appealed to the Conference to accept.

13. Ms. SKOVBY (Denmark) said that in general, if the carrier performed the transport-related service himself or through a servant, his liability, in the sense in which that term was used in the Convention, would fall under the law of carriage of goods; if instead he used an independent contractor - she preferred that term to "stevedore" - it made no difference whether the relevant law of carriage of goods embodied the "Himalaya clause", particularly in the case of sea carriers. If the sea carrier performed the transport-related services himself or through a servant, he could, according to the Hague and Hague-Visby Rules, but not according to the Hamburg Rules, claim exemption from liability during the period before loading and after discharge; and the shipper or receiver would accept that. If the relevant statute or the transport document, for example the bill of lading, had a "Himalaya clause", it would make no difference to the shipper or the receiver if the carrier used an independent contractor. If the shipper or receiver could not accept the disclaimer of liability, he could either say no or take over the transport-related service himself, for example by virtue of a free in-and-out clause, and he could then make an agreement with the terminal operator.

14. As long as the carrier was allowed to disclaim liability the independent contractor could do so when working for him, since in that case he had the same rights and duties as the carrier. It was a political choice not to allow that disclaimer, and it meant that if a person was not satisfied with the provisions of the Hague and Hague-Visby Rules he had to look to the Hamburg Rules.

15. Mr. TUVAYANOND (Thailand) said he found the text of subparagraph (a) of article 1 approved by the First Committee somewhat confusing. In the first sentence, an operator of a transport terminal was defined as a person who took goods in charge, while in the second sentence he was described as a person who was responsible for the goods. The First Committee had decided not to include a definition of the term "carrier" in article 1 because it would present too many problems; properly, therefore, the term should have been deleted from article 1. However, some mention of the carrier in the text of the Convention was unavoidable, and accordingly he supported the four-nation proposal (A/CONF.152/L.5), which would help to dispel any possible misunderstanding.

16. Mr. HERBER (Germany) said it had originally been his delegation's view that the article should not contain a reference to national law or a definition of the term "carrier", on the assumption that all States would be aware of what the term meant. However, that assumption had proved unfounded and the Conference had tried for some time to find an acceptable definition, but without success. The four-nation proposal did not of course require a definition of the term "carrier", but simply made reference to national law, which discussion had shown to be necessary. Its main difference from the text approved by the First Committee was that it was wider in scope and would cover any of a number of situations in which the law of carriage would be applicable.

17. Mr. BERAUDO (France) said that the definition of the term "operator of a transport terminal" was crucial to the scope of application of the Convention, on which so much work had been done over so many years. One of the principal objectives of the Conference was to ensure that all the definitions in article 1 would carry the same interpretation and have the same applicability in law for every State which ratified the Convention. That objective would not be attained if terms were inserted in the article which could give rise to different interpretations under different systems of law. If the phrase "responsible for the goods" was interpreted to mean that responsibility could be extended to cover activities other than transport, a very uncertain situation would be created.

18. The law on maritime transport at present in force derived from the Hague-Visby Rules, which contained a number of provisions imposed by carriers at a time when carriage by sea was uncertain and dangerous. Those rules, still in force in many countries, provided for a liability regime which was very favourable to the carrier but placed heavy burdens on the shipper. It was legitimate for the shipper to wish to ensure that when despatching goods to a country in which clauses such as the "Himalaya clause" were applicable, he should not have to bear the loss if, for example, a container was damaged through faulty handling.

19. In the interests of uniformity, therefore, and with a view to ending practices disproportionately unfavourable to the shipper, the text of article 1 (a) had to be redrafted so as to make clear that the carrier's protection should not be extended to the stevedore in circumstances in which it was not merited. If the text approved by the First Committee was adopted, there was a risk that it would be interpreted by some countries in a way that would destroy the whole content of the Convention. He therefore supported the proposal in document A/CONF.152/L.5.

20. Mr. OCHIAI (Japan) recalled that at the twenty-second session of UNCITRAL the United States delegation had proposed the deletion from article 1 (a) of the reference to a carrier (A/CN.9/SR.403, para. 26). The purpose of that proposal had been to exclude stevedores from the application of the draft Convention when they were already covered by clauses in bills of lading that extended to them the benefit of limits of liability available to carriers under the law of carriage. If that argument was accepted, stevedores could easily avoid liability under the Convention simply by claiming protection under clauses such as the "Himalaya clause". The matter was thus of great significance for the application of the Convention. His delegation had sponsored the proposal in document A/CONF.152/L.5 for that reason.
21. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that whatever the outcome of the four-nation proposal, he wished it to be recorded that the common view which had emerged from the proceedings of the Conference had been that the Convention did in fact apply to stevedores.
22. Miss VAN DER HORST (Netherlands) supported the proposal for the reasons advanced in its favour by other delegations.
23. Mr. SWEENEY (United States), in response to the point raised by the representative of Japan, said it was a matter of public policy, not only in the United States but in a number of other common law countries, that stevedores should be unable to exculpate themselves from all liability simply on the basis of contractual clauses. However, he understood that was not the position in countries such as Australia and Japan. The arguments his country had put forward on the subject at the United Nations Conference on the Carriage of Goods by Sea in 1978 were still valid: stevedores were not carriers, nor agents of the carrier, and should not be regulated as such; rather, they came within the definition of the term "operator". They could obtain some degree of carrier protection, notably in relation to loading and unloading, where most damage to cargo occurred, but such protection had to be bargained for, in exchange for a rate differential, so as to avoid the need for double insurance. He could not support the four-nation proposal and strongly favoured the adoption of the First Committee's text.
24. Mr. SOLIMAN (Egypt) said the First Committee's text for article 1 made sufficiently clear what was to be understood by the word "operator". As he saw it, no amendment to that text was required.
25. The PRESIDENT, summing up the debate, said that the question under discussion was the most important the conference had yet had to deal with and great care should be taken to see that the right conclusion was reached. Two opposing positions had been defined: the first, that of the sponsors of the four-nation proposal (A/CONF.152/L.5), was unacceptable to certain countries, notably the United States, and its acceptance might make it difficult for them to adhere to the Convention. On the other hand, the second position, namely that stevedores were covered by existing clauses in other instruments, could have the effect of destroying the uniformity of the Convention.
26. Mr. BONELL (Italy) took note with the greatest regret of the statement by the United States delegation to the effect that the adoption of the four-nation proposal (A/CONF.152/L.5) might jeopardize the United States Government's acceptance of the Convention. He felt that the wish of the United States was not that stevedores should be able to opt out of the regime established under the Convention, but rather to grant them a choice between that regime and the regime of the Hague-Visby Rules, and possibly of the Hamburg Rules. For many other countries, the alternative to liability for stevedores under the Convention would mean no liability for them at all, and it was with those countries in mind that the proposal had been put forward. So far as the matter specially affected the United States, he saw little fundamental difference between the four-nation amendment and the text as it stood. Whatever the outcome of the proposed amendment, he hoped that the fears of the United States delegation would ultimately prove groundless.
27. Mr. INGRAM (United Kingdom of Great Britain and Northern Ireland) said that he spoke as the representative of a common law country which was also the country where the "Himalaya clause" had originated. He wished to support the four-nation proposal, which in his delegation's view went some way towards enhancing the clarity and uniformity of the draft.
28. Ms. ZAWITOSKI (United States) said that under United States law the presence of a "Himalaya clause" in the bill of lading did not automatically mean that stevedores would have the benefit of the carrier's protection under the bill of lading; according to United States court decisions, several stringent requirements had to be met first. The bill of lading had to contain a clause which gave the shipper an opportunity to avoid the package limitation provision of the Hague Rules by declaring a higher value for his cargo and paying an additional amount. Another requirement was that the bill of lading had to include a clause which extended the carrier's responsibility for the goods over the period of time during which the goods were handled by stevedores. If that period was not covered, the stevedore was not protected, despite the presence of a "Himalaya clause" in the bill of lading. Her delegation was concerned by the possibility that a serious conflict might arise in the event of the adoption of the proposal because the Convention - which was based on the Hamburg Rules - and the Hague Rules could come into direct and serious opposition with regard to the period of time during which the goods were handled by stevedores.
29. Mr. HERBER (Germany) said that in most countries the situation was different from that just described by the United States representative; if the stevedore was covered by the inclusion of a "Himalaya clause" in the bill of lading, then, under the Hague-Visby Rules, he incurred no binding liability for the period of loading and unloading. In other words, in the majority of countries stevedores were, by way of the "Himalaya clause", included in the exemption from liability granted

to carriers. The object of the proposal was to bring stevedores out of that situation and into the Convention.

30. Mr. SMITH (Australia) agreed with the representative of Germany and also associated himself with the observation of the representative of France to the effect that one of the main objects of the convention was to promote uniformity of law. In practice, stevedores often enjoyed a monopoly position which enabled them to insist on gaining full protection from liability; in his own country, for instance, it appeared that the majority of bills of lading contained a "Himalaya clause". With regard to the possibility of conflict between conventions referred to by the United States representative, the point at issue was the mandatory application of a regime. The only reason why stevedores might be subject to the provisions of the Hague-Visby Rules would be that they used a clause whereby they contracted into that regime; but if they were subject to the mandatory regime governing operators of transport terminals, they would no longer have an incentive to seek to be covered by the carrier's protection and there would thus be no possibility of conflict.

31. Mr. HORNBY (Canada) concurred with those remarks and also endorsed the point made by the German representative. In his country, too, stevedores could avoid liability by invoking the "Himalaya clause". In the interests of ensuring that the basic intention underlying the Convention was realized, his delegation would agree to the four-nation proposal.

32. The proposal by Australia, Germany, Italy and Japan to amend article 1 (a) (A/CONF.152/L.5) was adopted by 26 votes to 4, with 5 abstentions.

33. Mr. MORAN (Spain) said that the Spanish translation of the amendment just adopted was inaccurate.

34. Mr. BERGSTEN (Executive Secretary) said that the Secretariat had taken note of that. For reasons of consistency, the Conference might wish to align the tense employed in the English version of the amendment with other articles by changing the words "shall not be" to "is not".

35. It was so agreed.

36. Article 1, as amended by the proposal in document A/CONF.152/L.5, was adopted by 27 votes to 2, with 3 abstentions.

Article 2

37. Article 2 was adopted by 30 votes to none, with 3 abstentions.

Article 3

38. Article 3 was adopted by 29 votes to 2, with 2 abstentions.

39. Mr. INGRAM (United Kingdom), speaking in explanation of vote, said that his delegation had voted against the article because it was insufficiently clear about the period for which the operator was responsible for the goods.

Article 4

40. Article 4 was adopted by 29 votes to 1, with 4 abstentions.

41. Mr. LAVIÑA (Philippines), speaking in explanation of vote, said that his delegation had abstained because the wording of article 4, especially in paragraphs 1 and 2, was unclear.

Article 5

42. Article 5 was adopted by 30 votes to 2, with 2 abstentions.

Article 6

43. Article 6 was adopted by 23 votes to 3, with 8 abstentions.

44. Mr. RUSTAND (Sweden), speaking in explanation of vote, said that his delegation had abstained because it favoured the Convention specifying higher limits of liability in order to take account of the effects of inflation. The United States delegation had mentioned that during the discussion of article 6 in the First Committee (A/CONF.152/C.1/SR.8, para. 64).

45. Mr. LAVIÑA (Philippines), speaking in explanation of vote, said that his delegation had abstained because it regretted the failure of the Convention to provide, as proposed by the German delegation in document A/CONF.152/C.1/L.12, that units of account per package as well as per kilogram of weight should be a basis for reckoning liability limits. If the Convention had done that, it would have taken account of shipments of low weight but high value, like other conventions.

46. Mr. LARSEN (United States), speaking in explanation of vote said that his delegation had voted in favour of the article subject to its interpretation that the terminal operator might not unilaterally, by contract, agree to raise the limits of liability for servants, agents and other persons whose services were used by the operator.

47. Mr. SCHROCK (Germany), speaking in explanation of vote, said that his delegation had abstained for the reasons given by the delegations of Sweden and the Philippines.

48. Mr. INGRAM (United Kingdom), speaking in explanation of vote, said that his delegation had voted against the article because it failed to contain an overall or global limit of liability. His delegation had explained to the First Committee (A/CONF.152/C.1/SR.10, paras. 25-26) the serious implications which that entailed for an operator in obtaining insurance and for insurers generally. The adoption of a convention which made risks less insurable than before would do a disservice to international trade, rather than the contrary. Moreover, without an overall limit of liability, the Convention would be less attractive to many States because their terminal operators would be subject to such high liabilities that it would cease to be useful and would be unlikely to come into effect.

49. Mr. HORNBY (Canada), speaking in explanation of vote, said that his delegation had abstained because of the absence of provision for a global limit of liability and a limit of liability per package. That would expose the operator to unwarranted risks and liability.

Article 7

50. Article 7 was adopted by 34 votes to none.

Article 8

51. Article 8 was adopted by 23 votes to 7, with 3 abstentions.

52. Mr. RUSTAND (Sweden) said that his delegation considered the article very important. It would have preferred the wording which would have resulted from acceptance either of the Netherlands proposal (A/CONF.152/C.1/L.25) or the second option suggested by Germany (A/CONF.152/C.1/L.3, second para.). It was not satisfied with the way in which the Convention allowed the effects of acts or omissions by servants or agents to circumscribe the operator's right to limit his liability.

53. Mr. INGRAM (United Kingdom) said that similar reasons had prompted his delegation to vote against the article. The possibility of an operator's limits being broken because of the intentional or reckless acts of his servants or agents would make his liability almost uninsurable, or insurable only at a very high cost, which was to no one's advantage.

54. Mr. HORNBY (Canada) associated himself with the comments of the previous two speakers.

55. Mr. LAVIÑA (Philippines) said that his delegation had abstained from the vote because the discussion of the article had not allayed its doubts, especially about the association between recklessness and knowledge.

56. Mr. SCHROCK (Germany), Miss VAN DER HORST (Netherlands) and Mr. CHRISTOV (Bulgaria) said they had voted against the article for the same reasons as Sweden, the United Kingdom and Canada.

The meeting rose at 12.45 p.m.

7th plenary meeting

Wednesday, 17 April 1991, at 9.30 a.m.

President: Mr. ABASCAL (Mexico)

A/CONF.152/SR.7

CONSIDERATION OF THE QUESTION OF THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 44/33 OF 4 DECEMBER 1989 (agenda item 9) (continued)

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (continued) (A/CONF.152/11, A/CONF.152/12)

1. The PRESIDENT said that proposals had been submitted by China in regard to article 9 (A/CONF.152/L.3), by the United States for article 21 (A/CONF.152/L.7), by the United Kingdom of Great Britain and Northern Ireland for an amendment to article 22 (1) (A/CONF.152/L.4) and by China, Mexico, Spain, the Union of Soviet Socialist Republics and the United States of America for the text of the preamble (A/CONF.152/L.6).

Article 9 (A/CONF.152/L.3)

2. Mr. WANG Yangyang (China) said that his delegation had put forward a proposal for a new subparagraph (c) or alternatively for changes in subparagraph (a) (A/CONF.152/L.3). It did not object entirely to the text of article 9 as approved by the First Committee (A/CONF.152/11), but

believed that it was not complete and might lead to uncertainty. The proposal aimed to bring the provisions of the article into line with those of article 13 (4) of the Hamburg Rules and article 23 (4) of the Convention on International Multimodal Transport of Goods. The terminal operator was a connecting point between sea, land and air transport and stood at the crossroads of various laws governing carriage. Although the provision on the precautions which the operator could take with regard to dangerous goods was very important, the Convention should also contemplate the emergency measures he should be entitled to take in the aftermath of the actual danger. The article should enable the operator to eliminate the danger as quickly as possible, avoiding possible harm to persons, goods and other property. The cost of damage to the goods caused by those lawful measures should not be borne by the operator, but that point was not clearly brought out in the existing text.

3. Naturally, the Chinese delegation was aware of the difference between the terminal operator, who operated mainly on land, and the carrier, who operated mainly on the sea. Accordingly, in its proposal the wording of article 13 (4) of the Hamburg Rules had been slightly amended: the word "unloaded" had been altered to "removed". However, the responsibility of the operator to remove the danger was not diminished simply because the danger occurred on land, and payment of compensation to him had to be commensurate with his responsibility. His delegation was not averse to the idea that the liability of the operator should be determined judicially; however, it sought to make the existing provision more flexible and more complete, so as to contribute to the wider application of the Convention and not leave too many problems for the courts. Operators might see in the article as it stood a greater risk than they were ready to assume, since when the actual danger occurred the operator could be assumed not to have taken all the necessary precautions. That implied that he would be liable for damage caused by the emergency measures he took, a situation which might make it difficult for operators in various countries if they were subject to the Convention as it stood. If the liability of the operator was made more complete and his legitimate interests were protected, the Convention would make him more willing to assume his responsibility and therefore reduce loss and damage to goods. That was entirely in conformity with the aims of the Convention.

4. Ms. SKOVBY (Denmark) said that, as she understood it, the Chinese proposal covered cases where the operator knew that the goods were dangerous. Her understanding of the Convention was that if the operator knew the goods were dangerous he could take that into account, perhaps charging more for his services than usual; his liability would be considered under article 5 and he would have to pay compensation according to article 6. The Chinese proposal, however, spoke of no compensation in a case where the operator had taken the goods in charge knowing that they were dangerous; in such a case they could not be considered dangerous for him. The proposal was modelled on the Hamburg Rules, but it had to be borne in mind that the Hamburg Rules were very specific to sea transport and that the terminal operator was based on land and was not subject only to rules of law relating to carriage by sea.

5. Mr. HERBER (Germany) recommended that the Conference reject the Chinese proposal. The new subparagraph dealt with the situation in which the operator knew of the dangerous nature of the goods, but it did not fit logically into the article because that was not the situation contemplated by the introductory wording which would govern it. In order to accommodate the Chinese proposal the whole of the existing article would have to form a single paragraph and the proposed subparagraph (c) be made a second paragraph. Such major redrafting to provide a global rule at the last moment would be risky.

6. If the terminal operator knew that particular goods were dangerous, he had to reach some agreement on the subject with his contractual partner; between them they would certainly deal with the matter. It went without saying that if there was danger to persons the operator was obliged to take precautions. It would be dangerous to incorporate the Chinese proposal in the text at such a late stage. He did not believe the lacuna it sought to fill would cause great problems.

7. The PRESIDENT invited the Conference to vote on the proposal in the first paragraph of document A/CONF.152/L.3.

8. There were 2 votes in favour, 17 against and 17 abstentions. Having failed to obtain the required two-thirds majority, the proposal was not adopted.

9. Mr. WANG Yangyang (China) regretted that, for technical reasons, his delegation's proposal had not been distributed to delegations in the First Committee. It withdrew the remainder of its proposal.

10. Mr. LAVIÑA (Philippines) said that the proposal was an interesting one and should have been discussed in the First Committee.

11. Article 9 was adopted by 28 votes to 1, with 7 abstentions.

12. Mr. LARSEN (United States), in explanation of vote, said that the title of the article was "Special rules on dangerous goods"; it dealt with circumstances where dangerous goods were left with the operator without his knowing their dangerous character. It did not deal with environmental requirements for dealing with the goods or with rights of indemnity for the operator that would cover his liability to third parties.

Article 10

13. Article 10 was adopted by 32 votes to 1, with 3 abstentions.

14. Mr. LARSEN (United States), speaking in explanation of vote, said that his delegation had voted for article 10 in the belief that it now stated that the operator of a transport terminal might retain goods for satisfaction of unpaid charges that were due for keeping the goods, both during the period of his responsibility and thereafter. Thus the operator could claim damages for storage after he had placed the goods at the disposal of the person entitled to receive them. Furthermore, under article 10 (3) the operator might sell the goods to satisfy such charges, assuming that the requirements of due process of the State where the goods were located were observed.

Article 11

15. Mr. LAVIÑA (Philippines) questioned the use in paragraph 4 of the word "apprehended", the ordinary meaning of which related to criminal activities or to mental attitudes such as fear.

16. The PRESIDENT said that the Drafting Committee had no doubt decided to adhere to the corresponding provision of the Hamburg Rules, which used the same term.

17. Article 11 was adopted by 32 votes to 1, with 3 abstentions.

18. Mr. OCHIAI (Japan), speaking in explanation of vote, said that his delegation had abstained because it was very much afraid that the mention of the carrier in paragraph 4 would cause serious difficulties. If the carriage of goods consisted of segmented transport, which carrier was meant by the paragraph? For example, if three carriers were involved, did "the carrier" mean the first carrier, the second carrier, the last carrier, or all of them? Secondly, if the carrier mentioned in paragraph 4 did not have any branch or liaison office in the country where the transport-related services were performed by the operator, did the carrier have to go to that country and give the operator all reasonable facilities for inspecting and tallying the goods? If so, the paragraph might impose severe obligations on the carrier. The Conference existed to discuss not the carrier but the operator; if it imposed obligations on carriers it should act with extreme caution.

Article 12

19. Article 12 was adopted by 29 votes to none, with 7 abstentions.

20. Article 13 was adopted by 34 votes to none, with 1 abstention.

21. Article 14 was adopted by 36 votes to none.

22. Article 15 was adopted by 31 votes to none, with 5 abstentions.

23. Mr. RUSTAND (Sweden), speaking in explanation of vote, said that his delegation had abstained because the words "or derived from" had been deleted from the text of the article.

24. Article 16 was adopted by 36 votes to none.

25. The PRESIDENT said that the Conference had concluded its consideration of the articles approved by the First Committee (A/CONF.152/11). He invited it to consider the articles approved by the Second Committee (A/CONF.152/12).

26. Article 17 was adopted by 36 votes to none.

27. Article 18 was adopted by 35 votes to none.

28. Article 19 was adopted by 36 votes to none.

29. Article 20 was adopted by 33 votes to 1.

Article 21

30. Mr. SWEENEY (United States), introducing his delegation's proposal in document A/CONF.152/L.7, said it was returning with great reluctance to a question which had already taken up much of the Conference's time. Discussions had indicated that it was unlikely any reservations would be made to the Convention. However, following the decision which the Conference had taken the previous day to amend the text which the First Committee had approved for article 1 (A/CONF.152/SR.6, para. 32), it would be necessary for his Government to enter a reservation in order to safeguard an important aspect of United States public policy. The scope of his delegation's proposal was deliberately confined to its specific concern, namely the problem of stevedores. It had been suggested to his delegation that adoption of the proposal would mean that a definition of "stevedore" would have to be added to article 1, but he did not consider that necessary. At the previous meeting, a number of delegations had indicated that courts in their countries interpreted the "Himalaya clause" very differently from courts in his own country. It would thus appear that the United States was the only State which would wish to take advantage of the proposed reservation.

31. His delegation had followed the work on the Convention closely, both in UNIDROIT and in UNCITRAL, for the past nine years, and believed it would be a valuable instrument for unifying legislation governing international trade. In his own country, for example, there was no federal law on operator liability; instead, as many as 50 different laws were applicable in different

states. In some states, the operator was regarded as a bailee, and made strictly liable for all damage done to the cargo, while in others the principle of negligence, or the contractual principle, applied. It was important for United States exporters to know that a uniform liability regime applied in all countries, just as it was in the interests of all countries that the Convention should be ratified by the United States. The introduction of a uniform liability regime for terminal operators in international trade might well be followed by the introduction of a similar regime for domestic trade.

32. The United States Government would not consider ratifying a treaty if there was opposition to it from an important sector of industry. Currently, it enjoyed the cooperation of the stevedoring industry in its efforts to unify legislation, but such cooperation was forthcoming on the assumption that stevedores would not be treated more unfavourably than carriers. His delegation's proposal was designed to preserve the existing legal position in the United States by making provision for a reservation. Until such time as both the Hamburg Rules and the present Convention were universally accepted, the proposal would guarantee that stevedores would be liable for any damage done by them, either under the present Convention or under the maritime bill of lading. They would not have the privilege of exculpation under the "Himalaya clause", although their liability would be subject to a unit limitation of US\$500 per package under the Hague Rules.

33. A number of amendments to the proposal had been suggested to his delegation. One had been to replace the word "determine" in paragraph 1 by the phrase "make a reservation"; another had been to add the phrase "and other contractors of the carrier" after the word "stevedores" in the same paragraph. A third, and more substantial idea, was to add at the end of the paragraph the words "provided only that such non-carrying intermediaries do not thereby exclude all liability". He suggested that a vote should first be taken to determine whether the proposal had majority support; if so, the various amendments could be put to the vote.

34. Mr. SMITH (Australia) said that, generally speaking, his delegation was not in favour of the idea that the Convention should provide for reservations, but on the particular point at issue he had considerable sympathy with the United States position. He could support the proposal if its adoption was thought necessary in order to secure the adherence of the United States to the Convention, but only on the clear understanding that in a State which had entered the reservation a non-carrying intermediary would not be permitted to exclude all liability.

35. Mr. BONELL (Italy) said his delegation greatly regretted that the Conference was now envisaging an amendment to the text of article 21 in order to provide for reservations. However, as one of the sponsors of the proposal concerning article 1 which the Conference had adopted at the previous meeting, he felt to some extent responsible for the situation which had prompted the United States proposal. It was clear that the United States regarded the Convention as a useful and important instrument which merited the widest possible acceptance, and since its reservation was intended to cover one specific problem, his own delegation would be prepared to accept it.

36. However, he was not sure that the best course would be to vote first on the principle of the proposal and secondly on the amendments which the United States representative had mentioned. The text as it stood was too vague; for example, he suggested that the word "mandatory" should be added after the word "applicable" in paragraph 1. It was essential that the text of the article should make clear that stevedores could be exempted from the requirements of the Convention only if they were subject to mandatory rules governing the carriage of goods, and that it was not the intention of the article to enable them, by a special contractual condition, to escape all liability whatsoever for their actions.

37. Mr. LAVIÑA (Philippines) said although he too had some sympathy for the United States proposal, he would have difficulty in agreeing to its being embodied in article 21. The rule that no reservations could be made to the Convention was a good one. He would vote in favour of the proposal if it could be incorporated in article 1, but would abstain if it was to take the form of an amendment to article 21.

38. Mr. RUSTAND (Sweden) shared the views expressed by the Italian representative. While his first reaction was to oppose the possibility of a reservation being entered, he could support the proposal, in view of its considerable importance for the United States, if paragraph 1 was amended by the addition of the words "provided only that such non-carrying intermediaries do not thereby exclude all liability".

39. Mr. HORNBY (Canada) said that the delegation of the United States clearly appreciated the concern of common law countries other than itself that the treatment given to stevedores should not be more favourable than that given to carriers. He had voted in favour of the four-nation proposal for article 1 (a) (A/CONF.152/L.5) and had learned at the present meeting of the great difficulties which its adoption had caused the United States delegation; he was therefore prepared to support the United States proposal (A/CONF.152/L.7), although somewhat reluctantly, since its adoption would undoubtedly affect the scope of the Convention.

40. Ms. SKOVBY (Denmark) remarked that, in the absence of a clear definition of the term "stevedore", it might be helpful to insert the words "or all similar contractors independent of the carrier" after the word "stevedores" in paragraph 1 of the text proposed by the United States.

41. Mr. FILIPOVIĆ (Yugoslavia) said that, while sympathetic to the principle underlying the United States proposal, he was strongly opposed to the inclusion of an exception in the article on reservations. The Convention would be in force for many years and the reasons for the exception would become obscured by time. The appropriate place for the provision proposed by the United

States was in a model contract, not in an international convention principally concerned with operators of transport terminals.

42. After a brief procedural discussion in which Mr. BONELL (Italy) and Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic) took part, the PRESIDENT invited the Conference to proceed to an indicative vote on the principle embodied in the United States proposal in document A/CONF.152/L.7. If it obtained the necessary two-thirds majority, a small working group might be set up to redraft the text of the proposal with a view to its being put to a formal vote. If not, the proposal would be considered as rejected.

43. There were 12 votes in favour, 11 against and 11 abstentions. The principle embodied in the United States proposal having failed to obtain the required two-thirds majority, the proposal was not adopted.

44. Mr. SWEENEY (United States) proposed the deletion of article 21 from the Convention.

45. The PRESIDENT said that the proposal was submitted at an extremely late stage in the proceedings of the Conference. He invited it to vote on the text of article 21 approved by the Second Committee.

46. Article 21 was adopted by 23 votes to 4, with 8 abstentions.

Article 22 (A/CONF.152/L.4)

47. Mr. INGRAM (United Kingdom), introducing the proposal by the delegation of the Netherlands and his own delegation with regard to article 22 (1) (A/CONF/152/L.4), said that article 14 of the Convention referred specifically to its international character. The text approved by the Second Committee proposed that only five States would have to ratify, accept, approve or accede to the Convention for it to enter into force. The Convention was intended to fill certain gaps in existing conventions relating to carriage of goods, many of which required a much larger number; for example, 20 for the United Nations Convention on the Carriage of Goods by Sea and 30 for the Convention on International Multimodal Transport of Goods. The Visby Protocol to the Hague Rules needed 10 ratifications or accessions and also stipulated that five of the States which ratified the Protocol or acceded to it should have a minimum tonnage under their flag. In order genuinely to harmonize international trade law and ensure that the Convention had sufficient standing to be taken seriously, an absolute minimum of 10 States should have to become parties to it for it to enter into force.

48. Mr. BONELL (Italy) said that all delegations not only hoped but also believed that the States they represented would seriously consider ratifying the Convention. It would be a fallacy, however, to think that the adoption of an instrument was in itself sufficient to motivate States to embark upon the process of ratifying it. In practice, many States were inclined to put off taking that step until the instrument came into force. In the light of long experience, he was convinced that the necessary number of ratifications or comparable steps should be kept as low as possible. Consequently, he was very strongly in favour of the present text of article 22.

49. Mr. ROMAN (Belgium) and Mr. ROJANAPHRUK (Thailand) expressed support for the proposal made by the Netherlands and the United Kingdom.

The meeting rose at 12.30 p.m.

8th plenary meeting

Wednesday, 17 April 1991, at 2.30 p.m.

President: Mr. ABASCAL (Mexico)

A/CONF.152/SR.8*

CONSIDERATION OF THE QUESTION OF THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 44/33 OF 4 DECEMBER 1989 (agenda item 9) (concluded)

Draft Convention on the Liability of Operators of Transport Terminals in International Trade (concluded) (A/CONF.152/11, 12; A/CONF.152/L.6)

Article 22 (concluded) (A/CONF.152/L.4)

1. Mr. RUSTAND (Sweden), referring to the statement made by the representative of Italy at the 7th plenary meeting, said that countries should base their decisions whether or not to ratify the Convention on the substance of its provisions, not on what other countries did. For that reason he was unable to support the joint proposal by the Netherlands and the United Kingdom of Great Britain and Northern Ireland (A/CONF.152/L.4).

*Incorporating document A/CONF.152/SR.2-8/Corr.1, dated 1 April 1992.

2. Mr. CHRISTOV (Bulgaria) said that in principle his delegation had no objection to the joint proposal, but would prefer to see an appropriate change made in article 1 rather than in article 22.

3. Mr. LARSEN (United States of America) said that his delegation still believed that the Convention should enter into force upon receipt of five instruments of ratification, acceptance, approval or accession, because of its peculiar nature and the way in which it was geared to the needs of each individual country. The Conference might also bear in mind that a precedent for five instruments had been set by the Visby Protocol to the Hague Rules.

4. Ms. ERIKSSON (Finland) said that her delegation strongly supported the original text requiring the deposit of five instruments, for the reasons stated by the representatives of Italy and Sweden. Experience had shown that a Convention generally became more attractive to States after it had entered into force. Some of the articles of the Convention had been drafted with the Hamburg Rules in mind, and the fact that those Rules were expected to enter into force at an early date, only one more instrument being required, was a good reason for having a low requirement for the present Convention.

5. Miss VAN DER HORST (Netherlands) reminded the Conference that the German delegation and her own had proposed in the Second Committee that the deposit of 15 instruments should be required for entry into force. That proposal had been rejected by no more than a small majority, of 8 votes to 5. The joint proposal (A/CONF.152/L.4) should therefore be considered a compromise.

6. Mr. SOLIMAN (Egypt) supported the joint proposal considering that 10 was the minimum number of instruments needed to ensure that the Convention would be effective.

7. Mr. LAVIÑA (Philippines) expressed support for the text as drafted, requiring the deposit of 5 instruments. While it was not normally desirable to fix the number required too low, the possibility of the Hamburg Rules entering into force in the very near future provided an incentive for deciding on 5 instruments for the present Convention.

8. The PRESIDENT invited the Conference to vote on the joint proposal (A/CONF.152/L.4).

9. The proposal was rejected by 19 votes to 9, with 8 abstentions.

10. The PRESIDENT invited the Conference to vote on article 22 as set forth in document A/CONF.152/12.

11. Article 22 was adopted by 25 votes to 4, with 6 abstentions.

Article 23

12. Article 23 was adopted by 34 votes to none.

Article 24

13. Article 24 was adopted by 35 votes to none.

Article 25

14. Article 25 was adopted by 34 votes to none.

Preamble (A/CONF.152/L.6)

15. Mr. SWEENEY (United States), introducing the proposed preamble (A/CONF.152/L.6) on behalf of the sponsors, said that the first and second paragraphs explained the purpose of the Convention and the reasons why it had come into being. The third paragraph had been taken from General Assembly resolution 44/33 calling for the Conference to be convened.

16. Mr. RAO (India) said that while in principle his delegation could support the proposed preamble, it considered that in the second paragraph the words "for the loss, damage or delay to such goods" should be brought into line with article 5 (1) and read: "for loss resulting from loss of or damage to the goods, as well as from delay in handing over the goods".

17. Mr. BERAUDO (France) said that in general he welcomed the proposed preamble, which set forth the general ideas underlying the text as a whole and expressed the philosophy of its authors. It would be more logical, however, if the third paragraph came first, so that the sequence of thought was from the general to the particular. In addition, the words "reaffirming its conviction" in that paragraph should read "affirming their conviction". Lastly, in view of the political changes which had taken place over the past two years, the words "among all States" in the same paragraph could be deleted, as it was becoming increasingly clear that economic cooperation could be established directly between individuals and that the position of the State as intermediary was fast disappearing.

18. Mr. MORAN (Spain) said that he could accept the French proposal to change the order of the paragraphs. With regard to the proposal to delete the words "among all States", despite the political changes over the past two years, they did not run counter to the general spirit of the

paragraph, and should remain. He could not support the proposal by the representative of India, considering that a preamble did not have to be aligned with any particular article in the body of a convention; rather it should be of a general nature and reflect the reasons why the Convention had come into being.

19. Mr. LAVIÑA (Philippines) said that the Indian representative's proposal was right both logically and grammatically. In the light of the comment made by the representative of Spain, however, he would suggest that the phrase might read: "for the loss of, damage to or delay in delivery of such goods". As regards the French proposal to change the order of the paragraphs, it was stylistically appropriate that as the most important item the quotation from a very important General Assembly resolution should come last.

20. Mr. BONELL (Italy) supported the French proposal to change the order of the paragraphs but could not support the deletion of the words "among all States". He agreed with the representative of India that it would be preferable to align the text of the second paragraph with article 5, with the stylistic changes suggested by the representative of the Philippines, except for the words "delivery of such goods", which he would prefer to replace by "in handing over the goods", as in article 5.

21. Miss VAN DER HORST (Netherlands) said that as she understood the Convention, both the carrier and the operator were in charge of the goods, the carrier with respect to the other party to the contract of carriage, and the terminal operator with respect to the other party to his contract. She therefore proposed that the words: "not in the charge of carriers nor in the charge of cargo-owning interests but while they are" should be deleted from the first paragraph, which would then read: "Considering the problems created by the uncertainties as to the legal regime applicable with regard to goods in international carriage when the goods are in charge of operators of transport terminals in international trade".

22. Mr. TARKO (Austria) supported the Netherlands proposal, the views of Italy with respect to the second paragraph and the French proposal to change the order of the paragraphs.

23. Mr. ROMAN (Belgium) said that while agreeing with the general idea behind the third paragraph of the proposed preamble, his delegation was not convinced that the Convention itself was in the interests of the developing countries, although progressive harmonization was. In trying to fill the gaps left by the existing conventions, the present draft Convention had gone too far too quickly. His delegation would therefore have to abstain on the preamble.

24. Mr. RUSTAND (Sweden) supported the proposed preamble with the paragraphs re-ordered as proposed by the representative of France.

25. Mrs. PIAGGI DE VANOSI (Argentina) supported the draft preamble as amended by the French representative but could not agree to the proposal by the representative of India.

26. Mr. SMITH (Australia) endorsed the French proposal to re-order the paragraphs. In the view of his delegation, the proposal of the representative of the Netherlands was necessary to ensure that the preamble accurately reflected the scope of the Convention. He could accept the Indian proposal as modified by the representative of the Philippines.

27. Mr. RAO (India) submitted that it was central to article 5 that delay in the delivery of goods would give rise to liability under the Convention only when it led to loss, which was the main concern. The aim of his amendment had been to correct the impression given in the draft preamble that there could be liability for mere delay in delivery: that impression seemed to prevail in the formulation proposed by the representative of the Philippines.

28. Mr. ROJANAPHRUK (Thailand), arguing in favour of simplicity in the preambular paragraphs, proposed that the second should be amended to read:

"Intending to facilitate the movement of goods by establishing uniform rules concerning liability of operators of transport terminals which is not covered by the laws of carriage arising out of conventions applicable to the various modes of transport".

29. Mr. PAMBOU-TCHIVOUNDA (Gabon) proposed that the third paragraph should be divided into two parts, to be separated by what were at present the first and second paragraphs. The first of those parts would stress that the progressive harmonization and unification of international trade law should reduce or remove legal obstacles to the flow of international trade. The second would underline the Convention's specific role in promoting the objectives set out in the final lines of the original draft preamble. Such a re-ordering of the text would remove the unrealistic presumption that the harmonization and unification of international trade law would significantly contribute to economic cooperation based on equality, equity and common interest. He suggested that a working group might be set up to draft a new preamble, taking account of his and other representatives' proposals.

30. The PRESIDENT said that the proposal by the representative of Gabon, which went beyond the limits of a mere amendment, had not been submitted in good time. He did not think, therefore, that it could be discussed.

31. Mr. BONELL (Italy) and Mr. SHATANI (Libyan Arab Jamahiriya) considered that the Conference might be able to discuss the Gabonese proposal.

32. Mr. INGRAM (United Kingdom) welcomed the amendment put forward by the representative of the Netherlands, which had a considerable bearing on the future interpretation of the Convention.

33. The PRESIDENT put to the vote the French proposal that the third paragraph of the draft preamble (A/CONF.152/L.6) should become the first.

34. The proposal was adopted by 21 votes to 5, with 9 abstentions.

35. Mr. PAMBOU-TCHIVOUNDA (Gabon) requested that a vote should be taken on his amendment to the original last paragraph of the preamble, proposing that the three lines, as far as "international trade", should be modified to read "Considering that the progressive harmonization and unification of international trade law should help reduce or remove legal obstacles to the flow of international trade" and should then be made into a separate paragraph serving as the first paragraph of the preamble.

36. The PRESIDENT invited the Conference to vote on the amendment proposed by Gabon.

37. The amendment was rejected by 18 votes to 3, with 15 abstentions.

38. Mr. BERAUDO (France) withdrew his proposal that the words "among all States" in the original last paragraph, now the first, should be deleted.

39. The PRESIDENT invited the Committee to vote on the amendment proposed by the Netherlands to the original first paragraph of the draft preamble, now the second, to delete the words "are not in the charge of carriers nor in the charge of cargo-owning interests but while they".

40. There were 15 votes in favour, 14 against and 9 abstentions. Having failed to obtain the required two-thirds majority, the proposal was not adopted.

41. The PRESIDENT invited the Conference to vote on the amendment proposed by Thailand to the original second paragraph of the draft preamble, now the last.

42. The amendment was rejected by 14 votes to 7 with 17 abstentions.

43. The PRESIDENT invited the Conference to vote on the proposal of the Philippines, as amended by Italy, that the phrase "for the loss, damage or delay to such goods" in the last paragraph should be replaced by "liability for the loss of, damage to, or delay in handing over of such goods".

44. The amendment was adopted by 20 votes to 2, with 17 abstentions.

45. The PRESIDENT invited the Conference to vote on the draft preamble (A/CONF.152/L.6) as amended.

46. The preamble as amended was adopted by 35 votes to none, with 3 abstentions.

ADOPTION OF A CONVENTION AND OTHER INSTRUMENTS DEEMED APPROPRIATE, AND OF THE FINAL ACT OF THE CONFERENCE (agenda item 10) (A/CONF.152/11, 12; A/CONF.152/L.1, L.6)

47. Mr. LAVIÑA (Philippines) said that the Conference might perhaps have facilitated its decision-making, especially in the committees, by taking an indicative vote rather than a formal one on some occasions. He also felt that the search for consensus had sometimes led to excessive haste in the deliberations at committee level. It was important, now that the time had come to vote on the Convention as a whole, that delegations should take an unequivocal position. He therefore requested that a roll-call vote should be taken on the draft Convention as a whole.

48. The PRESIDENT called on the Conference to vote on the draft Convention as a whole (A/CONF.152/11, 12; A/CONF.152/L.6), as amended.

49. At the request of the representative of the Philippines, the vote was taken by roll-call.

50. Lesotho, having been drawn by lot by the President, was called upon to vote first.

In favour: Argentina, Australia, Austria, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, China, Denmark, Egypt, Finland, France, Gabon, Germany, Guinea, India, Iran (Islamic Republic of), Israel, Italy, Japan, Lesotho, Mexico, Nigeria, Philippines, Republic of Korea, Spain, Sweden, Thailand, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United States of America, Yugoslavia.

Against: None.

Abstaining: Belgium, Indonesia, Libyan Arab Jamahiriya, Netherlands, Saudi Arabia, Turkey, United Kingdom of Great Britain and Northern Ireland.

51. The Convention as a whole, as amended, was adopted by 31 votes to none, with 7 abstentions.

52. Mr. INGRAM (United Kingdom), speaking in explanation of vote, said that his delegation had abstained on the Convention as a whole. It had not voted against the text, for two reasons. First, the United Kingdom shared the universal commitment to the harmonization and unification of

international trade law. Secondly, it respected the tremendous effort put into the draft Convention by so many people over the years - notably by the secretariats of UNIDROIT and UNCITRAL, but also by the representatives from many countries who had attended meetings over the years.

53. None the less, the result had not changed the view of the United Kingdom Government and, more importantly, of British commercial interests, that the new Convention would not be a help to international trade. In speaking of "commercial interests", he was referring to all those involved - operators of transport terminals, shippers of goods and carriers, and the insurers of all such interests. Two aspects of the Convention prompted that conclusion. First, the many and varied operators to be covered, from small stevedoring firms to operators of large container terminals, and the differing operations they performed, would lead to the Convention being open to differing and uncertain interpretations. The uncertainties which remained in the text had already been commented upon: they related, for example, to the definition of "carrier" and to the period of responsibility in article 3. Such uncertainties were unfortunate in themselves. More importantly, they meant that costs would not be reduced for the various parties concerned, since they would still need full insurance for their goods.

54. His delegation's second concern was the strict - though not absolute - basis of liability in article 5, which, combined with the lack of a global limit in article 6, and the possibility of breaking the limits even for the activities of a servant or agent in article 8, would create severe insurance problems, which his delegation had spelt out in the First Committee. He hoped any State which contained transport terminals would consider that aspect very carefully when deciding whether to ratify the Convention. It seemed unlikely that the United Kingdom would be among those doing so.

55. Mr. HORNBY (Canada) said that his delegation, while it had voted in favour of the Convention, had certain legal difficulties with the text. He believed the lack of clarity in some of its provisions would prove confusing and lead to delays and difficulties in implementing the Convention. He referred, in particular, to the absence of any clear understanding concerning the duration of the period of responsibility in article 3. The rules in article 8 concerning the loss of the right to limit liability, and the decisions of the Conference on the substantive rules of liability, would impose an unfair burden on operators, by comparison with the responsibilities of carriers under existing law. Those shortcomings in the Convention would expose operators to greater liability and higher costs, which would impede rather than advance the growth of international trade. However, his delegation's support for the Convention testified to his country's endorsement of the principles of progressive harmonization of international trade law and of the sterling work of UNCITRAL and UNIDROIT.

56. Mr. LARSEN (United States) said that his delegation had voted in favour of the Convention as a whole, since article 15 stated that the Convention did not modify any rights or duties which might arise under any international carriage of goods convention, or under any national law giving effect to that convention. Since stevedores might be entitled to certain rights of the carrier arising under the Hague Rules, article 15 preserved the option of seeking the benefit of the carrier's rights under the Hague Rules.

57. Miss VAN DER HORST (Netherlands) said that her delegation had abstained on the Convention as a whole, for the reasons it had already given in the First Committee. She associated herself with the views expressed by the representative of the United Kingdom.

58. Mr. ROMAN (Belgium) said that although his delegation supported the principle embodied in the Convention, it had abstained on the Convention as a whole, for reasons similar to those stated by the representative of the United Kingdom.

CREDENTIALS OF REPRESENTATIVES TO THE CONFERENCE (concluded) (agenda item 6)

(b) REPORT OF THE CREDENTIALS COMMITTEE (A/CONF.152/8)

59. Mr. HORNBY (Canada), Chairman of the Credentials Committee, introduced the Committee's report (A/CONF.152/8). The States listed in paragraph 4 were those for which credentials had been submitted by 15 April 1991, whether formally or in the form of a cable, facsimile, letter or note verbale. Having examined those credentials, the Committee was recommending to the Conference, in paragraph 9 of its report, the adoption of the following draft resolution:

"The Conference,

Having examined the report of the Credentials Committee,

Approves the report of the Credentials Committee."

60. Mr. BERGSTEN (Executive Secretary) observed that some of the States listed in paragraph 4 of the report had not yet submitted formal credentials as required by rule 3 of the rules of procedure of the Conference, but were expected to do so before its closure. A revised version of the Committee's report would be issued before the end of the Conference, including the names of those States which had submitted formal credentials in the meantime.

61. The PRESIDENT invited the Conference, on that understanding, to adopt the draft resolution proposed in paragraph 9 of document A/CONF.152/8.

62. The draft resolution was adopted by 32 votes to 1.

ADOPTION OF A CONVENTION AND OTHER INSTRUMENTS DEEMED APPROPRIATE, AND OF THE FINAL ACT OF THE CONFERENCE (agenda item 10) (concluded) (A/CONF.152/11, 12; A/CONF.152/L.1, L.6)

63. Mr. BERGSTEN (Executive Secretary) introduced the draft Final Act of the Conference (A/CONF.152/L.1). The name of Zaire, which had registered but subsequently withdrawn its representation from the Conference, should be deleted from the list of participating States contained in paragraph 3. The date of the adoption of the Convention (paragraph 12) was 17 April 1991; it would be opened for accession on 19 April 1991.

64. Mr. BERAUDO (France) noted that the list of intergovernmental organizations with observer status at the Conference did not include the Central Commission for the Navigation of the Rhine (CCNR), which had been present at a meeting the previous day.

65. The PRESIDENT invited the Conference to adopt the draft Final Act.

66. The draft Final Act of the Conference was adopted by 36 votes to none.

67. The PRESIDENT, in conclusion, expressed his gratitude to all who had contributed to the successful completion of the Convention, and especially to UNIDROIT, UNCITRAL and its Working Group, the Chairmen of the Committees of the Conference, and the Secretariat.

The meeting rose at 5.05 p.m.

9th plenary meeting

Friday, 19 April 1991, at 10.30 a.m.

President: Mr. ABASCAL (Mexico)

A/CONF.152/SR.9

SIGNATURE OF THE FINAL ACT, OF THE CONVENTION AND OF OTHER INSTRUMENTS (agenda item 11) (A/CONF.152/13)

1. Delegations were called on in alphabetical order to sign the Final Act of the Conference and, if they had the necessary powers, to sign the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade.

CLOSURE OF THE CONFERENCE (agenda item 12)

2. The PRESIDENT said that the work of the Conference had shown that international trade could be a vehicle not only for the exchange of goods but also for the exchange of cultures, and an opportunity for understanding and peace between nations. He commended the delegates to the Conference, all those who had collaborated in preparing the draft Convention and the Secretariat for demonstrating by their imagination, tenacity, enthusiasm and flexibility that trade was a means of uniting humanity. He paid special tribute for their work to Professor Joaquim Bonell, former Chairman of the UNCITRAL Working Group on International Contract Practices, and Mr. Jean-Paul Beraudo, Chairman of the First Committee of the Conference.

3. He declared closed the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade.

The meeting rose at 11.05 a.m.

SUMMARY RECORDS OF MEETINGS OF THE FIRST COMMITTEE

1st meeting

Wednesday, 3 April 1991, at 10 a.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.1

ADOPTION OF THE AGENDA (item 1 of the provisional agenda) (A/CONF.152/C.1/L.1)

1. The provisional agenda (A/CONF.152/C.1/L.1) was adopted.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

2. The CHAIRMAN drew the Committee's attention to the text contained in document A/CONF.152/5, which, according to rule 29 of the rules of procedure of the Conference (A/CONF.152/3), was the basic proposal for consideration. The Committee would also be considering alternative proposals or amendments, which would have to be submitted in writing. Adoption of such proposals or amendments would be by a simple majority, and any States that abstained would be considered as not voting.

3. He suggested that the Committee should begin by considering the more substantive provisions of the draft Convention, leaving the less substantive ones - articles 2, 13, 14 and 20 - till a later stage.

4. It was so agreed.

Article 1 (a) (A/CONF.152/C.1/L.6)

5. Mr. SCHROCK (Germany), introducing his amendment to article 1 (a) (A/CONF.152/C.1/L.6), said that during the preparatory work for the Conference, which had been begun in Rome at the International Institute for the Unification of Private Law (UNIDROIT), the scope of the Convention had been broadened considerably. The view expressed in the explanatory report of UNIDROIT had been that, desirable as it might be to establish a uniform liability for handling intermediaries, it would be unrealistic to seek to do so at that stage. The draft text now before the Committee, which had been prepared by the United Nations Commission on International Trade Law (UNCITRAL), did in fact make provision for handling intermediaries. His delegation shared the view expressed in a recent article in the Journal of Maritime Law and Commerce that the definition of "operator" proposed in the draft text was based on the assumption that the operator might provide services in respect of goods in an area in which he had a right of access or use, including services which might be performed on board a ship, such as loading, unloading, stowage or trimming. While his delegation was in no way opposed to the widening of the scope of the Convention, it believed that the definition in article 1 (a) should make it clear that the handling of goods was included in the functions of operators of transport terminals: the phrase "to take charge" was not sufficient to cover that concept. Some addition was needed in order to provide for situations that differed from the one in which goods were being carried on a means of transport to which no third party had any access. His proposal would entail consequential amendments to article 1 (c) and to article 3, but they could be discussed at a later stage.

6. Mr. SWEENEY (United States of America) did not think that the proposed addition would be an improvement, because the phrase "or to handle" was too vague. In his view, the phrase "to take in charge" was sufficient to cover the many situations that might involve the potential liability of the operator. Reference had been made to the work done by UNIDROIT in 1972, but at that stage efforts had been concentrated on the safekeeping aspect of the operator's activities. A subsequent study of terminal operations throughout the world by the UNCITRAL secretariat had shown that in fact safekeeping was no longer the only part of operators' activities, and as a result attention was now being focused on other types of activity. That was why it had been decided, in the analogous provision of the Hamburg Rules, to use the term "in charge" as the best way of defining the individual or enterprise responsible for the goods.

7. Mr. RUSTAND (Sweden) agreed with the representative of Germany that the term "take in charge" was perhaps insufficiently precise; it had given rise to some discussion during the preparatory talks as well as at the previous session of UNCITRAL in 1989. It frequently happened that goods were left on a quay for later collection, without any specific instructions as to their destination: in such a case, were they to be considered as having been "taken in charge" under the terms of the Convention? It was important that the Conference should define the term. However, he did not think the addition of the phrase "or to handle" would be an improvement.

8. Mr. HORNBY (Canada) agreed that the definition contained in article 1 (a) gave rise to some problems, but was not certain that the addition of the phrase "or to handle" would solve them. As he saw it, the definition of "transport-related services" contained in article 1 (d) already made it clear that handling activities were covered by the Convention. It would be best to focus attention on the concept of being "in charge", which had already been used, and defined, in the Hamburg Rules. A further paragraph might be added under article 3 in relation to that concept.

9. Mr. BONELL (Italy) said that he had at first been inclined to favour the German proposal but had now changed his mind in the light of the United States representative's remarks. The fact that the concept of "in charge" was incorporated in the Hamburg Rules was a good reason for maintaining it in the text under consideration. He did not agree, however, with the suggestion of the Canadian and Swedish representatives that the Conference should attempt to define the concept of "taking in charge". Such an exercise would have little chance of success. During the Commission's work on the draft a delegation had proposed the deletion of the words "take in charge goods involved in international carriage in order to", so as to leave it to future users to define the operator more closely. That solution would be preferable to an over-explicit definition.
10. Mr. ROJANAPHRUK (Thailand) agreed with the United States representative that the concept of "taking in charge" covered "handling".
11. Mr. LAVIÑA (Philippines) said that he would have no objection to omitting the words "take in charge goods involved in international carriage in order to" and adding a reference to both "taking in charge" and "handling" in article 1 (d). The text as it stood was, he thought, sufficiently clear, but he would also be prepared to accept the German proposal with a view to facilitating ratification of the draft Convention by as many countries as possible.
12. Mr. SCHROCK (Germany) said that the discussion showed the Conference's interpretation of the concept of "taking in charge" to be somewhat broader than that adopted in other transport conventions. Noting that his delegation's proposal concerning the first sentence of article 1 (a) had received only limited support, he said that he was willing to withdraw it with a view to shortening the debate. His delegation would, however, wish to have it placed on record that in the understanding of the Conference the concept of "taking in charge" was considerably broader than, for instance, in the General Conditions, 1989, of the Swedish Master Stevedores' Association, which restricted it to placing goods in cargo sheds or premises surrounded by fences.
13. Mr. WALL (United Kingdom of Great Britain and Northern Ireland) expressed concern at the looseness of the concept of "taking in charge". The discussion had, if anything, left it still looser. In the absence of a clear identification of the person upon whom liability would be placed, the way would be open to overlapping liabilities on the part of several "operators" and to a succession of claims and counter-claims.
14. In his delegation's understanding, article 1 (a), as read together with article 1 (d), did not include the activities of customs and revenue authorities.
15. Mr. SWEENEY (United States) agreed both with the German representative's view that the concept of taking in charge was not restricted to storing goods in sheds or behind fences and with the United Kingdom representative's view that article 1 (a) did not cover the activities of customs and revenue authorities. As to the question of precision, he remarked that under existing law the possibility of overlapping liabilities could not be ruled out.
16. Mr. OCHIAI (Japan) gave notice of a proposal by his delegation on the question of stevedores, which would be distributed shortly. He requested the Chairman not to close the debate until the proposal had been discussed.
17. Mr. ZHAO (China) said that his delegation understood the first sentence of article 1 (a) to refer to the entire process which took place between the time when a particular person, who might be a representative of a port authority or an airport authority, took in charge goods involved in international carriage and the time when that person handed those goods over. That broad understanding did not have to be spelt out in the article, as long as it was reflected in the record of the debate.
18. Mr. ROMAN (Belgium) said that his delegation intended to submit a formal proposal in connection with the phrase "in an area under his control", which it considered to be too vague. Unlike the representative of the United States, he did think that the concept of taking in charge should be restricted to the storage of goods in sheds or behind fences; to increase the scope of liability would mean increasing the cost of international transport and would thus be inconsistent with the aim of promoting international trade.
19. Mr. de GOTTRAU (International Road Transport Union), speaking at the invitation of the Chairman and without objection by the Committee, drew attention to the comments submitted by his organization (A/CONF.152/7/Add.1). In the French version of article 1 (a), it would be more appropriate to speak of "... toute personne qui prend sous sa garde ...". Furthermore, it should be noted that the term "person" meant both physical and juridical persons in both public and private law.
20. The CHAIRMAN, summing up the debate on the first sentence of article 1 (a), noted that the amendment proposed by Germany concerning handling operations (A/CONF.152/C.1/L.6) had been withdrawn. Some delegations had expressed concern that the concept of "taking in charge" and the specific operations it involved were not adequately defined. He trusted that careful consideration would be given to the various proposals made and that the matter would be discussed further in connection with other articles in which that concept played a part. With reference to the United Kingdom's objection that the first sentence would leave the situation unclear in practice, he pointed out that the compromise text now before the Conference was the outcome of lengthy and thorough discussions. There was no doubt room for improvement in the wording, a task which might be left to the Drafting Committee. He suggested that the first sentence should remain as it was and wondered whether participants might wish to vote on it.

21. Mr. WALL (United Kingdom) said that his delegation's concern about article 1 (a) was of a substantive nature and could not be dealt with by the Drafting Committee. He thought that a vote on the first part of the article would be premature.

22. Mr. OCHIAI (Japan) pointed out that his delegation's proposal, which concerned the interpretation of article 1 (a), was still pending. He asked whether he might make it orally, before any vote on the article.

23. Mr. BONELL (Italy) agreed with the Chairman's summary of the discussions on the first sentence. The wording was the result of a consensus reached in the Commission after lengthy and very thorough discussions. At so late a stage, he would be most reluctant to see a substantive discussion reopened on the definition of the term "take in charge". The text should be adopted unless there was a clear alternative proposal in writing.

24. The CHAIRMAN, referring to the point raised by the Japanese delegation, said that he preferred to adhere to the procedure of written proposals; the Japanese proposal would accordingly be discussed once it had been circulated in writing.

25. Mr. BERGSTEN (Executive Secretary), explaining voting procedure, said that if the Chairman of one of the Committees saw that there was general agreement on a text discussed by the Committee, there was no reason to put it to the vote. Voting was only necessary if there was obvious disagreement among delegations. By contrast, in the plenary at the end of the Conference, a vote must be taken on each article.

26. With reference to the Japanese proposal, he read out rule 30 of the provisional rules of procedure, which provided that proposals should normally be submitted in writing, but that oral amendments or proposals might be authorized by the President of the Conference. By extension, that included the Chairman of a Committee. Authorization of such a procedure was accordingly left to the discretion of the Chairman.

27. Mr. LAVIÑA (Philippines) endorsed the Executive Secretary's initial comment; the basic principle should be consensus, obviating the need for a vote. Rule 30 should be interpreted broadly, so that all delegations would be able to submit any proposals that might enable the Conference to arrive at a final agreement.

28. Mr. RUSTAND (Sweden) said that, since reference was also made to the concept of "taking in charge" in articles 3 and 5, it would be preferable to defer voting until all the relevant articles had been discussed.

29. Although he agreed with the representative of Italy that the issue had been discussed at length in the Working Group and at the Commission's twenty-second session, that did not preclude discussion of the matter at the Conference. The views and proposals put forward would be recorded in the summary records, which would provide a useful frame of reference at a later date.

30. Mr. HORNBY (Canada) said that although written amendments were desirable on complex matters of substance, oral amendments should be acceptable for simpler matters such as the deletion of a word or phrase.

The meeting was suspended at 11.15 a.m. and resumed at 11.55 a.m.

31. Mr. ROMAN (Belgium) expressed surprise at the apparent suggestion that there was no possibility of reopening the debate on a particular issue; if that were the case, there would be no need to work on the draft at all and the Conference could merely put the various articles to the vote.

32. The CHAIRMAN said that the Conference should exercise restraint in considering whether to reopen a discussion.

33. Mr. BONELL (Italy) considered that amendments should in principle be submitted in writing but that, where appropriate, exceptions should be allowed at the Chairman's discretion. He did not recall there having been any suggestion that there should be no possibility of further discussion. There was, however, no time for lengthy debate. The substance of the text now before the Conference, on a highly controversial issue, had been thoroughly discussed before it was drafted and a reopening of the substantive debate at so late a stage would be inappropriate.

34. Mr. WALL (United Kingdom) trusted that it would be possible to proceed without a vote. The discussion on article 1 (a) had been very useful, and subsequent discussions might reveal a need to reopen the debate on certain points and improve the wording of the text. His delegation felt that certain definitions in article 1 (a) needed to be reconsidered before a vote was taken; in general, it hoped that the Committee would not be too eager to take votes too often.

35. The CHAIRMAN said that there would be no vote on the first sentence of article 1 (a) for the time being. He invited the Conference to proceed with its consideration of the second sentence of that article. The proposal announced by Japan concerning conflicts between the Convention and applicable rules of law governing carriage had not yet been circulated as such, but would be found in its comments in document A/CONF.152/7.

36. Mr. OCHIAI (Japan) said it was perfectly clear that the preliminary draft Convention had applied to stevedores even if they were covered by a clause in a bill of lading that extended to

them the benefits available to carriers under applicable rules of law governing carriage. The draft Convention under consideration was not quite clear on that point. If it excluded such stevedores, it would not apply to about 90 per cent of the functions it was intended to cover. If it was to be of any use, it would have to include them.

37. Mr. HORNBY (Canada) said that his delegation shared the concern expressed by the representative of Japan about the second sentence of article 1 (a), which seemed to suggest that it would be possible for stevedores to place themselves outside the ambit of the Convention by invoking clauses contained in a carrier's contract. The purpose of the draft Convention was to ensure greater uniformity in the law applicable to limits for stevedores and for terminal operators in general. If stevedores were allowed to place themselves outside the provisions of the Convention and to have the same limits as carriers, its whole purpose would be defeated.

38. Ms. VAN DER HORST (Netherlands) drew attention to the sentence which her Government had proposed in place of the second sentence of article 1 (a) (A/CONF.152/7/Add.1, p. 6). It was concerned about the meaning of the existing sentence, in particular the word "responsible". The Netherlands had ratified the Hague-Visby Rules, under which a carrier was not responsible for goods before they were loaded on board and after they had been unloaded. The existing sentence suggested that the carrier could be regarded as liable under the Convention on the liability of terminal operators at such times, and the word "responsible" had therefore been deleted in the sentence proposed by her Government.

39. Mr. SWEENEY (United States) said that his delegation was in favour of keeping the existing wording. During the drafting of the text in the UNCITRAL Working Group, one of the major difficulties had been the reference to the word "stevedore", the meaning of which was not the same in all transport systems. Since the purpose of the draft Convention was to fill existing gaps, the need to have a broad conception of the word "stevedore" had been recognized.

40. Stevedores are not carriers. Stevedores can share the carrier's \$500 per package protection and the one year time bar through carefully drawn clauses in Ocean bills of lading specifically extending such protection. Thus, stevedores were not automatically covered by a bill of lading. In fact, that was a key issue in bargaining between stevedores and carriers, the purpose of which was to prevent unnecessary waste of resources and to eliminate dual or even triple insurance coverage. In the United States, stevedores were usually interested only in limiting their monetary liability.

41. Mr. LAVIÑA (Philippines) thought that the second sentence of article 1 (a) was quite vague. He agreed that the term "stevedore" had different meanings in different countries.

42. His delegation wished to make it clear that, when an operator had a dual capacity arising from his responsibility for the goods under the applicable rules, he would not be considered an operator in all circumstances. Secondly, the expression "applicable rules of law governing carriage" referred to both domestic law and treaty law.

43. Mr. BONELL (Italy) agreed that the rules in question should have the widest possible sphere of application, which meant that stevedores should in principle be included. Was he right in thinking that the United States representative's basic concern was that stevedores should not be placed in a worse position than carriers?

44. Mr. SWEENEY (United States) said that in the United States a complex situation involving bargaining between stevedores and carriers had led to considerable litigation, which sometimes went in favour of stevedores and sometimes against them. For example, the courts had struck down a number of broad provisions in maritime bills of lading that accorded the protections enjoyed by the carrier to all agents or independent contractors who had anything to do with the transport of goods. It should be noted that stevedores had to bargain for protection. Many carriers were unwilling to extend the terms of their bills of lading automatically to stevedores. Unless they did so, stevedores charged extra. His delegation had therefore expressed the view that stevedores should be treated no worse than carriers, in other words that they should not be placed in a worse position than carriers because of this Convention.

45. Mr. BONELL (Italy) thought that until a decision was taken on the limits of liability, it would be necessary to keep the existing text, possibly with the Japanese amendment.

46. Mr. WALL (United Kingdom) said that in his delegation's opinion, carriers must be excluded from the coverage of the draft Convention. That was the primary intent of the second sentence of article 1 (a). If the existing text of the sentence was kept, it would be in the stevedore's interest to seek whatever protection he could obtain from the carrier under the bill of lading or other transport document. His delegation agreed that if it was desired that the stevedore should not be placed in a worse position than the carrier, that could only be decided upon once a decision had been taken on the limitation amounts to be included in the draft Convention. At the present stage, his delegation believed that the draft Convention should specifically include stevedores.

47. Mr. RUSTAND (Sweden) shared the concern expressed by the representative of Canada. It would be unfortunate if the draft Convention created a new gap. His delegation's understanding was that if an operator was liable for goods under another applicable convention, then he would not be liable under the draft Convention. It had never been his delegation's understanding that the stevedore could be exempted from liability under the Convention by clauses contained in a bill of lading. He doubted whether the Netherlands proposal would ensure that stevedores could not escape any limitation and thought that it would have the opposite effect.

2nd meeting

Wednesday, 3 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.2

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 1 (a) (continued) (A/CONF.152/C.1/L.6, L.19, L.23)

1. Mr. RAMBERG (Observer, International Maritime Committee) called attention to the use of the term "rules of law" in the Commission's draft (A/CONF.152/5). It was his understanding that a contractual clause such as the "Himalaya clause", extending to stevedores the protection given to the carrier, would not amount to a "rule of law" as referred to in the second sentence of subparagraph (a), and thus stevedoring services would not be excluded from the Convention. On the other hand, a State party to the Convention that had ratified the Hague-Visby or the Hamburg Rules or the Multimodal Transport Convention would be subject to provisions of those Conventions appending certain benefits to independent contractors, such as stevedoring services. Where a stevedoring company was covered by such provisions, it would not be clear to what extent the second sentence of subparagraph (a) applied to it.
2. Referring to article 15 of the draft, he pointed out that even if, at the present stage of the discussion, persons who were covered by rules of law governing carriage were excluded from the projected Convention by article 1 (a), they might "re-enter" coverage by the Convention through the application of article 15 if they were found covered by provisions of the Conventions he had mentioned.
3. Mr. SWEENEY (United States of America) remarked that the Hamburg Rules and the Hague-Visby Rules protected the carrier and his "agents or servants". Because of potential coverage under other provisions of law, stevedores did not consider themselves to be either agents or servants, nor did they wish to be so classified. In the drafting of both the Hamburg Rules and the Visby amendments, an attempt had been made to define the independent contractor as including stevedores; in both cases, that attempt had failed, and as a consequence the independent contractor was protected by neither set of rules.
4. It was his impression that in the discussion the Committee had lost sight of the fact that the draft Convention was a non-carriage convention surrounded, as it were, by carriage conventions containing gaps which it proposed to remedy. Stevedores, he insisted, were not carriers, although they might seek some of the benefits accruing from that status.
5. Mr. HERBER (Germany) submitted that the phrase "responsible for the goods under applicable rules of law governing carriage" could pose problems of interpretation as far as the definition of the term "applicable rules" was concerned. In the interests of producing a clear text, and in the belief that there was a general understanding of what was signified by the term "carrier", he suggested the following wording, which was a shortened version of the Japanese proposal (A/CONF.152/C.1/L.19), for the second sentence of article 1 (a): "However, a person shall not be considered an operator whenever he is a carrier." His delegation considered the Japanese delegation's reference to multimodal transport operators to be superfluous, since they were obviously carriers, but he would not object to its inclusion.
6. Ms. JORGENSEN (Denmark) found the Commission's text quite adequate. She urged that, because the matters under consideration were of great importance, all proposals for amending the Commission's text should be submitted in writing and be fully substantiated. She asked what would be the position under the Convention as drafted of entities which did not describe themselves as stevedores but which performed stevedoring functions.
7. Mr. FILIPOVIĆ (Yugoslavia) remarked that it had long been his country's experience, when attempting to cater specifically for the concerns of stevedores in legislation on maritime and inland navigation, that stevedores tended to seek limited liability and other statutory benefits but declined attendant responsibilities. With regard to the German oral proposal, one effect of its adoption would probably be to reopen the debate concerning the meaning of the term "carrier". He believed that the Convention should define that term. His preference was for the Commission's text.
8. Mr. BONELL (Italy) said that while the German oral proposal seemed at first sight to have the merit of clarity, it might well prove on closer scrutiny to produce uncertainty. Like the previous speaker, he feared that its adoption would raise the question of what was meant by the term "carrier". He believed that the Japanese proposal might be approved in principle, subject to the Committee's later decision with regard to liability limits, following which it might be reviewed.

9. Miss VAN DER HORST (Netherlands), noting the absence of support for the proposal submitted by her delegation for the second sentence of article 1 (a) (A/CONF.152/C.1/L.23), withdrew it in favour of the oral proposal by Germany, which her Government would interpret as implying that a carrier who had under Hague-Visby Rules goods in his charge before the carriage began or after it had ended would not be considered as a terminal operator for the purposes of the draft Convention.
10. Mr. LARSEN (United States) said that his delegation could endorse the German oral proposal as best reflecting the clear distinction between carrier and non-carrier functions.
11. Mr. WALL (United Kingdom of Great Britain and Northern Ireland) endorsed the German oral proposal. Moreover, it removed the risk of confusion produced by the use of the terms "take in charge goods" and "responsible for the goods" in one and the same article.
12. Mr. LAVIÑA (Philippines) also approved the German oral proposal, while sharing the views expressed by the representatives of Yugoslavia and Italy.
13. The CHAIRMAN invited the Committee to vote on the German oral proposal for the second sentence of article 1 (a).
14. The proposal was adopted by 15 votes to 3.
15. In reply to a question by Mr. FILIPOVIĆ (Yugoslavia), the CHAIRMAN said that in accordance with rule 36 of the rules of procedure, States which abstained from voting were to be considered as not voting. For that reason, he had not called on those abstaining to declare themselves.
16. Mr. LAVIÑA (Philippines) felt that a count should be taken of the number of abstainers, since that seemed to be the intention of the rules of procedure.
17. Mr. BONELL (Italy) suggested that the Drafting Committee might be asked to formulate the second sentence of subparagraph (a) somewhat more elegantly, perhaps by reference to the preliminary draft convention on the subject prepared by the International Institute for the Unification of Private International Law (UNIDROIT).
18. Mr. HERBER (Germany) said he was not opposed to the Drafting Committee making cosmetic changes, but warned against the Committee referring to it questions with substantive connotations. Since the First Committee had adopted his delegation's oral proposal for the second sentence of article 1 (a), it withdrew the proposal for that sentence in paragraph 2 of document A/CONF.152/C.1/L.6.
19. Mr. LEBEDEV (Union of Soviet Socialist Republics) considered the Italian suggestion well founded. His delegation had abstained from voting on the German oral proposal because it found the Commission's text adequate to meet the definition requirement posed by the representative of Yugoslavia.
20. Mr. ZHAO Chengbi (China) agreed with the representative of Italy. His delegation had abstained in the vote on the German oral proposal because the meaning of the term "carrier" was unclear. It had to be defined because its interpretation varied from one legal system to another.
21. Mr. WALL (United Kingdom) suggested that delegations wishing to make improvements to the text of the second sentence of subparagraph (a) should consult informally and present an agreed text to the Committee. He pointed out that the Drafting Committee was not supposed to deal with substantive issues.
22. Mr. RUSTAND (Sweden) said that with the adoption of the German oral proposal a definition of the term "carrier" was urgently needed.
23. The CHAIRMAN said that the definition of the term "carrier" might be discussed later on the basis of written proposals.
24. He said that if there was no objection, he would take it that the Committee approved the text of article 1 (a) reproduced in document A/CONF.152/5, as amended orally by Germany, for referral to the Drafting Committee.
25. It was so decided.

Article 1 (b) (A/CONF.152/C.1/L.4)

26. Mr. LARSEN (United States) introduced his delegation's proposal for subparagraph (b) (A/CONF.152/C.1/L.4). He said that the draft Convention dealt with the transport of goods, not with the means of transporting them. Goods packed in containers should be covered by the Convention, but empty containers in storage yards, or in trucks and railroad cars, should not. It was necessary to make that clear.
27. Mr. HERBER (Germany) thought it was best not to make exceptions. Containers which were handled or carried as cargo should be treated under the terms of the Convention; compensation should therefore be payable for empty containers which were damaged in transit. The proposal would make an unwarranted exception for certain kinds of terminal operators.
28. Mr. LAVIÑA (Philippines) agreed. It was already clear that the goods covered by the Commission's draft included goods packed in containers, but not empty containers.

29. Mr. WALL (United Kingdom) preferred subparagraph (b) as it stood. There would be some inconsistency in adding a reference to storage yards for empty containers in subparagraph (b) when geographical distinctions of that kind had been rejected for subparagraph (a).
30. Mr. ROMAN (Belgium) observed that operators accepted packed containers without inspecting their contents. If goods were damaged while in transit, it would be difficult for the operator to prove that he was not liable.
31. Mr. OCHIAI (Japan) said that the United States proposal would raise difficulties with regard to the application of article 10 (3). It would be uncertain whether an operator who met the cost of repairs to empty containers could exercise the right of retention provided by that article.
32. The CHAIRMAN said that the Committee's understanding was that the term "goods" did not exclude empty containers, such as containers returning to their starting point after unloading.
33. Mr. BONELL (Italy) and Ms. JORGENSEN (Denmark) opposed the United States proposal.
34. Mr. LARSEN (United States) noted the difference of views in the Committee as to whether empty containers in storage yards were goods for the purposes of the draft Convention. His own delegation's view was that they were not.
35. The CHAIRMAN said that if there were no objection, he would take it that the Committee approved the text of article 1 (b) as it stood, for referral to the Drafting Committee.
36. It was so decided.

Article 1 (c) (A/CONF.152/C.1/L.6, L.23)

37. The CHAIRMAN said that the Committee need not consider the proposal by Germany to amend subparagraph (c) (A/CONF.152/C.1/L.6, para. 3) since it was simply consequential upon its proposal for the first sentence of subparagraph (a), which had been withdrawn.
38. Miss VAN DER HORST (Netherlands), referring to her delegation's proposal for article 1 (c) in document A/CONF.152/C.1/L.23, said that its purpose was to make it clear that the international carriage of the goods took place according to one contract only. Consignments carried between two domestic points and awaiting carriage abroad under a second contract would be excluded.
39. The CHAIRMAN recalled that the word "identified" had been included in the Commission's draft for that very reason, namely that the operator must be able to verify, by glancing at the goods, whether they were intended for international carriage. He should not be required to consult the contract of carriage.
40. Mr. FILIPOVIĆ (Yugoslavia) endorsed the principle underlying the Netherlands proposal. It was at the initial stage, the stage when the contract or documents were drawn up, that the intention of international carriage was created. In some cases the goods might not actually be carried to their destination - for instance, they might be stolen in transit.
41. Mr. WALL (United Kingdom) objected to the Netherlands proposal. A reference to the contract of carriage would make it impossible for the operator to ascertain whether he was liable for the goods.
42. Mr. SCHROCK (Germany) agreed that it would be problematic to include in the draft a reference to the contract as such, since the scope of the contract was not verifiable by the operator by means of any documents or markings on the goods. In paragraph 2 of its written comments on the draft (A/CONF.152/7) his Government had argued that purely domestic legs of segmented international transport, if identified as being subject to individual domestic contracts, should not be governed by the Convention. His delegation could accept subparagraph (c) as it stood.
43. Mr. HORNBY (Canada) objected to the exclusion of domestic segments from the scope of the Convention. There should be one rule to cover all transport, to be determined by the ultimate destination and to cover both combined transport operations and segmented contracts. He opposed the proposal of the Netherlands delegation, whose interpretation of subparagraph (c) differed from that of the German delegation.
44. Mr. LARSEN (United States of America) also opposed the Netherlands proposal. Including a reference to the contract would raise undue complications.
45. Mr. LAVIÑA (Philippines) agreed. However, the present wording of subparagraph (c) was awkward and called for stylistic improvement.
46. Miss VAN DER HORST (Netherlands) withdrew her delegation's proposal.
47. Mr. ZHAO Chengbi (China) said that the consideration of article 1 (c) led his delegation to question whether the title of the draft Convention was appropriate. Its views on that subject were set out in its written comments (A/CONF.152/7/Add.2). The title of the Convention should be amended to read "Convention on the Liability of Operators of Transport Terminals in International Carriage of Goods". Transport in the international carriage of goods could be interpreted more widely than transport in international trade and would thus facilitate the application of the Convention to the transport of non-trade goods, such as goods for purposes of aid, exhibition and

so forth, which accounted for a large part of international carriage of goods. During the discussion of article 1 of the draft Convention at the twenty-second session of the United Nations Commission on International Trade Law, most countries had taken the view that the term "goods", as used in the Convention, included non-trade goods. The task of regulating the international transport of goods was covered by many conventions, but there was no convention covering transport terminals and it was appropriate for that gap to be filled. The title proposed by China would be appropriate for the purpose.

48. The CHAIRMAN said that, although the content of article 1 (c) was related to the title of the Convention, it would be necessary to consider the sum of all its articles in order to be sure that the international carriage element prevailed over that of international trade. He felt it would be wiser to take up that question after all the substantive articles of the draft had been examined. He therefore suggested that consideration of the Chinese proposal for the title of the Convention should be deferred.

49. Mr. ZHAO Chengbi (China) agreed.

50. Mr. SCHROCK (Germany) said that his delegation's proposal for an additional sentence in article 1 (A/CONF.152/C.1/L.6, para. 4) was relevant to the discussion of article 1 (c). The proposal had emerged from discussions held with the operators of transport terminals concerned not with maritime carriage but with carriage by rail or road. According to draft article 1 (c), carriage was to be considered as international if the places of departure and destination of the goods were identified as being located in two different States. The transport documents which accompanied goods in such a situation would constitute a decisive aid towards such identification. His delegation therefore believed that it would be helpful if the Convention stipulated that the use of international transport documents such as CMR or CIM documents constituted a presumption of international carriage and that the use of national transport documents implied the opposite. His delegation now recognized that the proposal set forth a legal rule which did not perhaps fit systematically into article 1. It was ready, therefore, to leave a decision on its place in the Convention either to the First Committee or to the Drafting Committee. It nevertheless wished to submit the substance of its proposal to the Committee for consideration.

51. Mr. FILIPOVIĆ (Yugoslavia) supported the German proposals.

52. Mr. MUTZ (Observer, International Organization for Railway Transport) agreed with the idea in the first part of the proposal, namely that the existence of an international transport document should give rise to a presumption of international carriage, on the ground that it would facilitate the implementation of the Convention. He had difficulty in endorsing the second part, which might enable the operator of a transport terminal to escape liability under the Convention.

53. Mr. HORNBY (Canada) said that the presumption of international carriage must be rebuttable. To say that goods accompanied by a domestic transport document should be deemed not to be involved in international carriage would offer operators of transport terminals an opportunity to escape liability. The choice of document should be only one factor in determining whether carriage was or was not international. If it was made clear that the presumption was rebuttable, he could support the German proposal.

54. Mr. WALL (United Kingdom) said that he had considerable sympathy for the German proposal. Anything which would help the terminal operator to identify his liability under the Convention constituted a benefit. The method suggested, however, was only one of a number of ways in which that could be done. The proposed addition might not be appropriate in article 1 and a better location could perhaps be found for it. While it should not constitute an exclusive rule it could be regarded as a helpful step forward.

55. Mr. SWEENEY (United States) said that he was satisfied with article 1 (c) as it stood. One immediate difficulty which his delegation had with the German proposal was that transport documents were frequently not identified as domestic or international. A bill of lading, for example, was simply a bill of lading. Road and rail services in and between the United States, Mexico and Canada did not use the documents prescribed in the international conventions, and the transport documents which were employed did not identify themselves as being national or international. Moreover, the requirement that an international transport document should be "known to the operator" placed an impossible burden of proof on shippers. He agreed with the Canadian representative that the presumption must be rebuttable, but the difficulty could be removed entirely by deleting the clause "which is known to the operator" from both parts of the German proposal. The highly subjective nature of that element of proof would thus be eliminated. In his view, however, the proposal as a whole was made unnecessary by the objective test constituted by article 1 (c) as it stood.

56. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the idea behind the German proposal, of making the distinction between international and domestic carriage more readily apparent, was attractive, but spelling it out in the Convention posed serious problems. The distinction between international and domestic documents was uncertain. Documents established by international organizations and labelled as such were also used domestically, particularly in the framework of multimodal transport. To consider such carriage as international merely because the document used bore a stamp reflecting its international origin could be quite risky, particularly for large countries. Moreover, the very concept of a "document" was so broad and complex that its introduction into the article could lead to additional difficulties. The question whether carriage was or was not international should be governed by the criterion set out in

article 1 (c), without the introduction of any additional test, nor should such a test be included as an independent article or paragraph in some other part of the Convention. To do that would merely make its implementation more complicated.

57. Mr. LAVIÑA (Philippines) said that he too felt that the German proposal would complicate the issue. What made carriage international was the fact that it took place between two different States. Using as a test documents which were not readily identifiable would only lead to more complications. Article 1 (c) set forth a valid and logical rule and should remain as it was.

58. Mr. WALL (United Kingdom) said that his delegation was generally content with the definition in article 1 (c) as it stood. However, it was important that a terminal operator should be given a clear indication that he was taking in charge goods that carried with them a liability to which the Convention applied. While he could accept some of the arguments concerning the subjective language of the proposed addition, he felt that the use of the words "are identified" in the original wording already introduced a subjective element. The Convention should include some indication of how that identification was to be carried out. Some form of document or notice should have to be delivered to the terminal operator to give him clear notice that he could be liable under the Convention for the goods in question. The point was important and his delegation was therefore ready to support the German proposal, though perhaps not as a part of article 1 or precisely in its present form. A terminal operator must be made well aware that he was accepting goods to which a liability would attach.

59. Mr. RUSTAND (Sweden) said that although some clarification of the provision in article 1 (c) might be necessary, he did not think it should be on the lines suggested in the German proposal. When the subparagraph referred to the identification of the place of destination of the goods it was not clear who was to make that identification. Presumably it would be done by the operator, or by his staff on his behalf, but that was not apparent from the text. He agreed with the point made by the representative of the United Kingdom that the transport document should be only one means of establishing that goods were to be taken abroad. Labelling and marking were other means. Regarding the question of notice to the operator raised by the the United Kingdom representative, he observed that the normal procedure was not for the documentation to be presented to the operator when the goods were delivered to the terminal but afterwards, when the owner of the goods collected them. One way of clarifying the meaning of the words "are identified" would be to add after those words the words "or reasonably ought to have been identified". It would then be possible to apply the "reasonable man" test: for example, if the goods were clearly marked, a court would not accept a claim by the terminal operator that he had not identified them as being for international carriage and should therefore escape liability. If his oral proposal was not acceptable to the Committee, he was ready to accept the text as it stood.

60. Mr. SCHROCK (Germany) said that his delegation's intention was that the presumption of international carriage should be rebuttable. It withdrew the second half of its proposal. The first part of the proposal was not intended to detract from the substance of subparagraph (c), but merely to add something to cover the case of there being transport documents known to the operator which clearly indicated the international nature of the carriage, particularly where there might be false markings on boxes or containers.

61. Mr. ASTAPENKO (Byelorussian Soviet Socialist Republic) said that his delegation found subparagraph (c) entirely balanced. It endorsed the views of the United States and the Soviet Union that the text should remain as it stood. It shared the doubts expressed about the German proposal by other delegations, and particularly the views advanced by Sweden. It based its position on the Russian version of article 1 (c), which made it quite clear that the operator was the person who actually ascertained whether the carriage was international or not.

62. Mr. ZHAO Chengbi (China) said that his delegation could not support the German proposal because of the difficulty of distinguishing domestic carriage from international carriage, particularly by means of documentation. Also, the aim of the draft Convention was to lay down uniform rules. The Committee should take care not to exclude too many cases lest the scope of the Convention became too limited. The Chinese delegation therefore approved subparagraph (c) as it stood.

63. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that his delegation also approved subparagraph (c) as it stood.

64. Mr. WALL (United Kingdom) referred to the point raised by the delegation of the Byelorussian Soviet Socialist Republic about who, according to the text of article 1 (c), ascertained whether the carriage was international. Having compared the English, French, Russian and Spanish versions, his delegation found that the former two gave a somewhat different interpretation from the latter.

65. The CHAIRMAN said that discrepancies of that nature could be left to the Drafting Committee to resolve.

66. He now intended to invite the Committee to vote on the first part of the German proposal in paragraph 4 of document A/CONF.152/C.1/L.6. When a vote had been taken earlier in the meeting, the Philippines delegation had suggested after the vote that abstentions should be counted. He wondered whether there was any support for that proposal, bearing in mind that the counting of abstentions was not provided for in the rules of procedure and that abstentions did not affect the result of the vote.

67. Mr. LAVIÑA (Philippines) observed that the practice throughout the United Nations system was that abstentions were counted. It was of course understood that they did not affect the result of the vote, but they did indicate the preferences of a proportion of participants.

68. The CHAIRMAN said that it had been pointed out by the Secretariat that abstentions had been counted on several occasions during the United Nations Conference on Contracts for the International Sale of Goods in 1980. They could consequently be counted at the present Conference.

69. Mr. HORNBY (Canada), speaking on a point of order, said that some delegations were clearly opposed to the first part of the German proposal and others had indicated that they could support it if it was amended. The German delegation had acknowledged that the intention of the first part of its proposal was that the presumption of international carriage was to be a rebuttable one, but some redrafting would be needed to make that clear. Consequently, if asked to vote on the first part of the German proposal as it stood, his delegation would have to oppose it, but it might be able to accept an amended formula. Given the difficulty of redrafting the proposal in the Committee, the Canadian delegation would be prepared to accept forthwith the principle contained in the first part of the German proposal on the understanding that it would be left to the Drafting Committee to ensure that it was worded in such a way as to reflect the notion of a rebuttable presumption.

70. The CHAIRMAN invited the German delegation to clarify the first part of its proposal along the lines advocated by the Canadian representative.

71. Mr. SCHROCK (Germany) said that, on the understanding that the Drafting Committee would improve the wording of the proposal and that the Committee would vote only on its substance, his delegation amended the first part of its proposal to read:

"If the goods are accompanied by an international transport document which is known to the operator, it shall prima facie be presumed that such goods are involved in international carriage."

72. Mr. LAVIÑA (Philippines) said that his delegation considered that the revised proposal did not help to define international carriage. It preferred the text of subparagraph (c) as it stood. Furthermore, it could not agree to the idea that a text which had not been approved by the Committee should be passed to the Drafting Committee for consideration. That would violate rule 47 of the rules of procedure.

73. Mr. TARKO (Austria) said that his delegation did not understand what was meant by a prima facie presumption. It was satisfied with subparagraph (c) as it stood, particularly because of its objectivity and flexibility. If the Committee approved the revised German proposal, his delegation would ask for clarification of the notion of a prima facie presumption.

74. The CHAIRMAN observed that the term "prima facie" was the sort of formulation that could be reviewed by the Drafting Committee.

75. Mr. WALL (United Kingdom) said that his delegation opposed the revised proposal. It could, however, support one element of it and wished to inform the Committee that it was considering making a proposal for a different part of the draft Convention which would read:

"If a document is presented to the terminal operator indicating that the goods are involved in international carriage, that should be regarded as prima facie evidence that the provisions of this Convention apply to such goods."

76. Mr. OCHIAI (Japan) said that his delegation could not support the revised wording suggested by Germany unless a clear definition of the term "international transport" was included in the Convention. In his view the expressions "international transport" and "international carriage" were tautological.

77. The CHAIRMAN invited the Committee to vote on the first part of the German proposal in paragraph 4 of document A/CONF.152/C.1/L.6 as orally amended by its sponsor, on the understanding that it would be left to the Drafting Committee to improve the wording where necessary.

78. The proposal was rejected by 25 votes to 5, with 1 abstention.

79. The CHAIRMAN said that if there was no objection, he would take it that the Committee approved the text of article 1 (c) as it stood, for referral to the Drafting Committee.

80. It was so decided.

The meeting rose at 5.30 p.m.

3rd meeting
Thursday, 4 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.3

Article 1 (d) (A/CONF.152/C.1/L.23)

1. Miss VAN DER HORST (Netherlands), introducing her delegations's proposal (A/CONF.152/C.1/L.23), said that in her country many terminal operators performed other services in addition to the physical handling of goods: for example, they often financed certain services in relation to the transport of goods. During the meeting of the UNCITRAL working group, however, it had been agreed that the term "transport-related services" concerned only the physical handling of the goods. Her Government believed that the point should be made clear in the article itself.
2. Mr. LAVIÑA (Philippines) supported the Netherlands proposal.
3. Mr. WALL (United Kingdom of Great Britain and Northern Ireland) said that his delegation had considerable sympathy with the Netherlands proposal, but thought that, since the proposal set forth an exhaustive list of transport-related services, it would be necessary to examine the proposed list to determine whether it was complete. In addition, it was his understanding that certain activities, such as quarantine measures, which involved handling of the goods but which were in fact a public function undertaken by the authorities, were not to be covered by the Convention.
4. Mr. LARSEN (United States of America) agreed that the definition of transport-related services should not include financial services. However, his delegation did not wish to limit the activities of terminal operators which certainly involved more than physical handling. It was therefore in favour of keeping the existing definition, which would cover not only current services but also those which might be provided by terminal operators in the future.
5. Mr. ROMAN (Belgium) supported the Netherlands proposal. It was essential that the draft Convention should be limited to the physical handling of goods.
6. Mr. LEBEDEV (Union of Soviet Socialist Republics) noted that the draft Convention used the word "includes", which indicated that the list of services mentioned was not exhaustive and was given only for the purpose of illustration. The Netherlands proposal used the word "means", which could give the impression that the paragraph contained an exhaustive list of the operations involved in the physical handling of goods. In his delegation's opinion, a broader definition, such as would result from the word "includes", would be preferable.
7. Mr. LAVIÑA (Philippines) supported the existing wording of the paragraph. It was necessary to have as broad a definition as possible, and the word "includes" should therefore be kept.
8. The CHAIRMAN invited the Committee to vote on the Netherlands proposal on article 1 (d) (A/CONF.152/C.1/L.23).
9. The Netherlands proposal was rejected by 11 votes to 3, with 3 abstentions.

Article 1 (e) and (f)

10. Mr. RUSTAND (Sweden) said that the definitions in the two subparagraphs seemed to exclude any possibility of oral notices or requests. His Government considered it preferable to leave it to the parties involved to determine the form in which a notice should be given or a request made, in accordance with good commercial practice and their own interests. If the draft Convention required the use of a specific form, that would cause confusion in a number of legal systems where it was up to the courts to decide on the value of evidence presented in writing or orally. He was not making a proposal to delete the subparagraphs in question but thought that the record should state that some delegations had difficulties with the definitions.
11. Mr. TARKO (Austria) supported the view expressed by the Swedish representative. There was also the question of what was meant by "a record of information". During a lengthy discussion of the matter at a meeting of UNCITRAL in 1989, various delegations had expressed different views on the meaning of that term. In his opinion, it would therefore be preferable to delete the two subparagraphs in question.
12. Mr. WALL (United Kingdom) said that his delegation was satisfied with the existing wording of subparagraphs (e) and (f) but took note of the concern expressed by the delegations of Austria and Sweden.
13. Mr. HERBER (Germany) shared the concern expressed by the representatives of Austria and Sweden. He thought that it would be possible to give a notice or to make a request orally and that there was consequently no need for a definition of the terms "notice" and "request" in the draft Convention. His delegation therefore proposed that the two subparagraphs should be deleted.
14. Mr. LAVIÑA (Philippines), noting that the matter had been thoroughly discussed at the most recent session of the UNCITRAL Working Group, said that the majority of delegations had supported the two definitions in question, as he did himself. He appreciated the fact that in some domestic legal systems it was possible to give a notice or make a request orally, but thought that the terms should be defined in the draft Convention in order to have a uniform rule.
15. Mr. BONELL (Italy) thought that subparagraphs (e) and (f) permitted oral notices or requests and simply sought to ensure that there was some sort of record of notices given or requests made orally in order to avoid unnecessary litigation. Given the current state of technology, in particular computerized communication systems, he did not think that the provisions in question

would constitute a heavy burden on the parties concerned. In that connection, he referred to other related international instruments, which seemed to adopt the same approach. His delegation was in favour of keeping the existing text of the two subparagraphs.

16. Mr. FILIPOVIĆ (Yugoslavia) thought that the two definitions were not necessary and should be deleted.

17. Mr. MORAN (Spain) was in favour of keeping subparagraphs (e) and (f). Referring to article 11, he said that it was essential for the draft Convention to have a system for notices concerning loss or damage. The need to prove that a notice had been given must also be borne in mind. Consequently, the two subparagraphs were necessary and should be kept.

18. Mr. RUSTAND (Sweden) said that in Sweden, as in many other countries, the law required that the written form should be employed only where important transactions such as the transfer of real estate or the drafting of a will were involved. In cases of disputes over other transactions, it was thought best to leave it to the parties concerned to prove their case in court on the basis of either written or oral evidence.

19. In claims under the draft Convention, it would normally be for the operator, carrier or cargo-owner to produce some form of documentation to prove that he had made the notice or request concerned. However, such documentation might well be mislaid or lost, and it would be unsatisfactory if the party involved could not then call upon the testimony of witnesses to prove that the notice or request had in fact been made. To require that such notices or requests be made in a specific form would in his view be unduly restrictive and would tie the hands of judges when cases were brought before a court.

20. The CHAIRMAN invited the Committee to vote on the German oral proposal to delete subparagraphs (e) and (f) of article 1.

21. The German oral proposal was rejected by 18 votes to 6, with 3 abstentions.

Article 1, proposal for new subparagraphs

22. Mr. LARSEN (United States), introducing his delegation's proposal (A/CONF.152/C.1/L.5), said there were a number of clauses in the Convention which made reference to "declarations in writing" by the operator. In view of the fact that "writing" in today's world was often electronic, his delegation believed that a specific indication to that effect should be included.

23. Mr. ABASCAL (Mexico) pointed out that his delegation had already submitted a proposal to the Secretariat in connection with the suggestion made in paragraph 3 of the comments by the International Maritime Committee (A/CONF.1/152/7/Add.2) that article 4 (4) should use the terminology which already appeared in the revised Incoterms 1990, to the effect that a document could be replaced by an "equivalent electronic data interchange message". Although in principle he supported the United States proposal, it might be preferable, for the sake of uniformity, to adopt the wording used in Incoterms 1990.

24. Mr. ZHAO Chengbi (China) supported the United States proposal. Since the Convention was likely to remain in force for many years to come, provision should be made not only for more traditional forms of writing, but also for more advanced forms. The revised Incoterms 1990, with which all delegations would be familiar, stressed the importance of electronic messages as a tool to promote the development of international trade.

25. Mr. OCHIAI (Japan) supported the United States proposal.

26. Mr. RUSTAND (Sweden) said that under the Swedish legal system, it would in any event be up to the courts to decide whether "writing" was to be interpreted as including electronic writing, and in practice they would no doubt do so. Thus for Sweden the United States proposal would be superfluous.

27. Mr. HORNBY (Canada) said that electronic writing was already an acceptable form of writing in most States, so that the addition was not strictly necessary. Generally, it was inadvisable to add to a text definitions of terms that were already well understood, since to do so might lead to problems of interpretation. For example, the addition might be taken to imply that where electronic writing was not specifically referred to in other instruments, it was therefore excluded. The Convention should be kept as flexible as possible.

28. Mr. LEBEDEV (Soviet Union) supported that view. Technology was constantly evolving, and in the not too distant future new forms of writing might well be introduced. Unless article 1 was to include a general definition covering all possible forms that writing might take, it would be best not to single out one particular form for emphasis.

29. Mr. LAVIÑA (Philippines) pointed out that the United States text contained the word "includes", implying that other forms besides electronic writing were covered: its intent was merely to ensure that electronic writing was not excluded. Article 1 (8) of the Hamburg Rules already contained a definition of "writing" as including, *inter alia*, telegram and telex. He saw no harm in adding the United States text, since it would dispel any possible doubts on the issue and would be of help to some States.

30. Mr. WALL (United Kingdom) agreed with the representatives of Canada, Sweden, and the Soviet Union that the proposed definition was neither necessary nor helpful.

31. Mr. ABASCAL (Mexico) noted that the definition was not exclusive; in addition, it would have the merit of covering any new forms of writing that might be developed in the future. Whatever the outcome of the present discussion, he would like his own delegation's proposal in relation to article 4 (3) to be taken up at a later stage.

32. Mr. ROJANAPHRUK (Thailand) said that even for States where it was left to domestic courts to interpret the term, it would be an advantage to include such a definition, since then the courts would have no alternative but to accept it. Although electronic writing was already regarded as acceptable, there was still no harm in including the definition, which in any case was not exhaustive. He supported the United States proposal.

33. Mr. BONELL (Italy) said that while he appreciated that any definition was bound to have certain disadvantages, he too had some sympathy for the United States proposal. It was clear from the wording of the text that it was not in fact intended as a definition, but simply a reminder that electronic writing, the most important and frequently used means of communication in the context of the Convention, was covered by the term "writing". The Committee should also bear in mind that a definition of "writing" was included in a whole series of earlier conventions, such as the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927, the New York Convention, 1958, and the Geneva Convention, 1961, not to mention the 1978 Convention (the Hamburg Rules). For the Convention now under discussion to omit such a definition, therefore, might lead to difficulties of interpretation.

34. However, should the majority of the Committee be opposed to including such a text, he would strongly support the Mexican proposal that a reference be made to the Incoterms formulation in the context of article 4.

35. The CHAIRMAN noted that a number of earlier instruments specifically defined the means of communication (telegram, telex) covered by the term "writing". More recent Conventions, notably the two UNIDROIT Conventions (Ottawa 1988), included the same form of words as was used in subparagraphs (e) and (f).

36. Mr. BERGSTEN (Executive Secretary) said that "writing" was explicitly mentioned in the draft Convention in only two places, once in the substantive portion (article 12 (4)) and once in the final clauses (article 25 (1)). A definition in article 1 would, of course, apply to the final clauses as well as to the substantive part. In addition, three other articles, namely 1 (e), 1 (f) and 4 (3), had wording which was similar to that used in other instruments and which was intended to cover computer-to-computer messages.

37. Mr. ROMAN (Belgium) said that his delegation would not, in principle, be opposed to the United States proposal if sufficient guarantees of authenticity were provided.

38. Mr. RAMBERG (Observer, International Maritime Committee) remarked that adoption of the United States proposal would in no sense invalidate the suggestion made by the Mexican representative with regard to article 4 (3). The expansion of electronic data interchange and frequent replacement of written documents by electronic messages made it necessary to indicate with absolute clarity that the term "document" included such new methods of communication. Referring to the 1990 revision of Incoterms, he suggested that the proposed addition to article 4 (3) might read as follows "... and may be replaced by an equivalent electronic data interchange message".

39. Mr. BONELL (Italy) said that if the words "declaration in writing" in article 12 (4) were replaced by the word "notice", a definition of which had already been approved in article 1 (e), and if article 4 (3) were amended along the lines suggested by the previous speaker, there would be no need for a definition of "writing".

40. Mr. LAVIÑA (Philippines), noting that almost all existing conventions included a definition of "writing", expressed the view that, for the sake of uniformity, a definition should be included in article 1.

41. Mr. LARSEN (United States), again emphasizing the importance of the question of principle raised in his delegation's proposal, said that he was prepared to go along with the idea just put forward by the Italian representative and to leave the matter in abeyance pending consideration of article 12.

Article 1 (a) (continued) (A/CONF.152/C.1/L.29)

42. The CHAIRMAN, drawing attention to a proposal by the Belgian delegation concerning article 1 (a) (A/CONF.152/C.1/L.29), said that, since the proposal had been circulated after the Committee's adoption of article 1 (a), a decision to consider it would fall under rule 33 of the rules of procedure, which required a two-thirds majority of the representatives present and voting.

43. Mr. WALL (United Kingdom) said that undue haste in adopting decisions, as well as any tendency to apply procedural rules too strictly, was to be deprecated. The practice of taking indicative votes was a useful means of sounding a committee's general feeling. Rather than take a formal vote requiring a two-thirds majority, the Chairman might perhaps ascertain whether any delegation objected to considering the Belgian proposal. His delegation, for one, had no such objection.

44. The CHAIRMAN said that the Committee had adopted its rules of procedure and had to comply with them. It went without saying that procedural rules would be applied in a flexible manner.

45. Mr. ROMAN (Belgium) said that his delegation endorsed the views just expressed by the representative of the United Kingdom. It was surprising to note that the Committee was required to vote on some proposals while others were forwarded directly to the Drafting Committee. He stressed the importance of his delegation's proposal and pointed out that the Committee had not yet completed its consideration of article 1.

46. Mr. BONELL (Italy) expressed unconditional support for the Chairman's ruling.

47. The CHAIRMAN invited the Committee to vote on the proposal to reopen the discussion on article 1 (a).

48. There were 16 votes in favour, 12 against and 6 abstentions. Having failed to obtain the required two-thirds majority, the proposal was not adopted.

49. Mr. LAVIÑA (Philippines), speaking in explanation of vote, said that his delegation had abstained because, while recognizing that it was the Chairman's duty to apply the rules of procedure, it shared the United Kingdom representative's view that formal votes should be avoided where possible in the interests of achieving consensus. If an indicative vote had been taken, the Belgian proposal could have been discussed notwithstanding its late submission.

Article 1, proposals for new subparagraphs (continued)

50. Mr. RUSTAND (Sweden), introducing his delegation's proposal to add a definition of "carrier" in article 1 (A/CONF.152/C.1/L.28), said that the underlining in the text should be deleted. It was suggested that the proposed definition should be inserted as subparagraph (b), the subsequent subparagraphs being renumbered accordingly.

51. The proposed definition had been prompted by the amendments to the second sentence of article 1 (a) and the introduction of the word "carrier". If there were no definition of the concept of carrier, it would be unclear whether the word referred to the performing carrier or the contracting carrier. The Hamburg Rules provided guidance in that respect. Secondly, it would be unclear whether it referred to the servants, agents and other persons used by the carrier for the performance of the carriage contract. The Multimodal Convention provided the necessary guidance in that regard, since the draft Convention now under consideration was intended to cover all goods irrespective of the mode of transport. Thirdly, a definition of the term "carrier" would avoid the problem of conflicting definitions in the various transport conventions and contribute in some measure to the unification of law. He drew attention to the different conceptions prevailing in different countries in relation to the Hague-Visby Rules and the Hamburg Rules. Finally, without such a definition, the somewhat hastily adopted amendment to the last sentence of article 1 (a) would make the draft Convention less attractive to many countries that might otherwise have acceded to it.

52. The CHAIRMAN invited the Conference to consider whether a definition of the term "carrier" was needed or whether it was adequately defined in existing conventions and domestic legislation.

53. Mr. FILIPOVIĆ (Yugoslavia) expressed support for the very broad definition of "carrier" in the Swedish proposal, covering the carrier's servants, agents and independent contractors. The amendments introduced to article 1 (a) at the previous meeting would otherwise have left a gap in the draft Convention, in which the definition of "carrier" would have been open to interpretation.

54. Mr. SWEENEY (United States) said that his delegation would have difficulty in accepting a definition of "carrier" at the present stage of the deliberations. The proposed Convention was not a carriage convention; it sought to deal with the problem of a period not covered by existing carriage conventions that was an essential stage in the movement of goods in international trade. The Swedish proposal would add yet another definition to existing definitions in the various transport conventions and was indeed at variance with some of them. For that reason he would prefer to avoid any definition of "carrier". However, if some definition was considered necessary as a result of the amendments to article 1 (a) adopted at the previous meeting, he would suggest that the relevant conventions covering the different modes of transport should be identified and that, for the purposes of the draft Convention, a carrier should be deemed to be whosoever was so defined in terms of those conventions, with the possible addition of the Hamburg Rules and the Multimodal Convention, which were expected to enter into force in the near future. Adding that the term "other persons" in the Swedish proposal presumably referred to independent contractors, he reminded the Conference that the liability of independent contractors had been considered during the discussions on the Hague-Visby Rules and the Hamburg Rules but had been rejected.

55. Mr. WALL (United Kingdom) said that he appreciated the arguments put forward by the United States delegation, but considered it appropriate to include some single, broad definition of "carrier" in article 1, now that the word appeared in article 1 (a). He suggested that informal consultations should be held to work out a satisfactory alternative to the Swedish proposal, along the lines of the United States delegation's suggestion that a definition should be based on the definitions contained in existing conventions.

56. Ms. SISULA-TULOKAS (Finland) said that her delegation, representing a country with the same legal background as Sweden, supported the Swedish proposal. The fact that definitions existed in a variety of existing or future conventions did not dispose of the problem at hand.

57. Mr. BONELL (Italy) expressed support for the United Kingdom suggestion to seek a different definition of "carrier" for the purposes of the draft Convention, along the lines suggested by the United States delegation.

58. The CHAIRMAN, summing up the discussion, said that the Conference had before it a Swedish proposal which had been supported. The United States delegation had put forward the idea, which had also received support, that any definition should merely refer to conventions already in force. He therefore suggested that a vote should be taken on the Swedish proposal, leaving open the possibility for delegations wishing to draft a definition based on existing conventions to hold consultations and submit an alternative proposal.

59. Mr. HERBER (Germany) said that his delegation, like the United States delegation, was opposed to the definition contained in the Swedish proposal; it had indeed some doubts as to whether an acceptable definition could be found. He suggested that a vote should be deferred until the conclusions of the informal working group proposed by the United Kingdom delegation were known.

60. The CHAIRMAN said he took it that the Committee agreed to the proposal by the United Kingdom delegation to set up a working group to determine whether a definition of "carrier" should be included and, if so, how it might be drafted. The Committee would return to the discussion when the working group had completed its work.

61. It was so agreed.

62. Mr. WALL (United Kingdom) said that both Mexico and the International Road Transport Union (IRU) had proposed that there should be a definition of the term "person". The standard definition was that the term included both physical and juridical persons; his delegation considered that there would be no harm in including such a definition in the draft Convention.

63. Mr. ABASCAL (Mexico) said that the position of his Government was that there was some uncertainty, not about the strict definition of the term "person", but about the "person entitled to take delivery of the goods", an expression used in several articles of the draft Convention. However, because of the difficulty of formulating a definition and for reasons of time, Mexico had decided not to submit a specific proposal.

64. The CHAIRMAN said that the Mexican representative's explanation supported his own conclusion, which was in conformity with the rules of procedure, that it would not be advisable to reopen the debate every time a proposal or a new idea was put forward. He reminded the Committee that observations made by Governments between the forty-fourth session of the United Nations General Assembly and the convening of the current session of the Conference would be examined only if submitted in writing at the Conference itself.

65. Mr. WALL (United Kingdom) said that his delegation wished to give formal notice that the United Kingdom would submit a proposal concerning the definition of the term "person" and requested that the discussion on article 1 should be left open to allow the Conference time to consider that proposal.

66. The CHAIRMAN confirmed that, since it was the first time that that particular question was being discussed, the debate on article 1 would remain open for a discussion on the definition of the term "person". He requested the United Kingdom delegation to ensure that any proposals were received in good time.

67. Mr. WALL (United Kingdom) said that his delegation reserved the right to introduce a proposal at any time during the Conference as and when the United Kingdom deemed it appropriate to do so.

68. Mr. SOLIMAN (Egypt) drew attention to certain drafting inconsistencies between the Arabic and English versions of article 1 (a), (d), (e) and (f). The Egyptian delegation had submitted written amendments to the Arabic text, which it hoped would be taken into account.

69. The CHAIRMAN said that the Drafting Committee would be advised of the inconsistencies between the Arabic and English versions.

The meeting rose at 12.30 p.m.

4th meeting
Thursday, 4 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.4

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 3 (A/CONF.152/C.1/L.9, L.33, L.34, L.36)

1. The CHAIRMAN explained that the proposal by Germany in document A/CONF.152/C.1/L.9 was obsolete, since it was consequential upon the German proposal for the first sentence of article 1 (a), which had been withdrawn (A/CONF.152/C.1/SR.1, para. 12).

2. Mr. ROMAN (Belgium), introducing the proposal in document A/CONF.152/C.1/L.33, said that its object was to place a time-limit on the responsibility of the operator for the goods in the event that the person entitled to take delivery of them failed to do so.

3. Mr. MORAN (Spain) supported the idea of such a time-limit but pointed out that the provision in draft article 10 for a right of retention carried that implication since no operator would detain goods in the terminal for such a long period that the cost to him became prohibitive. It therefore seemed unnecessary to prescribe a time-limit in article 3.
4. Ms. SISULA-TULOKAS (Finland) welcomed the addition proposed by Belgium, which would clarify the point at which the operator's responsibility ceased.
5. Mr. LARSEN (United States of America) agreed with the representative of Spain that article 10 had a bearing on the matter. His delegation had submitted a proposal for a new paragraph to article 10 (A/CONF.152/C.1/L.15) which would have the same effect as the Belgian proposal, by establishing a time-limit after which the goods could be considered to be abandoned and be taken into the operator's possession. He suggested that the issue be held in abeyance until the Committee was ready to deal with draft article 10.
6. The CHAIRMAN observed that the duration of the operator's responsibility for the goods and his right of retention were separate legal issues. However, there was a degree of overlap between them.
7. Mr. HERBER (Germany) had grave doubts about the Belgian proposal. It was not clear when the specified period of 30 days would begin, and the "period stipulated in the contract" might be as short as two days, which would be unacceptable. Moreover, questions related to the nature, conclusion and violation of the contract were all governed by domestic law, which would also govern the liability of the operator if the person entitled to take delivery of the goods failed to do so.
8. Mr. SULEIMAN (Nigeria) supported the Belgian proposal. It merely sought to limit the responsibility of the operator to the period in which the cargo was in his hands. The effects of the Convention would be confined to that period.
9. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that in its existing form draft article 3 already provided a logical framework for the operator's responsibility by limiting it to the time during which he had charge of the goods.
10. Mr. LAVIÑA (Philippines) thought the issue of limitation of responsibility was sufficiently covered in draft article 10. Moreover, there was provision in draft article 5 (3) and (4) for the liability of the operator in certain circumstances. Delay in handing over the goods was covered by paragraph 4 of that article. He therefore favoured article 3 in its existing form.
11. Mr. WALL (United Kingdom of Great Britain and Northern Ireland) said that as matters stood, there was some difficulty in specifying exactly when the operator's period of responsibility began and ended. The phrase "at the disposal of" was ambiguous. As he saw it, the operator was responsible for the goods from the time the carrier or another person delivered them into his sole charge until such time as he handed them to another person entitled to take delivery of them. If nobody took delivery, the conditions specified in draft article 10 would take effect. Draft article 3 could perhaps be formulated more clearly.
12. Mr. ROMAN (Belgium) pointed out that the delay referred to in article 5 (3) was delay caused by the operator himself, whereas the delay referred to in his delegation's proposal was caused by the person who failed to take delivery, a situation for which the operator could not be responsible.
13. Mr. RUSTAND (Sweden) observed that in some countries the phrase "placed at the disposal of" had a specific legal meaning, requiring the customer to be notified that the goods awaited collection. If it was felt that those words were not sufficiently clear to determine the time at which the operator's responsibility ceased, an amendment introducing a requirement for the operator to give written notice of discharge would produce the desired effect. He could not agree with the representative of Germany that the operator's responsibility should continue as long as he had charge of the goods.
14. Mr. TARKO (Austria) said that article 3 and article 10 dealt with different issues: article 3 defined the period for which the operator was responsible for the goods in his charge, whereas article 10 dealt with the circumstances in which he had a right to retain them to defray his costs. The two issues should not be confused.
15. Mr. ZHAO Chengbi (China) thought the period of the operator's responsibility was clearly defined in the existing draft article 3. It extended from the time when the operator took charge of the goods until the moment when he handed them to the person entitled to receive them. Failure by the customer to take delivery of the goods was a separate issue, to which draft article 10 was applicable. The Belgian proposal merited close attention in that context.
16. Mr. LARSEN (United States) favoured the text of article 3 as it stood. The question of the operator's responsibility could be reconsidered in the context of article 10.
17. Mr. HORNBY (Canada) opposed the Belgian proposal. It did not dispel the potential ambiguity in draft article 3 concerning the period of the operator's responsibility, nor make it clear when the 30-day period would begin to run. He would prefer a simpler form of words.
18. Mr. ABASCAL (Mexico) said that his delegation preferred the text as it stood. Article 3 dealt only with the period of responsibility of the operator. It was a generally accepted rule of

law that that responsibility ceased when the goods taken in charge were handed over to the person entitled to take delivery of them or were placed at that person's disposal. Rights of retention or sale were dealt with in article 10.

19. Mr. ROMAN (Belgium) said that it was important to realize that the proposed period of 30 days could enter into effect from the moment the operator took the goods in question in charge. In some cases it might be difficult or impossible for the operator to give notice to the person entitled to take delivery, who might be unknown; that problem could be met by limiting the period of responsibility to 30 days or to the period stipulated in the contract.

20. The CHAIRMAN invited the Committee to vote on the Belgian proposal (A/CONF.152/C.1/L.33).

21. The proposal was rejected by 26 votes to 3.

22. Ms. SISULA-TUKOLAS (Finland), introducing her delegation's proposal (A/CONF.152/C.1/L.36), said that its purpose was to clarify the notion of placing the goods at the disposal of the person entitled to take delivery of them. Where the customer or the operator of the transport terminal was in delay, it should not be enough for the operator simply to declare that the goods were at the customer's disposal. Some sort of notification should be necessary to determine the time at which the operator's responsibility ceased. Her own preference was for the first alternative proposed by her delegation.

23. Mr. RUSTAND (Sweden) said that he supported the Finnish proposal in principle, although it was to some extent superfluous. In Swedish law, the notion of placing at disposal included giving notice to the customer and inviting him to collect the goods. However, if adding a requirement to give notice would answer the concerns of any other delegation, his delegation would support it.

24. Mr. SWEENEY (United States) said that he could not support the proposal. It would add to the Convention a mandatory requirement for the operators of transport terminals which was not part of their normal business. It was, in fact, part of the carrier's responsibility to notify the consignee that the goods had arrived and were ready to be picked up. In maritime transport such notification was essential and documents for sea and land transport contained an entry giving the name of the "notify party". An airway bill required a similar entry. There was no need to confer the further obligation on the operator to give notice that might not be necessary.

25. Mr. LAVIÑA (Philippines) preferred the second alternative proposed by Finland although it specified no time-limit after the receipt of notice. He felt there was no need to amend article 3.

26. Mr. WALL (United Kingdom) said that his delegation believed the more precise the Convention was, the more likely would be its acceptability to a large number of people. His delegation therefore found considerable merit in the Finnish proposal, although it might be better to redraft the article altogether. If the Finnish proposal was accepted, it must be made clear that the person entitled to take delivery of the goods had received prior notice that they had been placed at his disposal. Whatever additional burden that might involve for the operator, it would have the benefit of giving a starting point from which to calculate what other measures might need to be taken, if, for example, the goods were abandoned. His delegation intended to submit a redrafted version of article 3, but it would in the meantime support the second Finnish alternative if the word "prior" was added to it before the word "notice".

27. Mr. RUSTAND (Sweden) said that his delegation opposed the second alternative because it would mean that the operator would need to await some proof of the receipt of notice. It did not, however, believe that giving notice, as the first alternative provided, would place a new duty on the shoulders of the operator; rather it would be in his interest, enabling him to avoid continued responsibility for goods which had not been collected. The first alternative was a valuable clarification of article 3.

28. Mr. ABASCAL (Mexico) said that the Finnish addition should not be regarded as imposing a further duty on the operator but as a means of ending the period of responsibility. His delegation was not prepared to go so far as to require the article to stipulate proof of receipt of the notice. It therefore favoured the first alternative.

29. Mr. BONELL (Italy) said that article 3 had been intended to meet the situation in which the person entitled to take delivery of the goods did not appear to collect them; in such a case, it was not the operator that was in default. Why, therefore, should he be obliged to give notice? Where the consignee had lost all interest in the goods, it might be very difficult to give notice. The requirement to give notice would not only place an unjustified additional burden on the operator but might prove impossible to fulfil. His delegation could not support the Finnish proposal.

30. Mr. ZHAO Chengbi (China) reiterated his delegation's view that article 3 should deal solely with the period of responsibility, a matter which was adequately covered by the Commission's draft. The article had no place for such specific issues as a period of notice or responsibility for notice. The Hamburg Rules contained no such requirement, only a provision establishing the conditions under which the goods were taken over and subsequently delivered. The non-appearance of the person entitled to take delivery of the goods would be covered by local laws and, for the purposes of the draft Convention, by article 10.

31. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the Committee should carefully consider what was meant by the phrase "has placed them [the goods] at the disposal of the person

entitled to take delivery of them" and how that operation was to be carried out in physical terms. Article 3 as it stood did not clarify or define that point, although the procedure had to be conducted in accordance with specific rules. Article 4 (2) of the Hamburg Rules referred to the placing of the goods at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge. The problem had been discussed by the Working Group on International Contract Practices, which had decided that article 4 (2) of the Hamburg Rules would have to be recognized as applying to the matters regulated by the draft Convention. However, since the draft Convention covered not only carriage by sea but also other forms of carriage, the Working Group had decided not to include in the draft the wording which appeared in the Hamburg Rules but to leave it to be assumed that those rules applied none the less. That would be the normal way of resolving the question of what the phrase "place [the goods] at the disposal of" meant. Under the Finnish proposal, the procedure of placing goods at a person's disposal would require only one action, that of giving notice, which in turn meant that if notice had been given, no other action was required of the operator. He agreed with the United States that an additional burden would be placed on the operator if the Finnish proposal was accepted, because in practice in some cases it was sufficient for oral notice to be given instead of written notice, as defined in article 1. On the other hand, in some countries local usage might require additional measures to be taken, so that any attempt to solve the question by means of an international convention might not be very effective. For all of those reasons, the formulation of article 3 which appeared in the Commission's draft might be the best way of solving the problem.

32. Mr. ROMAN (Belgium) said that the statement made by the representative of Italy clearly reflected his delegation's concern with draft article 3 and the reasons why it had proposed an amendment to it.

33. Mr. WALL (United Kingdom) said that it was important to ensure that the draft Convention did not lean too heavily on the rules contained in any single convention dealing with any particular transport mode. The United Kingdom would have difficulties with it being overdependent on the Hamburg Rules as other States might have with it being overdependent on other conventions. The draft Convention had to fit neatly into the gaps between the other transport conventions but as far as possible had to be self-contained. In the light of the discussion, and particularly the statement by Italy, the United Kingdom delegation now felt that no more should be required of the operator than to make reasonable efforts to give notice.

34. Ms. JORGENSEN (Denmark) said that the goods might be sold many times while in possession of the operator. That being so, the operator might not readily know the identity of the person entitled to take delivery of them, in which case there could be no rule requiring him to give the notice to which the Finnish proposal referred.

35. After an exchange of views on how the Finnish proposal might be reworded to cater for the views expressed by delegations, and with the approval of Ms. SISULA-TUKOLAS (Finland), Mr. WALL (United Kingdom) proposed the following text as a revised form of the first Finnish alternative: "and he has sought to give reasonable prior notice thereof to that person".

36. Mr. LAVIÑA (Philippines) said that his delegation disliked the United Kingdom wording because it was uncertain as to whether the wording required the operator to succeed in giving the notice and the person concerned to receive it. The wording placed overdue emphasis on the operator's efforts and failed to specify a period of time during which the consignee could obtain the goods. His delegation therefore continued to prefer article 3 as it stood. It endorsed the views put forward by the representatives of the United States and the Soviet Union.

37. Mr. SULEIMAN (Nigeria) suggested specifying that the notice might be served by the operator either directly or indirectly, thus ensuring that an undue burden was not placed on the operator and that the requirements of local laws in many parts of the world were taken into account.

38. Mr. TARKO (Austria) said that he was satisfied with the formulation of article 3 as it stood and also had some sympathy for the first Finnish alternative in its original form. As revised by the United Kingdom, it caused his delegation problems. Austria would prefer it to read: "and he has given or sought to give prior notice thereof to that person".

39. Mr. ROJANAPHRUK (Thailand) submitted that the first Finnish alternative, as revised by the United Kingdom introduced unwelcome elements of subjectivity and imprecision into the Commission's draft; it would also have the undesirable effect of placing an additional burden and responsibility on the operator. For his part, he found the Commission's text adequate; if a question of notice were to be involved, it should be the responsibility of the person entitled to take delivery to notify the consignee as soon as the goods were placed at his disposal.

40. Mr. AIT HMID (Morocco) fully endorsed the remarks made by the representative of the Philippines.

41. Mr. RUSTAND (Sweden) said that surely what was at issue was whether or not the operator, when placing the goods at the disposal of the customer, should accept the additional burden - which he himself considered a minor one - of making reasonable efforts to give notice thereof.

42. Mr. WALL (United Kingdom), responding to the comments made by the representatives of Austria and Sweden, suggested the following further revision of the first Finnish alternative: "and has given or made reasonable attempts to give prior notice thereof to that person".

43. The CHAIRMAN put to the vote the second wording suggested by the United Kingdom for the addition to article 3 proposed by Finland.

44. The wording was rejected by 22 votes to 8, with 3 abstentions.

45. Mr. ABASCAL (Mexico) introduced the proposal in document A/CONF.152/C.1/L.34, which was intended to ensure that the Convention specified clearly the time when the operator's responsibility began. It was motivated by a situation common in respect of certain goods in some Mexican ports, and possibly met with in other countries as well: when goods had been unloaded from a ship - and the carrier's responsibility had therefore ended - the warehouse operator failed to take them in charge immediately, and subsequently denied all responsibility for them during what had come to be known as el periodo de nadie, a time when they were nobody's concern. That was obviously a most undesirable state of affairs, which his delegation's proposal sought to remedy.

46. Mr. WALL (United Kingdom) commended the words "when the goods are delivered to him" in the Mexican proposal for its precision in situating the beginning of the operator's responsibility. That being said, he did not believe that the Mexican amendment would be of any great benefit to the article, on which his delegation reserved its final position.

47. Mr. TARKO (Austria) agreed that the amendment would contribute little to the article. Not only was the first part of the text somewhat difficult to understand; it also seemed quite clear from the definition in article 1 (a) that a person who failed to take goods in charge could not be considered an operator for the purposes of the draft Convention.

48. Mr. ABASCAL (Mexico) withdrew his delegation's proposal.

ELECTION OF A VICE-CHAIRMAN AND A RAPPOREUR (agenda item 2)

49. Mr. LAVIÑA (Philippines) said that the members of the group of Asian States, were ready to assume any responsibilities that might be assigned to them in the conduct of the Committee's proceedings. They found the continued absence of a rapporteur in the First Committee disquieting. Moreover, they regretted that the Conference had not yet appointed a Credentials Committee and elected all its officers.

50. Mr. ABASCAL (Mexico), speaking as President of the Conference, called for the speediest possible nominations for the Credentials Committee and the outstanding posts on the General Committee.

The meeting rose at 5.35 p.m.

5th meeting

Friday, 5 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.5

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Proposal for new article (A/CONF.152/C.1/L.31)

1. Mr. WALL (United Kingdom of Great Britain and Northern Ireland), introducing his delegation's proposal (A/CONF.152/C.1/L.31) for the inclusion of a new article at an appropriate place in the draft Convention, said that it stemmed in part from the discussion on article 1 and was also related to the requirements for the issuance of a document under article 4. Its purpose was to introduce an element of precision into the text of the draft Convention by ensuring that the application of the Convention was clearly indicated. In connection with paragraph (1), it should be stressed that the decision of the carrier or other person having an interest in the goods to provide the operator with a notice indicating that the goods were involved in international carriage was optional. As stated in paragraph (2), written acknowledgement by the operator of receipt of such a notice would be considered prima facie evidence of the applicability of the Convention.

2. Mr. BONELL (Italy) said that, given the definition of international carriage in article 1 (c), he saw no need for express notification of the international character of the carriage as provided for in paragraph (1) of the proposal. As regards paragraph (2), he failed to see why notification that the goods were involved in international carriage should be taken only as prima facie evidence of the applicability of the Convention.

3. Mr. MORAN (Spain), endorsing the comments made by the previous speaker, said that, since paragraph (2) of the proposal seemed to refer more to the scope of application of the draft Convention and was directly related to article 2 (1), consideration of the proposal as a whole should be deferred until the discussion on article 2.

4. Mr. LAVIÑA (Philippines) doubted the need for the proposed paragraph (1) in view of the definition of international carriage given in article 1 (c). Moreover, the international character of the carriage should not be determined by one of the parties unilaterally. He shared the Italian delegation's misgivings about paragraph (2); there again, a unilateral action by one party should not determine the applicability of the Convention.

5. Mr. RUSTAND (Sweden) considered the proposal somewhat superfluous, since it could be assumed that all parties would try to protect their interests by making sure that the operator was aware that the goods were involved in international transport. With regard to paragraph (2), the United Kingdom delegation's aim could be met by amending the wording of article 4 (1) to include the identification of the goods "as being involved in international carriage". He too failed to see why such notification should be only prima facie evidence; any court would deem it conclusive evidence.

6. Mr. ROMAN (Belgium) expressed full support for the United Kingdom proposal as a necessary clarification of the terms of the draft Convention.

7. Mr. WALL (United Kingdom) said that the statements by previous speakers showed clearly that there was a need for greater precision, although there was also perhaps some concern that too much emphasis on precision might be counter-productive. He assured the representative of the Philippines that the proposal was not intended to endorse unilateral action. He drew attention to the optional character of paragraph (1). Paragraph (2) provided that, if the operator terms of the Convention. He was willing to reconsider whether the evidence should be regarded acknowledged receipt of the notice in question, that would be evidence of the applicability of the merely as prima facie. He would endeavour to draft a new proposal for inclusion in article 4, failing which he would ask that the proposal now under consideration should be discussed afresh as a separate article.

Article 1. proposals for new subparagraphs (A/CONF.152/C.1/L.5) (continued)

8. Mr. LAVIÑA (Philippines) drew attention to certain outstanding questions relating to article 1, particularly the United States proposal concerning the definition of the term "writing" (A/CONF.152/C.1/L.5).

9. The CHAIRMAN said that it had been decided that the Drafting Committee would take account of the concern of the United States by ensuring that electronic writing was covered by the formulation used in the Convention with reference to any writing, request or notice.

10. Mr. LAVIÑA (Philippines) said that the United States proposal did not solely concern the inclusion of electronic writing in the definition of the term "writing", but would have implications for many important articles of the draft Convention concerning notices and requests. The Drafting Committee was established primarily to consider questions of style and was not authorized to deal with substantive issues, which should be dealt with in the main Committees.

11. The CHAIRMAN said that he understood the Committee to have taken a decision in the matter.

Article 4 (A/CONF.152/C.1/L.10, L.26, L.35)

12. Mr. OCHIAI (Japan), introducing his delegation's proposal for the insertion of a new paragraph (1 bis) in article 4 (A/CONF.152/C.1/L.26), said that under the provisions of article 4 (1), the operator could be obliged to sign or issue a document even after a suit had been brought against him by the customer. That was undoubtedly not the intention behind the article, and the purpose of the proposal was to subject customers' requests to a time limit.

13. Mr. MORAN (Spain) said that the aims of the Japanese proposal were already met by the substance of article 4 (1); he would therefore prefer to leave the text as it stood.

14. Mr. RUSTAND (Sweden) said that it was clear from the wording of the existing paragraph that either the operator or the customer would raise the question of documentation immediately after the goods had been handed over in the terminal. He did not think that a long period of time would elapse before any of the parties sought to ensure the existence of documentation referring to the handling of the goods. The idea behind the wording "within a reasonable period of time" in the first line of article 4 (1) was that the operator should be allowed sufficient time to issue the document. His delegation was therefore in favour of keeping the existing text of article 4 (1).

15. Mr. OCHIAI (Japan) said that in view of the Swedish representative's comments, his delegation was prepared to withdraw its proposal.

16. The CHAIRMAN invited the Committee to consider the proposal made by Mexico to add a sentence to article 4 (3) (A/CONF.152/C.1/L.35).

17. Mr. ABASCAL (Mexico) said that his proposal was based essentially on comments made by the International Maritime Committee and used the wording contained in the 1990 revision of Incoterms.

18. Mr. RUSTAND (Sweden) said that it was essential not to exclude any modern means of communication. In his view, a message was something that could be immediately transformed into a document or a record of some sort.

19. Mr. ABASCAL (Mexico) said that an electronic message was not necessarily a document. On the other hand, however, the 1990 revision of Incoterms took account of documents and electronic messages used in the international carriage of goods.

20. Mr. BERGSTEN (Executive Secretary) said that the words "which preserves a record of the information contained therein" in article 4 (3) were intended to include any form of communication that would preserve a record. The text was clearly intended to include data contained in a computer. In his view, therefore, the Mexican proposal was not necessary.

21. Furthermore, articles 1 (e) and (f) used language similar to that found in the two uniform Conventions adopted in Ottawa and in the UNCITRAL Model Law on International Commercial Arbitration, which was becoming accepted as the appropriate formulation when moving from the requirement for a paper-based record to one that might be in a magnetic form or a laser disc.

22. Mr. ABASCAL (Mexico) said that in view of the explanation given by the Executive Secretary, his delegation was willing to withdraw its proposal and to leave the matter to the Drafting Committee.

23. Mr. LARSEN (United States of America) said that in light of the statement made by the Executive Secretary, it would not be necessary to consider the matter any further.

24. Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic) agreed with the United States representative and thought that there was no great need to include in the draft Convention a statement referring to an equivalent electronic data exchange message.

25. Mr. BONELL (Italy) said that if the relevant provision of the 1990 revision of Incoterms stated that a document might be replaced by an equivalent electronic data interchange message, it was then essential for some similar formula to be included in the draft Convention, because otherwise it would be assumed that, for the purposes of the Convention, a document must be in the traditional form.

26. The existing text of article 4 (3) referred to only one of the two possibilities mentioned in paragraph (1), that in subparagraph (b). However, reference should also be made to subparagraph (a). In his opinion, therefore, if paragraph (3) was amended to include a text indicating that the document might be replaced by an equivalent electronic data interchange message, that would cover both situations and introduce a necessary clarification.

27. Mr. TARKO (Austria) said the Drafting Committee should be informed of the fact that there was a fundamental difference between article 1 (e) and (f) and article 4 (3) since under the former all forms were acceptable. In his opinion, a document was something written on a piece of paper, and therefore the operator would have to give the customer a paper of some kind.

28. Mr. LAVIÑA (Philippines) thought that the clarification given by the Executive Secretary had resolved the issue. The Mexican proposal could perhaps be reflected by inserting in article 4 (3), after the words "in any form", the words "including an equivalent electronic data interchange message". The question would be amply covered by articles 1 (e) and (f).

29. Mr. ZHAO Chengbi (China) said that the form of the document was of great importance. For instance, the customer might have to submit a document to the court in order to resolve a conflict. His delegation believed that the draft Convention should fully reflect developments in modern technology. The 1990 revision of Incoterms contained the same idea and referred to an equivalent electronic data interchange message. His delegation therefore supported the Mexican proposal.

30. Mr. MUTZ (Central Office for International Railway Transport), speaking at the invitation of the Chairman, agreed with the Executive Secretary that the wording used in article 4 (3) was broad enough to cover electronic data interchange messages. He noted that the expression "electronic data interchange message" had a specific meaning in the EDIFACT rules adopted by the Economic Commission for Europe. That terminology would be widely used in international trade in the next decade and could be reflected in the draft Convention. Article 4 (3) could be amended to read: "The document may, inter alia, be replaced by an equivalent electronic data interchange message".

31. Mr. RUSTAND (Sweden) said he was prepared to accept the Mexican proposal, but only if it was made clear that an electronic data interchange message would be the equivalent of a document in the sense that it would preserve a record of information. The protection provided for the customer under paragraph (1) (b), which ensured that he would have concrete evidence to produce in court in the event of any subsequent dispute, should not be weakened. The Committee needed to be quite sure whether or not an electronic message would preserve a record of information before taking a decision.

32. Mr. RAO (India) agreed that the only point that now needed clarification was whether an electronic data interchange message would be a valid substitute for a document in the sense that it would preserve a record of information. If it would not, then a question of substance was involved, and the Mexican proposal would need further discussion. If it did preserve such a record, however, then the Mexican proposal could perhaps be transmitted to the Drafting Committee for study in the context of article (1) (e) and (f) and article (4) (3).

33. Mr. BERGSTEN (Executive Secretary) read out the relevant provisions of Incoterms 1990. Under those provisions, it was one of the obligations of the seller to give the buyer notice that the goods had been delivered on board. Where such notice did not take the form of a transport document, the seller was also obliged to assist the buyer in obtaining a transport document, such as a negotiable bill of lading, a non-negotiable seaway bill, an inland waterway document, or a multi-modal transport document. Where the seller and the buyer had agreed to communicate electronically, such a document could be replaced by an equivalent electronic data interchange message.

34. Mr. WALL (United Kingdom) urged that to avoid any possibility of confusion it should be made absolutely clear in article 4 that the document referred to in paragraph (1) (a) should also preserve a record of the information contained therein. In other words, there should be no doubt that there was no difference between the documents referred to in the two subparagraphs, in the sense that they were both records.

35. Mr. LARSEN (United States) pointed out that under the Convention for the Unification of certain Rules Relating to International Carriage by Air (the Warsaw Convention), and also under the Montreal Protocol No. 4 thereto, it was already open to the operator to issue the document concerned in electronic form.

36. Mr. BONELL (Italy) said he was glad to note that other delegations shared his concern at the fact that paragraph (1) (a) was excluded from the scope of paragraph (3). That inconsistency should be eliminated, and he therefore proposed that the wording of paragraph (3) should be amended accordingly. The rest of the text of the article should remain unchanged, but with the addition of a formulation along the lines of the Incoterms provision concerning a prior agreement between customer and operator to communicate electronically.

37. The CHAIRMAN pointed out that, while the revised Incoterms 1990 were of the greatest importance in international trade, the International Chamber of Commerce (ICC) was a private association, and a United Nations conference need not necessarily accept unquestioningly all the texts ICC had formulated. It was open to the Committee to approve other proposals if it considered them to have merit.

38. Mr. ROJANAPHRUK (Thailand) said after hearing the Incoterms provisions that had been read out by the Executive Secretary, it was now his view that the formulation of article 4 (3) could remain unchanged, since under article 4 (1) (b) it would be left to the discretion of the operator to issue the signed document in whatever form he considered appropriate. It was also made clear in article 4 (1) (a) that acknowledgement of receipt of the goods would be made only by signing a document presented by the customer at that customer's request. Such a document could take either the traditional form, or the form of an electronic data interchange message.

39. Mr. ROMAN (Belgium) said he had had the impression after hearing the Incoterms text read out that the document concerned need not necessarily be a separate paper, or message, but could simply be a provision in, for example, a bill of lading. Was that in fact the case?

40. Mr. BERGSTEN (Executive Secretary) said the Incoterms requirements he had quoted were for a form of transport document. While the document referred to under article 4 (1) (a) could well be a transport document of some kind, the document referred to in paragraph (1) (b) would of course not be, since it would be issued by the terminal operator.

41. Mr. ROMAN (Belgium) said that he was satisfied with that explanation.

42. The CHAIRMAN said he understood that the United States delegation had agreed that its proposal relating to article 4 (A/CONF.152/C.1/L.10) should be dealt with by the Drafting Committee, which would also take into account the various points raised during discussion on the subject of electronic writing. The Mexican representative having withdrawn his proposal, there were thus no further proposals on article 4 to be considered, apart from the oral proposal made by the Italian representative.

43. Mr. BONELL (Italy) said his proposal was to add to article 4 (3) a new sentence reading as follows: "When the customer and the operator have agreed to communicate electronically, the document referred to in paragraph (1) may be replaced by an equivalent electronic data interchange message".

44. Mr. WALL (United Kingdom) said that he had great difficulty in accepting the Italian proposal. He failed to see how, in the absence of any written record, a court could issue a ruling in a case arising in connection with subparagraphs (a) or (b) of article 4 (1).

45. Mr. ZHAO Chengbi (China) said that he accepted the idea of the Italian proposal, which reflected recognition of an important long-term development, but would prefer to see it expressed more briefly, e.g. by the insertion of the words "including electronic data interchange which is agreed between the customer and the operator in the process of business" after the words "issued in any form" in article 4 (3).

46. Mr. ABASCAL (Mexico) said that he supported the Italian proposal, which was not substantially different from the proposal originally made by his delegation and subsequently withdrawn in the light of explanations by the Executive Secretary.

47. Mr. LARSEN (United States) also supported the Italian proposal. The industry, whose concerns the Conference should endeavour to meet, had indicated a preference for the approach reflected in the proposal. The decision as to the precise place where the proposed new sentence should appear in the draft could be left to the Drafting Committee.

48. Mr. HERBER (Germany), Mr. OCHIAI (Japan) and Mrs. PIAGGI DE VANOSSI (Argentina) also expressed support for the Italian proposal.

49. Mr. RAO (India) said that he entirely agreed with the view expressed by the United Kingdom representative. In the absence of any record the determination of liability would become practically impossible.

50. The Italian proposal was adopted by 14 votes to 12, with 6 abstentions.
51. The CHAIRMAN, noting that a new sentence had now been added to article 4 (3), said that, unless he heard any objection, he would take it that the Committee understood the whole of that paragraph to refer to both subparagraph (a) and subparagraph (b) of paragraph (1).
52. Mr. LEBEDEV (Soviet Union) asked whether the agreement between the parties referred to in the second sentence of paragraph (3) just adopted by the Committee had to be concluded in written form or could be an oral one.
53. The CHAIRMAN said that, as he understood the matter, the fact of the sender and receiver of the message being electronically linked was in itself sufficient evidence of agreement.
54. Mr. BONELL (Italy) endorsed that interpretation.
55. Mr. LEBEDEV (Soviet Union) noted that any form of agreement, including oral agreement, would be acceptable, electronic methods being a particular case. A further point on which elucidation would be welcome was whether electronic data interchange could be used only in the event of agreement between the parties, or, in other words, whether the first sentence of paragraph (3) was applicable in the absence of agreement.
56. Mr. BONELL (Italy) said that the first sentence of paragraph (3) remained applicable even without the agreement referred to in the second sentence.
57. The CHAIRMAN confirmed that the two sentences of paragraph (3) were not mutually exclusive, the second sentence being supplementary to the first.
58. Mr. BERGSTEN (Executive Secretary), speaking as Secretary of the Drafting Committee, asked whether the Drafting Committee would be authorized to add such words as "In addition" at the beginning of the second sentence so as to make it clear that a separate concept was being introduced.
59. The CHAIRMAN said that the Drafting Committee was free to make all necessary drafting changes.
60. Mr. ROJANAPHRUK (Thailand), speaking in explanation of vote, said that he had voted against the Italian proposal, not because he had any objection to the idea it contained but because, for reasons stated earlier, he considered it superfluous.

The meeting rose at 12.35 p.m.

6th meeting

Friday, 5 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.6

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 4 (continued) (A/CONF.152/C.1/L.31)

1. Mr. WALL (United Kingdom of Great Britain and Northern Ireland) said that article 4 as a whole caused his delegation considerable concern. The use of the word "customer" in paragraph 1, and nowhere else in the Convention, was a particular problem. While he was reluctant to suggest that the term should be defined in the Convention, it was important that there should be a clear understanding of what it meant in that particular context. The people who might present a document to the operator, or require one from him, included carriers, either delivering or collecting the goods, and persons with some form of interest in those goods at the first or last stage of their international carriage. While such people might have no contractual relationship with the operator, they would wish to be sure, on handing over an item to him, that he would provide a receipt indicating that the goods had been accepted by him and were in good condition. The Committee might wish to consider whether the term "customer" was appropriate for that purpose.
2. He had found, in seeking to incorporate into article 4, his delegation's proposal in document A/CONF.152/C.1/L.31, that there was a clash between the notion of a carrier or other person with an interest in the goods and the notion of customer as used in the article. Under subparagraph (a) of article 4 (1), the customer would present a document which was to be signed by the operator. That document would identify the goods and - if the text suggested by the United Kingdom was incorporated into the article - would also indicate that they were involved in international carriage. The introductory wording of article 4 (1), however, gave the operator the option of acknowledging his receipt of the goods by signing that document or of himself issuing

the signed document described in subparagraph (b); the latter document might also acknowledge that the goods were involved in international carriage. But under article 4 (2) the operator, by not acting in accordance with either of the subparagraphs of article 4 (1), would be the subject of a rebuttable presumption that he had received the goods in apparent good condition. That provision caused his delegation great difficulty. Moreover, it could see no justification for the exception set forth in the second sentence of paragraph 2, and suggested that it should be excluded from the draft.

3. He believed that the amendment which the Committee had made to paragraph 3 at the previous meeting did the paragraph a major disservice and, through it, a disservice to the article as a whole. Regarding paragraph 4, which closely followed the wording of article 14 of the Hamburg Rules, he suggested that a comma should be inserted between the word "printed" and the words "in facsimile". It was unfortunate that it had been omitted from the Hamburg Rules.

4. In his delegation's view, article 4, and paragraphs 1 and 2 in particular, compressed too many ideas together. The documents to which the article referred would be highly important and the Convention should make it very clear, possibly by adding further details, what their true intention was.

5. The CHAIRMAN suggested that the Committee might discuss the United Kingdom proposal in document A/CONF.152/C.1/L.31 and, if its substance was approved, seek a way of adapting it to article 4.

6. Mr. WALL (United Kingdom) said that he hoped he himself would be able to formulate his delegation's proposal in such a way that it would be amenable to incorporation into article 4. He would continue to work towards that end.

7. Mr. LAVIÑA (Philippines) said that, as it stood, paragraph 1 of article 4 was confusing and would need some drafting changes. His delegation was also concerned about the use of the words "rebuttably presumed" in the first sentence of paragraph 2. In the second sentence, did the phrase "no such presumption applies" mean that there would be no such rebuttable presumption, in other words that there would be a conclusive presumption, or no presumption at all? His delegation endorsed the view expressed by the representative of the United Kingdom on the use of the word "customer". In previous transport conventions and in other parts of the present draft the more technical term "interested party" was employed. He approved the suggestion that a comma should be inserted in paragraph 4 between the words "printed" and "in facsimile".

8. Mr. HERBER (Germany) said that his delegation also felt great concern about article 4. Paragraphs 1 and 2 contained a great number of ideas, not all of which had been clearly expressed. Paragraph 2, for example, dealt with the question of presumption: if the operator did not act in accordance with either subparagraph (a) or subparagraph (b) of paragraph 1, there would be a presumption that he had taken the goods in charge in apparent good condition. What happened, however, if he did issue a document saying that he had received the goods in good condition? Would that create a presumption and would it be a rebuttable one? The answer to both questions could only be in the affirmative. The document in question would not be a negotiable instrument and therefore any presumption which it created must be rebuttable. It was not sensible to imply, as paragraph 2 seemed to do, that, if the operator acted in accordance with subparagraphs 1 (a) or (b), his action would raise no presumption at all. It could be argued that, in that case, the presumption was self-evident but that was a highly dangerous approach.

9. He felt that the reason for the lapse lay in the changes that had been made in the draft during its elaboration. Originally, in the Hamburg Rules and in the UNIDROIT text, the rule on presumption had been restricted to someone who had the goods in charge and to the case where the document was issued, and it dealt only with the kind of presumption which the document raised. Paragraph 2 of the Commission's draft had turned the rule around and made failure to issue a document constitute a presumption that the goods had been received in good condition. The main point, what kind of presumption the document created, had been dropped. The text was unclear and needed further consideration.

10. Mr. ABASCAL (Mexico) said that the representative of the United States of America had agreed that his delegation's proposal for paragraph 4 (A/CONF.152/C.1/L.10) might be dealt with by the Drafting Committee. However, the omission of the substantive point implied by the words "if not inconsistent with the law of the country where the document is signed", which appeared at the end of article 4 (4) of the Commission's draft, could not be dealt with by the Drafting Committee.

11. The CHAIRMAN said that the discussion of article 4 in the First Committee had not been concluded. Moreover, what had been said since the United States had made that suggestion had shown that the situation in regard to electronic writing was not as simple as had appeared at first sight.

12. Mr. RUSTAND (Sweden) said he looked forward to studying the United Kingdom's anticipated reformulation in writing of its proposal in document A/CONF.152/C.1/L.31, with a view to the consideration of its incorporation into article 4. He would reserve his final comments on the article until he had seen the new proposal. His delegation would have no objection to the replacement of the word "customer" by a more suitable term. As far as the rule of presumption was concerned, he had compared paragraph 2 of article 4 of the draft Convention with the text that had been before UNCITRAL at its twenty-second session, and had noted that the second sentence of the paragraph had been added at that session, although the sessional report (A/44/17) did not show the reasons for the addition. His own recollection was that it had been considered unfair to require an operator who merely transferred goods from one means of transport to another to take the

documentary action for which the article called, and still more unfair if failure to do so were to create the presumption in question. That was the reason for the exception expressed in the second sentence. He endorsed the suggestion that a comma should be inserted in paragraph 4 between the words "printed" and "in facsimile" and wished to reserve his position on the very interesting and difficult point raised by the representative of Germany.

13. Mr. MORAN (Spain) said that his delegation approved article 4 as it stood and was confident that the doubts expressed about it could be solved by looking at the Convention as a whole. The representative of Germany had believed that paragraph 1 would raise a presumption. According to the Spanish legal system, and perhaps others, the presumption would be that at the time of acting the operator had exercised reasonable diligence. If the customer presented a document to the operator which the latter signed, then the goods would be presumed to have been received in good condition, as evidenced by the signed document. That presumption would exist, but - as could be deduced from article 6 - the operator might be able to show that damage to the goods had been caused by another person's fault, in which case he would not be held liable solely by virtue of his signature.

14. The second possibility offered by article 4 (1) was that the customer did not present a document but waited for the operator to provide one; the operator would then be able to check the goods and in reasonable time issue a document which created a presumption as to the circumstances in which the goods had been found and whether or not anything had happened to them while in the terminal. The third possibility was where the operator neither issued a document nor signed that given to him by the customer, which was the case to which paragraph 2 referred. Again there would be a presumption, unless proved otherwise, that the goods had been handed over in good condition; it was logical that the presumption should fall only after it had been demonstrated that the goods had not been received in good condition, as reflected in the content of article 6.

15. His recollection regarding the second sentence of paragraph 2 was the same as that of the Swedish representative. He believed it logical that no presumption should attach to the operator in the case envisaged.

16. Mr. ZHAO Chengbi (China) said that, in his delegation's view, article 4 as drafted was fair to both the customer and the operator. The operator had both a right and a duty to provide a signed receipt acknowledging the condition of the goods. To a certain extent his delegation endorsed the views of the representative of the United Kingdom about the use of the word "customer", but it considered that the term could be interpreted as meaning the person who requested the operator to give a receipt for the goods. Such a request was reasonable and the customer should have the right to make it. Article 4 (2) was also fair and reasonable. Subject to minor drafting changes, article 4 was acceptable to his delegation.

17. Mr. TARKO (Austria) said that his delegation was satisfied with article 4 as it stood despite its complexities. The only problem he found was that the presumption referred to in paragraph 2 covered not only paragraph 1 (b) but also paragraph 1 (a), which did not require the operator to mention the condition of the goods. He should not therefore be penalized by a presumption in the latter case that the goods had been received in good condition.

18. Ms. SISULA-TULOKAS (Finland) shared the objection raised by the representative of Austria.

19. Mr. WALL (United Kingdom) said that one essential idea appeared to be missing from both paragraphs 1 and 2, namely that the operator had in fact received the goods. Some of the problems mentioned in connection with paragraph 2 might to a certain extent be alleviated if it was expressly indicated in both paragraphs that the action required under paragraphs 1 (a) and 1 (b) was dependent on the operator having received the goods. Any acknowledgement made under paragraph 1 (a) would simply be an acknowledgement of receipt, whereas the acknowledgement of receipt under paragraph 1 (b) also required reference to the condition of the goods.

20. The CHAIRMAN said that the present discussion in the Committee was similar to that which had taken place in the Working Group on International Contract Practices, where the article had been discussed at length. He therefore invited the Committee to proceed to a vote on article 4 (2).

21. Article 4 (2) was approved by 17 votes to 7, with 9 abstentions.

22. Mr. RUSTAND (Sweden) expressed surprise that the Chairman had called for a vote on paragraph 2. As he understood it, the Committee had been waiting for a new proposal from the United Kingdom delegation which would touch upon several of the paragraphs of article 4.

23. Mr. WALL (United Kingdom) said that the Committee should beware of assuming, as the Chairman seemed to have done, that his delegation's search for a way of incorporating some of the ideas in document A/CONF.152/C.1/L.31 into article 4 would have no implications for paragraph 2. He, too, had been surprised that the Chairman had proceeded to a vote on that paragraph. His delegation's new proposal concerning document A/CONF.152/C.1/L.31 would at the very least refer to paragraphs 1 (a) and 1 (b) of article 4. As those subparagraphs were specifically referred to in paragraph 2, the latter would obviously be affected. His intention was not to redraft article 4 completely. He would do his best to reflect the decision made by the Committee on paragraph 2 but reserved his delegation's right to decide, in seeking to reflect document A/CONF.152/C.1/L.31 in article 4, whether or not it wished to propose some consequential amendments to paragraph 2 as well as proposing amendments to paragraph 1. He regarded its freedom to do that as exceptionally important and requested the Chairman to allow him the necessary flexibility to approach the matter with the sense of responsibility which the Chairman himself would wish to exercise.

24. The CHAIRMAN said that he had noted the views of the United Kingdom. The vote on paragraph 2 was maintained with the reservation that there might be an amendment to document A/CONF.152/C.1/L.31.

25. Mr. LAVIÑA (Philippines) said that his delegation had abstained from the vote. Had there been sufficient clarification of paragraph 2, it would have voted in favour of it, but its doubts had not been dispelled, particularly with regard to the issue raised by the representative of Germany.

26. Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic) said that his delegation had abstained from the vote because it considered that the Committee had been rushed into taking a decision. It nevertheless believed that the difficulties which had arisen could be overcome by suitable efforts.

27. Mr. RUSTAND (Sweden) said that his understanding was that at the previous meeting the Committee had tacitly agreed to await the new proposal for article 4 which the United Kingdom had undertaken to draft. As far as paragraph 2 was concerned, the United Kingdom had expressed doubts about the advisability of including the second sentence in the draft. Bearing in mind the discussion subsequent to that, nobody present could possibly have assumed that the new United Kingdom proposal would not affect paragraph 2. What had occurred at the present meeting had confirmed his impression that the basic text was considered a fait accompli and that any serious attempts at improving it were unnecessary and perhaps even unwelcome.

28. Mr. RAO (India) said that his delegation had abstained from voting. There appeared to have been undue haste in the recourse to a vote. The representative of the United Kingdom had indicated at both the present and the previous meeting that he was working on certain ideas connected with article 4 and a large number of delegations had expressed misgivings about that article. Efforts to reach a consensus in the Committee should not be discouraged, particularly where opinions appeared to be equally divided. He therefore requested the Chairman to be patient with the Committee and where possible to consider setting up small negotiating groups to resolve difficult issues. Had that been done where paragraph 2 was concerned, the negotiations would undoubtedly have produced a consensus at the beginning of the following week.

29. Mr. WALL (United Kingdom) said that, following the vote, he had understood that he would be unable to make a consequential amendment which would involve deleting the second sentence of paragraph 2. As far as he was concerned the decision had been taken to retain that sentence. His attention would now focus on such consequential amendments to paragraph 2 as arose from his attempts to incorporate into paragraph 1 the ideas expressed in document A/CONF.152/C.1/L.31. In the meantime, he referred the Chairman to rule 7 of the rules of procedure which, as applied mutatis mutandis to the Committee, enjoined the Chairman to promote general agreement. All delegations might usefully bear that in mind.

The meeting was suspended at 4.05 p.m. and resumed at 5.15 p.m.

ELECTION OF A VICE-CHAIRMAN AND A RAPPORTEUR (agenda item 2) (continued)

30. Mr. LAVIÑA (Philippines) nominated Mr. Soliman (Egypt) for the post of Vice-Chairman and Mr. Safarian Nematabad (Islamic Republic of Iran) for that of Rapporteur.

31. Mr. Soliman (Egypt) and Mr. Safarian Nematabad (Islamic Republic of Iran) were elected Vice-Chairman and Rapporteur respectively.

The meeting rose at 5.20 p.m.

7th meeting

Monday, 8 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.7

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 4 (continued) (A/CONF.152/C.1/L.10)

1. Mr. SWEENEY (United States of America), introducing his delegation's proposal (A/CONF.152/C.1/L.10), explained that its purpose was to bring the provision into line with the language of other existing transport conventions. The words "if not inconsistent with the law of the country where the document is signed" appearing in the Commission's draft were, in his delegation's view, unnecessary.

2. Mr. ABASCAL (Mexico) strongly supported the proposal to delete the words "if not inconsistent with the law of the country where the document is signed", which he considered to be undesirable and indeed dangerous from the point of view of uniformity of the law. As to the rest of the

paragraph, he supported the United States proposal, pointing out that it was based on the definition used in the United Nations Convention on International Bills of Exchange and International Promissory Notes of December 1989, the most recent of the United Nations Conventions in the field of international trade.

3. Mr. MORAN (Spain) and Mr. WALL (United Kingdom of Great Britain and Northern Ireland) also supported the proposal.

4. The CHAIRMAN said that, in the absence of any objection, he would take it that the Committee approved the United States proposal subject to such drafting changes as might be necessary in order to bring the wording completely into line with the text of the United Nations Convention on International Bills of Exchange and International Promissory Notes.

5. It was so decided.

Article 3 (concluded) (A/CONF.152/C.1/L.38)

6. Mr. WALL (United Kingdom), introducing his delegation's proposal (A/CONF.152/C.1/L.38), said that the United Kingdom was somewhat concerned by the multiplicity of operations involved in the concept of delivery of the goods into the operator's charge, particularly in the light of the wording of article 1 (a) as approved by the Committee. Under the proposal, the only two factors determining the period of responsibility were delivery of the goods and their collection. In his delegation's view, there was no need to refer to the eventuality of the goods' not being collected in time.

7. Mr. MORAN (Spain) said that the proposal was a highly interesting one and deserved to be considered in relation to other parts of the draft Convention, and particularly articles 1, 4 and 10.

8. Mr. BONELL (Italy) said that he failed to see in what respect the proposed text was clearer than the Commission's draft.

9. Mr. SWEENEY (United States) said that he was in favour of keeping article 3 as it stood. To include the concept of "sole" charge would be tantamount to an invitation to allocate the operator's activities, at present more or less unified, among several individual corporations, each without assets or insurance. The result would be most undesirable. The term "delivers" did not necessarily connote physical delivery and was not in his view preferable to the concept of "taking in charge". As for the expression "hands them over", it did, perhaps, have stronger physical connotations than the expression "placed them at the disposal", but the latter was, in his view, a sufficiently close reflection of reality. He was unable to support the United Kingdom proposal.

10. Mr. RUSTAND (Sweden) remarked that the expression "placed them at the disposal" was preferable in that it offered the operator an opportunity to divest himself of responsibility without physically handing over the goods. He could not support the United Kingdom proposal, but would support the original text, which, in his view, would have been further improved by the Finnish amendments (A/CONF.152/C.1/L.36).

11. Mr. TARKO (Austria) noted that the United Kingdom proposal made a number of changes to the wording of article 3, some of which were of a substantive nature. In his view, rather than introducing the idea of the carrier or other person delivering the goods into the operator's charge, it would be preferable to speak of the operator taking them in charge, as in article 1. He could not support the insertion of the word "sole", since it could lead to disputes: the goods, for example, might not be in the "sole" charge of the operator, yet might be in his charge all the same, and he should therefore be responsible for them.

12. On the other hand, it was accepted that the responsibility of the operator did not end completely after the period during which he had taken the goods in charge. Under article 10 (1) he still had a right of retention over them after that period, but in exercising that right he was not free to do as he liked, so that in a sense his responsibility continued. Hence there was much to be said for the proposal to omit the words "or has placed them at the disposal of", since they might create a measure of uncertainty.

13. Mr. ROJANAPHRUK (Thailand) said that the omission of the words "or has placed them at the disposal of" in the United Kingdom proposal introduced a major change in the text of article 3. Its effect would be to extend the period of responsibility of the operator, which, in his view, was not justified. He was therefore in favour of keeping article 3 as it stood.

14. Mr. ZHAO Chengbi (China) noted the efforts of the United Kingdom delegation to define more closely the period of responsibility of the operator. The terms used in its proposal, however, were not exactly in line with those used in other articles. The term "take charge" had been extensively discussed at previous meetings and, despite its uncertainty, most delegations had accepted it for want of anything better. The United Kingdom proposal involved a substantive change in that it extended the period of responsibility of the operator until the goods were actually handed over to the person entitled to take delivery. The present wording, however, allowed for the possibility that that person might be represented by an agent and for that reason had been found, after much discussion, to be satisfactory by most delegations.

15. Mr. ROMAN (Belgium) said that he could agree to the first part of the United Kingdom proposal. The second part, however, raised certain problems, in that the operator would retain

full responsibility for the goods even if he was unable to get rid of them. He was therefore against the proposal as a whole.

16. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that while it was true that as legal terms "take in charge" and "hand over" might be difficult to interpret in practice, all efforts to improve on them had been fruitless, and the present proposal was no more successful. Moreover, while the term used in article 3, "takes in charge", meant that attention was focused on the operator, the United Kingdom proposal shifted the emphasis to delivery by the carrier or other person, which could well create problems. In addition, in the second part of the proposal, the goods were only to be "handed over". The omission of the concept of "placing them at the disposal of the person entitled to take delivery of them" had important practical implications. The operator might not be in a position to hand over the goods and yet ought to be able to discharge his responsibility by making them available. Despite the valid problems raised by the United Kingdom, he therefore thought it would be better to stick to the present form of words.

17. Mr. SCHROCK (Germany) said that his delegation had always felt some uneasiness regarding article 3 and the term "take in charge". In the light of comments by previous speakers, however, he considered it preferable to keep the present text as it stood.

18. Mr. WALL (United Kingdom) said that the discussion had shown there to be real problems concerning the existing text of article 3 and the difficulty of arriving at clear definitions of responsibility. As the Committee had not felt it appropriate to seek such definitions, the area covered by article 3 was bound to become a source of major problems concerning the respective responsibilities of carrier and operator. The United Kingdom was particularly concerned about the casualness of the concept of "placing at the disposal"; to use such language would be tantamount to allowing the operator to disclaim responsibility simply on the grounds that he had dumped the goods on the quayside and the person entitled to collect them had not turned up. The Convention as a whole did not necessarily confer indefinite responsibility on the operator; if the goods were not collected after a certain period of time, the operator could avail himself of other provisions of the Convention to dispose of them, but he ought to remain responsible for the goods until he had done so. His delegation remained very attached to the Finnish proposal, which, however, had been rejected, precisely because it sought to avoid the casualness of the idea of placing goods at someone's "disposal". In the circumstances it would withdraw its own proposal.

19. The CHAIRMAN accordingly took it that article 3 was approved.

20. It was so decided.

Article 1. proposals for new subparagraphs (continued)

21. Mr. WALL (United Kingdom), introducing his delegation's proposal (A/CONF.152/C.1/L.37) said that it concerned the definition of the word "person", used in his proposals for article 3 and article 4. It might be argued that, since his proposal for article 3 had not been accepted, there was no need to define the term "person". He felt, however, it would be preferable to defer discussion until after consideration of article 4.

22. The CHAIRMAN said that document A/CONF.152/C.1/L.37 would be considered after the United Kingdom proposal concerning article 4.

Article 5 (A/CONF.152/C.1/L.11, L.12, L.20, L.24, L.39, L.42)

23. Mr. SCHROCK (Germany), introducing his delegation's proposal to add a new paragraph (1 bis) (A/CONF.152/C.1/L.11), said that after consultations with the Australian delegation, it had been decided to insert the word "unsupervised" between the words "granted" and "access". As thus revised, the proposal was now submitted jointly by Australia and Germany. It stemmed from the fact that article 5 (1) on the "basis of liability" reversed the burden of proof concerning fault and neglect. In normal circumstances it was up to the claimant to prove that the loss he had suffered had been caused by the fault or neglect of the defendant. In the present article, the burden of proof had been reversed, as it had been in other transport conventions, because when something happened to goods in a ship or railway wagon, for example, it was the carrier who knew the facts of the matter, and not the shipper, consigner or consignee. That point of view, expressed in the conventions on carriage, was one he fully supported. In the case of transport terminal operators, however, especially in major sea ports, the factual situation could be quite different, because the goods would not necessarily be stored under lock and key. Sometimes it was necessary to grant the customer access to his goods so that he could inspect them or deal with them in some other way. In big sea ports it was not possible to install electronic monitoring or supervise all customers' visits. For practical reasons, customers were sometimes given unsupervised access to goods, and if the damage occurred when a customer had been granted such access, it could equally well have been caused by the terminal operator or by the customer. In that particular situation, therefore, he suggested a return to the general rule of law whereby it was the claimant who must prove fault or neglect.

24. Mr. SMITH (Australia) said that his delegation considered that the burden of proof should not be shifted where the operator had granted the customer or other persons access to the goods in question. That would be in line with recent decisions by English courts under the common law of bailment. He had suggested the insertion of the word "unsupervised" to cover cases where the operator retained control and supervision of the goods in question, again in line with English law.

25. Mr. FILIPOVIĆ (Yugoslavia) said that while national law on the subject varied, the intention behind the draft Convention was that the operator alone should bear liability, based on fault, with reversal of the burden of proof, and he was therefore opposed to the joint proposal.

26. Mr. BONELL (Italy) said that his delegation had difficulty in supporting the joint proposal. There was sufficient room in the formula "take all necessary measures that could reasonably be required to avoid loss or damage to the goods" to enable the operator to prove that he had done what was necessary when, for example, other people were present at the place where the goods were held, in particular the customer or his agent. His delegation accordingly thought that the proposal introduced an unnecessary complication.
27. With regard to the expression "at the time of the occurrence", he thought that it would be more appropriate to refer to the entire period during which the goods were under the responsibility of the operator.
28. Mr. ROMAN (Belgium) said that he could have supported the original German proposal. Since, however, the insertion of the word "unsupervised" placed the entire burden on the operator, his delegation would abstain in the vote on the joint proposal.
29. Mrs. EL OTMANI (Morocco) said that in her country, consignees frequently visited ports and had free access to the goods. Her delegation therefore thought it should be for the consignee to prove that there had been some kind of occurrence while the goods had been in the custody of the operator.
30. Mr. TARKO (Austria) said that article 5 (1) was quite flexible. Under the existing wording of the paragraph, it was possible for a judge to determine whether the operator had taken all the measures that could reasonably be required.
31. The expression "at the time of the occurrence" could give rise to difficulties since it might be difficult to determine when the loss, damage or delay had actually taken place. His delegation was therefore unable to accept the joint proposal.
32. Mr. RUSTAND (Sweden) said that, when the goods were inspected by the customer, it would be normal for a representative of the operator to be present to supervise matters and to protect his interests. In his view, therefore, the joint proposal was unnecessary.
33. Mr. HORNBY (Canada) said that if the customer or owner of the goods in question had been granted access to the area where the goods were stored, that would be a factor to be taken into account by the courts in determining whether or not the operator had taken all measures that could reasonably be required. His delegation could not, therefore, support the joint proposal, which would shift the burden of proof onto the claimant.
34. Mr. WALL (United Kingdom) said that, while his delegation did not oppose the proposal, it had some difficulty, for example, with regard to the word "customer". Who exactly was the customer, and what was his relationship to the operator, carrier, owner or despatcher? With respect to the expression "at the time of the occurrence", he thought that it might be more appropriate to say "during the period when the loss or damage occurred". It would be only realistic to recognize that there would probably be instances where the customer wanted to influence matters in his own interests. If the customer had an advantage in being allowed unsupervised access, he should not be able to use that advantage to the detriment of the operator. In those circumstances, the burden of proof should remain with the customer.
35. Mr. CHRISTOV (Bulgaria) said he was in favour of the proposal, since in his country's ports it was often the case that the customer did have access to the goods. He pointed out that there was a marked difference between the Hague-Visby Rules and the Hamburg Rules in that respect: in the former, the carrier, who corresponded to the terminal operator in the present case, simply had to prove that he had discharged all his responsibilities; he was not compelled to prove the occurrence of any loss or damage; in the latter, he was. Bearing in mind the actual situation that prevailed in practice, he would opt in favour of relieving the operator of the burden of proof.
36. Mr. OCHIAI (Japan) said he had some difficulties with the proposal in that it was based on the assumption that the customer and the claimant were one and the same person. If, however, they were not, and if there were no fault on the part of the claimant, he could not see why the latter should have the burden of proof imposed on him.
37. Mr. LARSEN (United States) said he too preferred the existing text. The proposal was introducing an evidentiary rule over and above the basic principle of liability enshrined in the Convention. In trying to deal with one specific set of circumstances, it created a shift in the burden of proof which raised as many questions as it tried to solve. In the event of an occurrence resulting in loss, the operator already had a defence, in that he could show that he had taken all reasonable care to protect the goods. He would also have a defence under article 3, in that if the customer had taken possession of the goods to inspect, treat or handle them, the operator would no longer be responsible.
38. Mrs. PIAGGI DE VANOSI (Argentina) said she too had difficulties with the proposal; in practice, it might be difficult to prove that the customer, or persons acting on his behalf, had been granted access to the area concerned at the time the loss or damage had actually occurred.
39. Mr. SCHROCK (Germany) said the joint proposal was not intended to cover some hypothetical situation, but the real situation currently existing in transport terminals, as reported by the industry and as confirmed by himself through personal visits. He could accept the United Kingdom suggestion that the phrase "during the period when the loss or damage occurred" should be substituted for the word "occurrence" in the first line of the proposal.

40. Ms. SISULA-TULOKAS (Finland) believed the situation was already taken care of in paragraph (1) of the article by the phrase "all measures that could reasonably be required". If the proposal were accepted, it would be very unwise for the customer to ask to inspect the goods; on the contrary, it would be wise for him to make clear that he did not wish to have any access to them at all.

41. Mr. BELLO (Philippines) said that while he understood the concern of the sponsors of the proposal about unsupervised access by customers, it should be remembered that such access, although unsupervised, would have been granted by the operator, so that the customer would not be an interloper or trespasser. A shift in the burden of proof could not be made on the basis of mere speculation that there was a causal link between unsupervised access and the occurrence that had caused damage.

42. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said he preferred the existing text. In the event of such an occurrence, it should be for the operator to adduce the necessary evidence to show that he was not to blame for the damage that had been done.

43. Mr. MUTZ (Observer, Central Office for International Railway Transport) said he shared the doubts expressed as to whether the provision could be applied in practice, since normally access would be supervised. Determining whether or not access had been supervised would usually amount to the same thing as determining whether or not all reasonable precautions had been taken to protect the goods.

44. The CHAIRMAN invited the Committee to vote on the joint proposal (A/CONF.152/C.1/L.11).

45. The proposal was rejected by 27 votes to 4, with 4 abstentions.

46. The CHAIRMAN suggested that a further proposal relating to article 5, submitted by Spain (A/CONF.152/C.1/L.20), which concerned a drafting point, could be transmitted to the Drafting Committee.

47. It was so agreed.

48. Mr. SOLIMAN (Egypt) introduced his proposal relating to article 5 (2) (A/CONF.152/C.1/L.42). In practice it might be difficult to prove how far the loss sustained was or was not attributable to failure on the part of the operator.

49. Mrs. EL OTMANI (Morocco) supported that proposal. It was likely to be difficult to prove anything so essentially uncertain as to the extent to which loss or damage was attributable to this or that cause.

50. Mr. BONELL (Italy) said some misunderstanding might have arisen owing to the fact that paragraph (2) was worded in a somewhat negative way. In fact, what was at stake was not a negative factor, but a positive factor, namely, the amount of loss attributable to one cause as distinct from another. Under the principle of contributory negligence, the operator's liability would be limited to the loss or damage he had in fact caused.

51. Mr. FILIPOVIĆ (Yugoslavia) shared that view. Although the concluding phrase of paragraph (2) was negative in tone, in fact it would be for the operator to prove his own part in the causation of the matter, and thus the proof required would be positive rather than negative.

52. Mr. OCHIAI (Japan) said he had some difficulties with the proposal. Since the wording used in the concluding phrase of the paragraph in the Commission's text was the same as that used in paragraph 7 of article 5 of the Hamburg Rules, as well as in article 17 of the Multimodal Convention, he would prefer to see it kept.

53. The CHAIRMAN invited the Committee to vote on the Egyptian proposal (A/CONF.152/C.1/L.42).

54. The proposal was rejected by 20 votes to 7, with 7 abstentions.

55. Miss VAN DER HORST (Netherlands), introducing her delegation's proposal to add a new paragraph to article 5 (A/CONF.152/C.1/L.24), said that at the moment the draft Convention contained no specific provisions as to consequential damages. The UNCITRAL Working Group, in the preparatory discussions, had concluded that it would be for national law to determine whether the operator should be made liable for such damages, a conclusion which could mean that operators were liable in one State, but not in another. Now that an attempt was being made to unify the rules on operator liability, it would perhaps be advisable to include a provision in the Convention making it clear that consequential damages could not be recovered.

56. Ms. SKOVY (Denmark) supported the Netherlands proposal, but would prefer it to be incorporated into article 6.

57. Mr. RUSTAND (Sweden) drew attention to his Government's comment (A/CONF.152/7/Add.1, p. 12) that it was not clear whether the word "loss" in paragraph (1) was to be taken as including consequential loss, and that as a result the extent of the operator's liability was uncertain. In principle, his delegation supported the proposal, although it doubted that any firm conclusion could be reached at such a late stage. For the present, it wished to reserve its position.

58. Mr. LARSEN (United States) shared that view. The point had already been sufficiently debated in the Working Group, where the point had been clarified, and the addition proposed by the Netherlands was unnecessary.

59. Mr. ABASCAL (Mexico) said that while he could agree to the principle that article 5 should cover consequential damages, he believed that the addition proposed by the Netherlands would be unduly restrictive in regard to the limits provided for under article 6. Accordingly, he could not support the proposal.

60. Miss VAN DER HORST (Netherlands) said the position was somewhat confused. Some delegations appeared to be in favour of making the operator liable for consequential damages, and others did not. It would perhaps be best to let the matter be decided by national authorities. She would therefore withdraw her delegation's proposal.

The meeting rose at 12.25 p.m.

8th meeting

Monday, 8 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.8

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 5 (continued) (A/CONF.152/C.1/L.39)

1. Mr. ROMAN (Belgium), introducing the proposal in document A/CONF.152/C.1/L.39, said that the additional paragraph would help to balance the rights and the duties of the operator by exonerating him from liability for loss or damage to the goods following the customer's failure to take delivery of the goods.

2. Mrs. EL OTMANI (Morocco), supporting the proposal, said that there was a link between the fact of goods being left in the operator's hands and the period of his responsibility. It was already established that in practice the operator's responsibility would cease once the goods were placed at the customer's disposal.

3. Ms. SISULA-TULOKAS (Finland) said she was sympathetic to the idea embodied in the proposal but thought it pertained to article 3 rather than article 5.

4. Mr. BELLO (Philippines) said that he could support the proposal if the words "within a reasonable period" were replaced by a specific time-limit, such as five days. A time-limit should also be laid down in paragraph 3 of article 5.

5. Mr. ROJANAPHRUK (Thailand) said that the point raised in the Belgian proposal was adequately covered in article 3; there was no need for an additional paragraph on the matter in article 5.

6. Ms. JORGENSEN (Denmark) said that the proposal did not affect the operator's liability as such. It was concerned with the period of the operator's responsibility under article 3 and added nothing except a requirement for the operator to notify the person entitled to take delivery of the goods. She did not favour any such addition, either to article 5 or to article 3.

7. Mr. TARKO (Austria) agreed. The point at issue was already covered by article 3. Furthermore, he questioned the repeated use of the word "delivery" in respect of the goods. The operator was not a carrier; he simply placed the goods at the disposal of the customer.

8. Mr. ILLESCAS (Spain) agreed that the draft must strike an appropriate balance between the rights and the duties of the operator; however, the point raised in the Belgian proposal appeared to be covered by article 3. Moreover article 10 (3), by enabling the operator to sell the goods if they were not collected, provided him with a means of curtailing the period for which he remained responsible for them. Thus his liability in the case contemplated by the Belgian proposal was already limited. His delegation would be reluctant to approve the Belgian proposal if the operator was thought to be sufficiently protected by articles 3 and 10.

9. Mr. LARSEN (United States of America) agreed. He too felt that the issue raised in the Belgian proposal pertained to article 10 rather than article 5. His own delegation had submitted a proposal for article 10 (A/CONF.152/C.1/L.15) whereby the goods would be treated as abandoned if unclaimed within a specified period of time. The problem of the operator's liability in such cases should be resolved in article 10 rather than in articles 3 or 5.

10. Mr. RUSTAND (Sweden) said that the point at issue was not the basis of the operator's liability but the period of his responsibility for the goods. The period of responsibility would be rendered more, not less, uncertain by the words "a reasonable period" which appeared in the Belgian proposal.

11. Mr. GOKKAYA (Turkey) supported the proposal. The operator must not be forced to assume responsibility for the goods for an indefinite period. Since interpretations of the term "reasonable period" were bound to differ, he suggested replacing it by a fixed time-limit of 30 days.

12. Mr. NAOR (Israel) thought the Belgian proposal was redundant. Its only effect would be to extend the period of the operator's responsibility slightly beyond the period provided in article 3.
13. Mr. CHRISTOV (Bulgaria) said he could support the Belgian proposal with the amendment suggested by the representative of Turkey.
14. Mr. WANG Yangyang (China) said that the addition of a provision in article 5 to protect the operator, along the lines proposed by Belgium, would be justified. However, the proposal failed to specify a time-limit for the operator to notify the customer that the goods were available for collection.
15. Mr. ROMAN (Belgium) noted that considerable support had been expressed for his delegation's proposal, but there was also a widely-held view that article 5 was the wrong place for it. The Committee could perhaps deal with the point under article 10.
16. The CHAIRMAN observed that the reasonable period of notice contemplated in article 10 referred to the exercise of the operator's right of retention, not to his responsibility for the goods. A separate decision must be made on each question. The effect of the Belgian proposal would be to establish that the operator's responsibility for the goods lasted for a "reasonable period" after notification had been given that they were available for collection, and ceased when that reasonable period expired. A formal decision was required on that principle.
17. Mr. RUSTAND (Sweden) said that if the principle underlying the proposal was accepted and the wording of the proposal improved, its best place might be in article 3.
18. Mr. BONELL (Italy) pointed out that article 3 had been approved by the Committee and could not be amended. As to article 10, there was no apparent link between the United States proposal for that article and the Belgian proposal for article 5.
19. Mr. LEBEDEV (Union of Soviet Socialist Republics) wished it to be made clear whether the Belgian proposal would extend the period of the operator's responsibility beyond the period envisaged in article 3.
20. Mr. ROMAN (Belgium) said that the proposal would exonerate the operator from liability for loss or damage to the goods when a reasonable period after the goods had been placed at the disposal of the customer had expired.
21. The CHAIRMAN invited the Committee to vote on the Belgian proposal (A/CONF.152/C.1/L.39).
22. The proposal was rejected by 17 votes to 13, with 4 abstentions.
23. Mrs. EL OTMANI (Morocco) said that the term "failure" was used in article 5 (2), whereas in the corresponding provisions of the Hamburg Rules the expression used was "fault or neglect". She would prefer the new Convention to employ the terminology of the Hamburg Rules, since the functions of a port operator supplemented those of the maritime carrier. In Moroccan law the term "failure" implied a very broad degree of responsibility and would be interpreted as making port operators liable for the slightest failure of any sort, whereas "fault or neglect" would mean that the port operator had omitted to perform a particular act. The present difference in terminology between the Convention and the Hamburg Rules would have very harmful implications for the operator.
24. The CHAIRMAN said that in the context of article 5 (2) the term "fault" would carry a moral connotation which was inappropriate. The word "failure" did not attribute blame and indicated merely that the operator's responsibility was not properly discharged.
25. Mr. BONELL (Italy) said that the term "failure" constituted a departure from both the UNIDROIT draft and the Hamburg Rules. "Fault" would be a more appropriate term than "failure". Failure to perform a certain act implied that there was no need to inquire into the conduct of the defaulting party, whereas a stipulation of fault placed the burden of proof on that party. The term "fault" should always be used where negligence was implied, as in article 5 (1). His preference would therefore be for the words "fault or neglect" to replace the word "failure" in article 5 (2).
26. Mr. SWEENEY (United States) agreed. The term "failure" denoted a contractual element; however, the basis of article 5 was not simply contractual since it involved elements of both delict and tort. From that point of view "fault" was a more appropriate term. For the sake of conformity with the Hamburg Rules, it should replace the term "failure".
27. Mr. PAMBOU-TCHIVOUNDA (Gabon) said that his delegation was in favour of using the terminology of the Hamburg Rules since it was an accepted part of international trade law.
28. Mr. ILLESCAS (Spain) said that his delegation was in favour of the text as it stood: paragraph 2 of article 5 described quite clearly the sort of failure which would determine the operator's liability, namely, his failure to carry out the measures described in paragraph 1. In that context the use of the word "fault" could be misleading.
29. Mr. BRUNN (International Union of Marine Insurance), speaking at the invitation of the Chairman, pointed out that article 17 of the United Nations Convention on International Multimodal Transport of Goods (the Multimodal Convention) used the same terminology as the Hamburg Rules. It

would be detrimental to all three conventions if the present one, which was designed to fill the gaps between the other two, introduced new terminology.

30. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that his delegation preferred the expression "fault or neglect" because it considered it more precise.

31. Mr. WANG Yangyang (China) said that his delegation wished to retain the term "failure". The translation into Chinese of the word "failure" was very different from that of "fault": failure meant omitting something, whereas fault related to wrongdoing. The problem should be referred to the Drafting Committee and not be determined by a vote.

32. Mr. ILYTCHEV (Soviet Union) said that the word "failure", meaning omission of the necessary measures, was more universal in scope than the word "fault". His delegation therefore preferred the text drafted by the Commission.

33. Mr. RAO (India) said that his delegation had no strong views about either word but basically preferred the text as it stood. The operator's duty under paragraph 1 of article 5 was to take all measures that could reasonably be taken to avoid the prejudicial occurrence and its consequences. The manner in which the article dealt with failure in that duty was merely descriptive. Instead, therefore, of trying to particularize the notion of failure the Committee should simply allow it to stand in article 5. In practice the courts would interpret it in a liberal manner, which would necessarily involve consideration of the notion of fault or neglect.

34. Mr. FILIPOVIĆ (Yugoslavia) said that, as he saw it, the word "failure" meant insufficiency as measured by certain legal standards, which could mean fault or neglect. The two terms therefore amounted to the same thing, although the word "failure" as used in paragraph 2 might be broader and therefore more suitable.

35. Mrs. PIAGGI DE VANOSI (Argentina) reminded the Committee that when the subject had been discussed at the twenty-second session of the Commission it had been concluded that failure was not the same as fault or neglect.

36. Mr. MARSHALL (United Kingdom of Great Britain and Northern Ireland) said that the word "failure" in paragraph 2 served purely to apply the proportionality criterion set out in that paragraph to any liability that might arise under paragraph 1. The use of the word "failure" ensured a much more complete application of that criterion than the expression "fault or neglect".

37. The CHAIRMAN observed that the Committee seemed highly divided on a subject which was not normally one on which a vote would be taken. He therefore suggested that the Drafting Committee be invited to take up the point.

38. Mr. BONELL (Italy) said that he did not consider the question to be a matter of overwhelming importance but it might perhaps be more than just a drafting issue.

39. The CHAIRMAN asked whether there were any delegations for whom the present wording was unacceptable.

40. Mrs. EL OTMANI (Morocco) reiterated her delegation's objection to the use of the term "failure".

41. Mr. PAMBOU-TCHIVOUNDA (Gabon) shared the objections to the term "failure" voiced by the representative of Morocco. However, the choice of expression would depend on whether the system of liability to which the new Convention referred was based on risk, in which case "failure" might be more appropriate, or on fault. The use of the expression "failure" would, as the representative of Morocco had stated, create unnecessary difficulties for the operator in that any shortcomings on his part would have to be defended. That would raise particular problems in the developing countries. In drafting legislation, efforts should be made to avoid regional subjectivity and employ objective considerations based on common sense that would be acceptable to all.

42. Mr. ABASCAL (Mexico) drew the Committee's attention to article 14 of the draft Convention, which emphasized its international character and the need to promote uniformity in its application. That would rule out any interpretation based on national legal systems. In article 5, "failure" meant failure to take the specific measures defined in paragraph 1. The text as it stood was therefore better.

43. The CHAIRMAN agreed that the expression "failure" was clearly to be interpreted in relation to the Convention as a whole and not to any meaning that it might have in a specific legal system. He had heard only two delegations which had been emphatic in their opposition to the use of the word "failure". Unless, therefore, he heard any further objection, he would take it that the Committee approved the text of article 5 as it stood, for referral to the Drafting Committee.

44. It was so decided.

45. Mr. FALVEY (United States) said that he wished to share with the Committee his delegation's interpretation of the approved text of article 5. Concern had been expressed by operators in the United States and elsewhere that a strike by their employees might be deemed a cause of damage or delay under the Convention. The approved text would provide the operator with a defence in the event of a strike, should he have taken all appropriate action permitted under local law to deal

with a strike situation, which might include bona fide negotiations; if he had taken such action he would not be held liable for the loss or damage occasioned by a strike on the part of his employees, ex-employees or agents' employees.

The meeting was suspended at 4.05 p.m. and resumed at 4.40 p.m.

Article 6 (A/CONF.152/C.1/L.12, L.27, L.45, L.51)

46. Mr. OCHIAI (Japan) introduced his delegation's proposal for the addition of a new paragraph (1) (c) to article 6 (A/CONF.152/C.1/L.27). The text was inspired by the second sentence of article 22 (2) (b) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention) as amended by the Hague Protocol of 1955. Its purpose was to provide for situations in which partial loss or damage could affect the whole of a consignment - when, for example, a piece of machinery was shipped in two packages, one of which was lost or damaged.

47. Mr. ILLESCAS (Spain) endorsed the proposal as a useful stipulation.

48. Ms. JORGENSEN (Denmark) also approved the proposal, which reflected her country's understanding of the issue.

49. Mr. CHRISTOV (Bulgaria) considered the Japanese proposal to be just, but also superfluous in so far as its principles merely echoed the general principles of civil liability.

50. Mr. BELLO (Philippines) said his delegation could accept the proposal if it was approved on the understanding that it would be articulated with the proposal submitted by Germany in document A/CONF.152/C.1/L.12, which sought to add to article 6 (1) the notion of units of account per package or other shipping unit.

51. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) joined in approving the Japanese proposal.

52. The Japanese amendment to article 6 (1) was adopted by 12 votes to 7, with 15 abstentions.

53. Mr. LEBEDEV (Soviet Union) observed that the number of abstentions might imply that insufficient time had been devoted to consideration of the Japanese proposal. He took it that the Committee had approved the idea it embodied but might wish to reflect a little further on its formulation. In particular, thought might be given to the question of identifying accurately the goods described as those whose value was affected, and indeed to all the implications of that phrase.

54. The CHAIRMAN said that the Drafting Committee might consider the most suitable point at which to insert the Japanese proposal in the draft Convention, and might seek some improvement in the wording. The text was intended to provide guidance to courts in determining the limit of the operator's liability. Since it was derived from the Warsaw Convention as amended by the Hague Protocol - which had already served as the basis for at least one lengthy ruling in law - it would be wise to approach with caution any suggestion for altering the language which the Committee had just approved, and to align it as closely as possible with that of the instrument from which it was derived.

55. Mr. SCHROCK (Germany) introduced paragraph 1 of his delegation's proposal in document A/CONF.152/C.1/L.12, calling for the deletion of subparagraph (b) of article 6 (1). The rationale for that amendment had been set out in detail in paragraph 5 of his delegation's comments on the Commission's draft (A/CONF.152/7), which he read out to the Committee. In proposing the deletion of subparagraph (b), the German delegation was conscious that the decision whether or not to retain it was quite closely related to whatever limits of liability were to be adopted by the Conference: the position of a number of delegations, including possibly his own, with regard to article 6 (1) (a) and 6 (1) (b) would undoubtedly be influenced by agreement on relatively high or relatively low amounts. For its part, his delegation believed that the higher those amounts might be, the less would be the reason for retaining subparagraph (b).

56. The CHAIRMAN pointed out that the effect of the German proposal would be to reintroduce the notion of a single limit of liability, regardless of the mode of transport involved; that notion had been discussed at an early stage of the Commission's deliberations and subsequently set aside in accordance with the prevailing view that the dual-limit approach was preferable. He suggested that the Committee's work would be expedited if members first pronounced on those two options before examining the article further.

57. Mr. CHRISTOV (Bulgaria), after alluding to the relationship between the draft Convention and the equivalent provisions of the Hamburg Rules, and to the distribution of liabilities between the operator and his customer, said that his delegation would not object to a single limit if it corresponded to paragraph (1) (b) of the Commission's draft. On the other hand, it could see the merits of - and tended to favour - the dual-limit approach in the form in which the Commission had proposed it.

58. Ms. JORGENSEN (Denmark) supported the German proposal. Her delegation favoured a single limit of liability at least as high as that proposed in paragraph 1 (a).

59. Mr. BONELL (Italy) said that it was difficult to express a view on a single aspect of the question of limits of liability without knowing how its other aspects would be settled. In the

case of the choice between a single and a dual system, it was hard to reach a definite decision without knowing what figure would be set. For the time being, he would express a preference for a higher limit than that provided for in paragraph 1 (b), possibly as high as that set in paragraph 1 (a). The more the Convention departed from the limit set in 1978, when economic conditions had been very different, the more he would favour a single-limit approach. However, as long as the precise figure was not known, he could do no more than express a preference. The best way of proceeding might be to get the feeling of the Conference and proceed step by step, on the understanding that the possibility should be considered of revising a preliminary decision on the matter if it proved necessary.

60. Mr. TARKO (Austria) said that his delegation supported the German proposal for a single limit of liability. It was also in favour of a limit at least as great as the 8.33 units of account mentioned in paragraph 1 (a).

61. Mr. MARSHALL (United Kingdom) agreed that there was considerable logic in having a single limit. The Committee was, after all, considering the case of one operator and his ability to react to losses when they occurred and to compensate those losses. However, that must be put in the context of the difference between the two levels of liability provided for in the Multimodal Convention and the differences among the limits provided for in the various unimodal transport conventions. It was not only the value of the goods carried which determined the carrier's liability or, in the case of the present Convention, that of the operator, but also the ability of the operator or carrier to find suitable insurance coverage if he was to be able to pay compensation when he was liable. In the case of road transport, for example, if only a single truck was involved, the concentration of loss was not large; it would be possible to compensate for the loss even if there were very high value goods inside the truck. On the other hand, the limit of liability for transit by sea was much lower, as it must be considering the size of the vessel and the enormous concentration of values. The sea carrier found it difficult and expensive to insure himself for a suitable amount to afford him protection and that was why a lower level of limit of liability had been set in the Hamburg Rules.

62. In the case of the operator of a transport terminal, it should be remembered that, if he was to be exposed to a single limit or even to two limits, what was involved was a port area which might have goods in it whose value was many times greater than that of the goods in a single vessel. Thus, if the Committee were to move to a single and higher limit, it would find that, apart from the lack of comparability between the various transport conventions, the operator would have to protect himself to a far greater extent. In many cases, where the capacity of the insurance market was limited, the operator might have difficulty in finding an insurer and might indeed have to operate uninsured. He was sure that many countries, both developed and developing, that had large State-run terminals would be unhappy with the present Convention if it stipulated such high limits that the operator's liabilities would be enormous in the event of a catastrophe.

63. Mrs. EL OTMANI (Morocco) said that she agreed entirely with the previous speaker and favoured the dual system proposed in the draft Convention. She pointed out that under paragraph 1 (b) an operator receiving goods immediately after their carriage by sea was already being asked to bear a liability greater than that stipulated for the sea carrier in the Hamburg Rules. It would have been preferable to align the limits.

64. Mr. LARSEN (United States) said that his delegation believed that the Convention should, to the extent possible, make the terminal operator's liability uniform with the limit of liability for the mode of transport used to carry the goods. There should therefore be a dual system. If carriage was principally by sea, the limit should be generally uniform with that applicable to sea transport. If carriage was principally by land, the limit that applied to the land portion of the journey should prevail. The choice would be made by the shipper; if he sent goods by sea, which was the cheaper means, he faced the possibility of greater risk. He would have to take care of that risk himself, however, since the carrier would bear a lower level of liability. In the case of surface or air transport, a higher level of liability would apply. But the Committee must also consider the effect of inflation since 1980, when the limits set in the Multimodal Convention had been determined. According to statistics provided by the International Monetary Fund, the amounts set had lost about one third of their value. Accordingly, his delegation supported setting dual limits of liability but wished those limits to be updated to take account of their erosion by inflation.

65. Mr. RUSTAND (Sweden) associated himself with the views expressed in favour of providing for a dual system in the draft Convention. It was true, as the representative of Germany had pointed out, that goods sent by sea could be of great value but they were normally less valuable than those transported by other means. His delegation was therefore in favour of retaining the dual system.

66. Mr. HORNBY (Canada) also advocated the inclusion of the dual system in the draft. He believed that the guiding principle should be that the operator of a transport terminal should be subject to no less favourable limits of liability than those applicable to the carrier. That might be difficult to ensure in cases in which there was a lack of uniformity between the provisions applicable, but observance of the principle could be better achieved by a dual system such as that contemplated in the Commission's text.

67. Mr. ZHAO Chengbi (China) also thought that a dual system would be fairer. Under existing unimodal conventions, air and sea transport had very different limits of liability. Combining the different limits and asking all countries to recognize them would create difficult problems.

68. Mr. BRUNN (International Union of Marine Insurance), speaking at the invitation of the Chairman, said that he too favoured a dual system, as contemplated in the Multimodal Convention. He believed that not only the value but the amount of cargo carried by a vessel had influenced the decision to institute a dual system in that Convention. Insurance cover would be needed; if the draft Convention provided for a single system the insurance would be very expensive and problems of market capacity would arise, especially in developing countries.

69. Mr. MUTZ (Observer, Intergovernmental Organization for International Carriage by Rail) said that he was aware of the political nature of the question under discussion and that in such a case the views of an observer might not carry the same weight as they would in technical matters. He also knew that the share of rail transport in international trade was much lower than that of sea carriage. He noted, however, that railways were both operators of transport terminals and clients of such terminals. He believed that a liability system which differentiated between modes of transport would, in practice, complicate the situation. The lower liability in the case of goods to be handed over by the operator for carriage by sea might give rise to litigation. In 1956, when the Convention on the Contract for the International Carriage of Goods by Road (CMR) had been adopted, a limit of liability had been set of 25 gold francs - currently 8.33 units of account per kilogram - and was still in force. At that time the limit for transport by rail was four times as large, namely 100 gold francs, but in 1970 it had been reduced by half to the present limit. It was perhaps not always desirable to start from too low a point and it would not be advisable for the limit of liability to develop in that direction. However, while it could be argued that the value of goods was higher in one form of transport than another, it was undeniable that for all modes of transport the value of all goods carried had increased a great deal in the last decade and would go on doing so.

70. Mr. LEBEDEV (Soviet Union) said that one factor which had been taken into account in drafting article 6 had been the need to make the present Convention attractive to the operators of transport terminals by setting them a reasonable limit of liability. Justified fears had been expressed that setting a high limit might result in major operators in various countries, developed and developing alike, being unwilling to support the adoption of the Convention. At the same time, the need to relate limits of liability to the basic forms of transport had also been taken into account. Although it was undoubtedly easy to establish a system of limits for carriers in specific modes of transport, the dual system devised to limit the liability of operators of transport terminals was the most rational in the circumstances. The German proposal was not without merit, but in the last analysis it would be better to keep the system proposed in the draft Convention.

71. The CHAIRMAN said that, if the Committee adopted the proposal by Germany to delete subparagraph (b) of article 6 (1), it would be opting for a single system of limits of liability; if it rejected the German proposal, it would be approving the dual system contemplated in the Commission's draft. He invited the Committee to vote on that part of the German proposal in document A/CONF.152/C.1/L.12.

72. The proposal by Germany in paragraph 1 of document A/CONF.152/C.1/L.12 was rejected by 27 votes to 4, with 4 abstentions.

The meeting rose at 5.40 p.m.

9th meeting

Tuesday, 9 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.9

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 6 (continued) (A/CONF.152/C.1/L.45, L.51)

1. The CHAIRMAN reminded the Committee that at the previous meeting it had decided to retain the dual system of limits of liability set out in article 6 (1) (a) and (b). It now had to decide whether to approve the amounts of units of account at present enclosed in square brackets in those two subparagraphs. The first figure, 8.33 units of account, was derived from the CMR Convention, while the second, 2.75 units of account, was derived from the Multimodal Convention of 1980.

2. Mr. ROMAN (Belgium) supported the views that had been expressed at the previous meeting by the representatives of Morocco and the United Kingdom. The limit of the operator's liability should never be higher than that of the carrier's; the limit should also be related to the mode of carriage that had been chosen.

3. The CHAIRMAN invited the Committee to vote on the proposal by Morocco (A/CONF.152/C.1/L.51) that the figure "2.75" in article 6 (1) (b) should be reduced to "2.5".

4. The proposal was rejected by 13 votes to 8, with 4 abstentions.

5. Mr. HORNBY (Canada), speaking in explanation of his delegation's vote, said he had voted in favour of the proposal because he believed that the limits applicable to operators of sea terminals were most likely to become widely accepted. The lower limits proposed by Morocco were those contained in the Hamburg Rules, which, once they had entered into force, would gain wide acceptance.

6. The CHAIRMAN reminded the Committee that the previous day oral proposals had been made by the delegations of Denmark and Germany in favour of higher limits than those given in the text. He suggested that the Committee should vote on those proposals.

7. Mr. LARSEN (United States of America) asked whether a vote for higher limits would be a vote for a real increase in the limits, or simply a vote for an increase to take account of inflation.

8. The CHAIRMAN said the issue to be voted on was whether or not the figures appearing in article 6 (1) (a) and (b) should be increased. If the majority favoured such an increase, a working group might perhaps be set up to determine what the new limits should be.

9. Mr. BONELL (Italy) thought that the Committee should not be asked to decide at the present stage whether the limits should be increased; rather, it should be asked to decide whether the figures given should be adjusted to take account of inflation.

10. Mr. LAVIÑA (Philippines) shared that view.

11. Mr. LARSEN (United States) said the problem was that while the Committee had just voted against lowering the limits, a vote in favour of keeping the existing figures would amount in effect to a vote in favour of lowered limits. He agreed with the Italian representative that the issue the Committee should in fact be voting on was whether to keep the existing limits, adjusted for inflation: so adjusted, the figures would be approximately 11.5 units of account for land transport and 3.15 units of account for sea transport.

12. Ms. JORGENSEN (Denmark) explained that when she had earlier expressed a preference for a higher limit, that had been in the context of a single, unified system of limitation for all forms of transport. While the dual system was still in force, she would prefer to keep the existing limits.

13. Mr. FRANCONI (Instituto Argentino Uruguayo de Derecho Comercial), speaking at the invitation of the Chairman, pointed out that any increase in limits would immediately be followed by corresponding measures on the part of the companies concerned, notably with regard to insurance, measures which would be reflected in increased charges.

14. The CHAIRMAN invited the Committee to vote on the proposal to increase the figures quoted in article 6 (1) (a) and (b).

15. The proposal was rejected by 19 votes to 8, with 4 abstentions.

16. Mr. LAVIÑA (Philippines), speaking in explanation of vote, said that although his delegation favoured a higher limit, it had abstained because the question at issue had not been properly clarified. As he saw it, the interpretation of the position given by the United States representative in fact constituted a proposal, and it was that proposal which should have been voted on.

17. Mr. FILIPOVIĆ (Yugoslavia), introducing his proposal to add a sentence to article 6 (4) (A/CONF.152/C.1/L.45), said it was intended to make it clear whether or not the operator's servants or agents would be bound by an agreement on the part of the operator to increase the limits of liability as provided for under that paragraph. All existing transport conventions made provision for operators to make such an agreement by means of a special declaration. While it already seemed clear that the operator's servants and agents would be bound by such an agreement, it was less clear whether it would also be binding upon independent contractors. The issue was an important one, and should not simply be left to the courts in the various States to interpret.

18. The CHAIRMAN suggested that it would be more appropriate to include the sentence in article 7 (2).

19. Ms. JORGENSEN (Denmark) supported the proposal, and agreed that it would be better placed in article 7 (2).

20. Mr. CHRISTOV (Bulgaria) remarked that the Yugoslav proposal had no legal foundation, as the relationship between the operator and his servants or agents or other persons was res inter alios acta.

21. Mr. LAVIÑA (Philippines) thought that the proposed text was self-evident and could be added to article 6 (4) without modifying its legal effect. He was not in favour of putting it in article 7 (2).

22. Mr. SWEENEY (United States) agreed that the appropriate place for the Yugoslav proposal was in article 7 rather than article 6. With regard to the substance of the proposal, it was self-evident in so far as it concerned the operator's servants or agents, but he would endorse the Bulgarian representative's view that a legal problem arose in connection with the "other persons" referred to.

23. Mr. BONELL (Italy) said that he failed to see how the operator's servants or agents or other persons involved in the performance of the transport-related services could be bound by a contractual provision agreed upon between the operator and the customer.

24. Mr. RUSTAND (Sweden) said that he saw no difficulty in accepting the Yugoslav proposal, which he considered to be a logical counterpart of the entitlement provided under article 7 (2).

25. Mr. FRANCONI (Instituto Argentino Uruguayo de Derecho Comercial), speaking at the invitation of the Chairman, said that under Argentine law an agreement concluded between the operator and the customer would apply to the operator's servants or agents, but not to other persons such as contractors or subcontractors.

26. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that he favoured the principle incorporated in the Yugoslav proposal and would have no objection to its being added to article 6 (4), although he agreed that article 7 (2) would be a more appropriate place.

27. Mr. ABASCAL (Mexico) pointed out that the limits of liability referred to in article 7 were those provided for in the Convention, while the Yugoslav proposal was concerned with limits of liability agreed between the operator and the customer. In his view, the latter were binding upon the operator alone and could not be extended to his servants or agents or other persons of whose services he made use for the performance of the transport-related services.

28. Mr. BRUNN (International Union of Marine Insurance), speaking at the invitation of the Chairman, said that he shared the concern expressed by a number of delegations with regard to the position of independent contractors. From the insurance point of view, the provision might create severe problems for the independent contractor as regards insurance cover for his liability, the extent of which might not even be known to him.

29. Mr. FILIPOVIĆ (Yugoslavia) said that he would have no objection to his proposal being incorporated in article 7. With regard to other points raised during the discussion, he said that there was no possibility of the contractor being unaware of the extent of liability he might incur, as the precise value of the goods would be stated in the consignment notes and other documents. With regard to the question of insurance, he drew attention to article 6 (4) of the Hamburg Rules, which spoke of an agreement between the carrier and the shipper increasing the carrier's limit of liability.

30. Ms. SISULA-TULOKAS (Finland) said that her delegation would have difficulty in accepting the Yugoslav proposal in so far as it affected independent contractors. She referred in that connection to article 10 (3) of the Hamburg Rules, which provided that any special agreement under which the carrier assumed obligations not imposed by the Convention affected the actual carrier only if agreed to by him expressly and in writing.

31. Mr. ZHAO Chengbi (China) pointed out that whereas the main object of article 7 (2) was to protect the interests of the operator's servants or agents or other persons of whose services he made use for the performance of the transport-related services, that of the Yugoslav proposal was to protect the interests of the customer. For that reason, he would be opposed to including the proposal in article 7. He agreed with previous speakers that an agreement concluded by the operator could not be automatically applicable to the "other persons" referred to in the text.

32. Mr. CHRISTOV (Bulgaria) said that the provision proposed by the Yugoslav delegation would have no legal value unless the servants, agents or other persons referred to were informed of the terms of the agreement between the operator and the customer.

33. Mr. NAOR (Israel) said that a distinction should be drawn between the limits of liability that were compulsory under the Convention and those agreed upon separately between the operator and the customer. The Convention should deal only with the compulsory limits and leave the question of those arranged by separate agreement to the parties to that agreement.

34. Mr. ILLESCAS (Spain) remarked that the Yugoslav proposal was couched in more mandatory terms than article 7 (2). For his part, he would prefer to maintain the non-imperative, discretionary character of the present wording of article 7 (2). However, at least part of the Yugoslav delegation's concerns might be met by adding the words "and the contract" at the end of article 7 (2).

35. Mr. LEBEDEV (Union of Soviet Socialist Republics) suggested that, in view of the substantial differences of view which had emerged during the debate, a separate vote should be taken on the question whether the higher limits of liability agreed to by the operator applied also to the operator's servants or agents, on the one hand, or to his servants or agents or other persons of whose services he made use for the performance of the transport-related services, on the other. With regard to the applicability of the higher limits of liability agreed to by the operator to the operator's servants or agents, he noted that no provision of that nature was to be found in the Hamburg Rules or in earlier international transport conventions. Adoption of the Yugoslav proposal, even without any reference to "other persons", might entail certain consequences with regard to the future interpretation of article 7 (2) of the Hamburg Rules. For that reason, he was inclined to think that it might be preferable not to adopt the proposal.

36. Mr. RUSTAND (Sweden) expressed his delegation's continuing support for the Yugoslav proposal. Unless a contractor or subcontractor was aware of the limits of his liability, he was unlikely to offer his services to the operator.

37. Mr. AL-ZABEN (Saudia Arabia) considered that, although the principle behind the Yugoslav proposal was appropriate, it might impose unnecessary liability on "other persons". The problem could be solved by adding a phrase to the effect that servants, agents or other persons must be made aware of their liability.

38. Mr. BONELL (Italy) said it was clear from its title that the draft Convention dealt with the liability of the operator of a transport terminal in regard to his customer. The only contractor employed by the customer was the operator of the transport terminal, and the present purpose was to establish the basis of and mandatory limits to his liability. The operator could never derogate from the limits of his liability to the detriment of the customer, but could, under article 6 (4), derogate in the customer's favour by agreeing to higher limits of liability. The purpose of article 7 was to avoid all the differences in national legal systems between contractual claims, tortious claims, quasi-contractual claims, etc., by stating, in paragraph 1, that the defences and limits of the liability applied irrespective of the nature of the action brought against the operator. The purpose of article 7 (2) was to cover the case in which a servant, agent, or other person such as an independent contractor might be responsible for damage or loss of goods under tortious liability should the customer bring an action against him. In such a case, the servant, agent or other person could avail himself of the same benefits as the operator. However, it would be very surprising, and even illogical from a legal point of view, to say that the operator's contractual agreement to increase his limits of liability also applied to other persons. It was not enough to assert that such other persons must be made aware of the increased limits of liability; they must accept such a clause before it could be invoked against them. Nothing was said in the Hamburg Rules about such an automatic extension of liability. In article 10 (3), the "actual carrier" was bound by any special agreement between the carrier and the customer only if he so agreed expressly and in writing. In short, it was almost impossible to accept a proposal such as that submitted by Yugoslavia because the law did not allow contractual provisions to be extended to third parties.

39. Mr. FILIPOVIĆ (Yugoslavia) said that the aim of his proposal was to bring the matter under discussion, since the Convention covered not only the servants and agents of the operator of a transport terminal, but also other persons, such as independent contractors, used by him and bound to him in a business relationship. It would be quite possible for the Conference to fix limits, as in article 6 (1) (a), with respect to such persons, or to delete article 6 (4). It was up to the Conference to decide.

40. After a procedural discussion in which Mr. SWEENEY (United States), Mr. LEBEDEV (Soviet Union), Mr. BONELL (Italy), Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic), Mr. RUSTAND (Sweden) and the CHAIRMAN took part, the CHAIRMAN invited the Committee to proceed to an indicative vote on the following three questions:

(a) Should higher limits of liability agreed to by the operator apply only to the said operator?

(b) Should higher limits of liability agreed to by the operator apply also to the operator's servants and agents?

(c) Should higher limits of liability agreed to by the operator apply also to the operator's servants and agents and to other persons of whose services the operator made use?

41. After the indicative vote, the CHAIRMAN announced that 20 delegations had voted in favour of question (a), 13 in favour of question (b), and 3 in favour of question (c).

42. Mr. FILIPOVIĆ (Yugoslavia) said that the vote showed that his delegation had been right to relate its proposal to article 6 (4), because it had become apparent that it gave rise to differences of interpretation, which the Conference was in a position to eliminate. In some legal systems only the operator would be concerned, in others it would be the operator and his servants and agents, and in still others it would be other persons as well. In his view a positive decision was needed, and he therefore wished his proposal to be put to the vote.

43. The CHAIRMAN said that since the third alternative had received only three votes, the Committee might wish to choose between the other two alternatives.

44. After a procedural discussion in which Mr. FILIPOVIĆ (Yugoslavia) and Mr. RUSTAND (Sweden) took part, the CHAIRMAN, noting that the Yugoslav representative was no longer pressing his proposal, invited delegations to express their views by means of an indicative vote on whether a contractual commitment of the operator applied also to the operator's servants or agents.

45. After the indicative vote, the CHAIRMAN announced that 16 delegations considered that the commitment did not apply, 15 thought that it did apply and 4 delegations had abstained. In his opinion, the results were not clear enough to enable the plenary to take a decision, which required a two-thirds majority of the participating States present and voting. The Committee could either keep the existing text or leave it to States to adopt the first or second alternative in light of their national legislation.

46. Article 7 (2) gave rise to some difficulty, since it could be interpreted as allowing other persons used to be affected by the operator's contractual commitment. Therefore, he thought that it would be necessary for the Drafting Committee to revise the text in order to show clearly that "other persons" used by the operator would not be affected by a contractual increase in the operator's liability.

47. Mr. CHRISTOV (Bulgaria) said his delegation thought that article 7 (2), was quite clear and in accordance with the Hamburg Rules. He did not think that it required any revision.

48. Mr. RUSTAND (Sweden) thought that it was not appropriate, in view of the results of the indicative vote, for the Committee to refer the text of article 7 (2) to the Drafting Committee. It should be left to States to interpret the provision in the light of their national legal systems.

49. After a procedural discussion in which Mr. LEBEDEV (Soviet Union), the CHAIRMAN and Mr. BELLO (Philippines) took part, Mr. LARSEN (United States) said that he wished to draw attention to his delegation's proposal (A/CONF.152/C.1/L.14), which could provide a solution to the problem facing the Committee by suggesting that the agent should not be affected by an increase in the operator's liability.

50. The CHAIRMAN said that the United States proposal dealt with a different matter from that under discussion at the present time. It would be taken up under article 7.

51. Mr. RAO (India) said that article 7 (2) lent itself to different interpretations. The Committee was drafting a Convention that dealt with the liability of the operator and not that of his agents or servants. Under article 5 it was the operator who was liable for the actions of his agents or servants or other persons of whose services he made use for the performance of the transport-related services. However, under article 7 (2), if the customer proceeded against servants, agents or other persons used by the operator for the performance of the transport-related services, they were entitled to the same defences and limits of liability as the operator. In accordance with article 8 (2), however, when a servant, agent or other person caused damage deliberately, the defences and limits of liability would not apply to him. Article 7 did not deal with the question of the limits of liability when the servant, agent or other person acted beyond the scope of his employment or engagement. The intention appeared to be, and rightly so, that the matter was something to be regulated by national legislation or in the contract between the operator and the person concerned. In his delegation's opinion, article 6 (4) should be left as it stood and the other aspects should be governed by national legislation.

52. The CHAIRMAN said that if he heard no objection, he would take it that the Committee was in favour of keeping the existing text of article 6 (4).

53. It was so agreed.

The meeting rose at 12.30 p.m.

10th meeting

Tuesday, 9 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.10

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 6 (concluded) (A/CONF.152/C.1/L.12)

1. Mr. SCHROCK (Germany) introduced his delegation's proposal to add a new paragraph 1 bis to article 6 and to make amendments to paragraph 1 (A/CONF.152/C.1/L.12, paras. 2 and 3). One of the Canadian Government's written comments on the draft Convention (A/CONF.152/7) had been that the prescribed measure of liability - units of account per kilogram of gross weight - could create problems for goods that were not shipped by weight but by volume or pieces. In such circumstances, if the weight of the goods was not known, it would be impossible to calculate the limit of liability. The draft Convention at present provided for a limit based exclusively on the gross weight of goods lost or damaged, thus precluding the customer, in certain circumstances, from calculating his claim per package or per unit.

2. The question was, whether to have only a limit based on weight or, in addition, an alternative limit based on the number of packages or freight units. Had the Committee agreed on relatively high limits of liability, the alternative method of calculation might not have been considered necessary, although the concerns of the Canadian delegation would have remained. It was true that a limit per package might create practical problems, especially with containerized goods, but complications could not always be avoided and the simplest solution was not necessarily the most workable or equitable one. It had also been pointed out that the proposed new system would make the documentation required under article 4 somewhat complex. The suggested new paragraph 1 bis was based on article 6 (2) (a) of the Hamburg Rules, but since the bill of lading or other document mentioned in that provision was of a different nature from the document prescribed by article 4 of the draft Convention, the new subparagraph (a) stated a rebuttable presumption that the packages or other shipping units enumerated in the document were in fact packages or shipping units. That would cover the case of containerized goods.

3. It might be argued that the proposal did not solve all the problems involved in ensuring that the customer could make an appropriate claim. The customer would, however, be able to fall back on the general rules under which he would have to prove the number of packages or units lost or damaged as a basis for calculating his claim. If, therefore, the language of the proposal was of no direct use to the claimant, it would at least give him more options than he had under the draft Convention as it stood, since that excluded any possibility of basing a claim on a limit per package. He reiterated that the proposed system of an alternative method of calculation followed the pattern of article 6 (2) of the Hamburg Rules; it also reflected article 4 (5) of the Hague-Visby Rules.

4. Mr. HORNBY (Canada) thanked the German delegation for its proposal. It accurately reflected his own delegation's views with regard to the need for a limit per package or per shipping unit in the Convention. It had been argued that the absence of such a limit would lead to great difficulties if the cargo had been shipped otherwise than by weight, which was the only limit at present provided for in article 6 (1). Cargo was often shipped by volume or by package, particularly from developing countries or countries exporting primary products. How under the draft Convention as it stood, would the weight of lost cargo be determined if it had not been shipped on a per package or per volume basis and the operator removed it from the ship and it fell into the sea and disappeared? If it had not been shipped by weight, it would be very difficult to determine the basis of liability. The Canadian delegation therefore supported the proposal to add the limit per package or other shipping unit to the Convention; it would go a long way towards solving one of the problems that marine terminal operators in particular would face under the existing draft. The representative of Germany had referred to some of the problems that might arise with a limit per package, but in a great many countries that notion had been used successfully in litigation and was now well understood and applicable to the law of carriage. It fitted well into the Convention.

5. Mr. CASTILLO (Philippines) said that at its 8th meeting the Committee had decided to retain paragraph 1 (b) of article 6 on the ground that goods transported by waterborne craft were heavier and less expensive. That implied that different types of goods should be compensated differently for loss or damage, and various transport instruments had been mentioned in that connection. It was perfectly obvious, however, that one cubic foot of pelts and animal skins might be more valuable than a ton of grain or sugar, yet on the basis of the operator's liability under paragraph 1 (a) of article 6 their value would be the same per kilogram of gross weight of the goods damaged or lost. Furthermore, as the Canadian Government had aptly observed in its written comments (A/CONF.152/7), the present measure of liability could create problems for goods not shipped by weight but by volume or pieces. It was sound business practice to insure goods for adequate compensation in the event of loss or damage, but insurance was an activity in which the developing countries were not in a position to compete. His delegation therefore supported the German proposal.

6. Mr. CHRISTOV (Bulgaria) asked whether the words "units of account per package or other shipping unit" were to be introduced into both the subparagraphs of article 6 (1).

7. Mr. SCHROCK (Germany) said that paragraph 2 of his delegation's proposal (A/CONF.152/C.1/L.12) would have to be redrafted to adopt it to the Committee's decision not to delete article 6 (1) (b).

8. Mr. RUSTAND (Sweden) said that it had not been clear to him any more than to the representative of Bulgaria whether the package notion was to be introduced into both subparagraphs. However in the light of the explanation given by the representative of Germany, the intention appeared to be to have a dual system in respect of the carriage of goods by sea as well.

9. In its written submission to the Conference on article 6 (A/CONF.152/7/Add.1), his Government had expressed support for a limit per kilogram only. The discussion in the Working Group on International Contract Practices and at the twenty-second session of the Commission had highlighted the practical difficulties involved in introducing the package notion. After hearing the remarks made by the representatives of Germany and Canada he was no longer convinced that those practical difficulties could not be overcome. There were three main obstacles which had been discussed in the past. The first was the problem of defining what was meant by packages and units of account; an example had been given of how that might be solved by means of the corresponding provision of the Hague-Visby Rules. The second obstacle was to determine how many packages or other shipping units a container held; that, however, could be solved by a burden-of-proof rule. The third obstacle was the additional rules regarding the document to be used by the operator. Sweden's position at the present Conference was very flexible. If a majority favoured the German proposal, it would be happy to join that majority.

10. Ms. SISULA-TULOKAS (Finland) asked whether the representative of Germany had any thoughts about the level at which unit limits should be set.

11. Mr. BONELL (Italy) said that his delegation would be prepared to support the proposal.

12. Ms. SKOVBY (Denmark) said that her delegation could not support the German proposal and did not believe that the unit notion was properly understood. Court cases had been withdrawn in Nordic countries because settlements based on the unit had been considered undesirable. For modes of transport such as road, rail and air there was only a weight limit, but claim problems were solved nevertheless. The Convention should not contain a double system for limits of liability.

13. Mr. OCHIAI (Japan) said that his delegation also opposed the German proposal. If the package notion was introduced, the Committee would have to solve the very difficult problem of defining a

package or unit. Also, with the proposed "container clause" - the suggested new paragraph 1 bis - there still remained the very difficult problem of cases in which the document called for in article 4 (1) was not issued.

14. Mr. MORAN (Spain) said that his delegation could not support the German proposal and preferred the text as originally drafted. There were many complications with the limit per package whereas the limit per kilogram was adequate and straightforward. Being involved in the carriage of goods, the operator might have to redistribute goods received at the terminal to a variety of places and by a variety of forms of transport, perhaps by emptying containers, transferring the contents to another type of container and possibly even packaging them. The operator should perhaps assume a greater degree of liability for certain types of package, as the representative of the Philippines had indicated; that would involve certain contractual obligations. The limit per kilogram could still apply very flexibly and in a practical way.

15. Mr. PAMBOU-TCHIVOUNDA (Gabon) agreed that the introduction of a limit based on the notion of a package would be very complicated and virtually impossible to apply. It might be understood from the proposed text that a container and pallet were similar, yet in practical terms they were not interchangeable and did not serve the same purpose. Furthermore, nobody could tell what was in a container and the case might even arise where an empty container had to be covered by the same rules as a full one. He endorsed the objections to the German proposal put forward by the representatives of Spain and Japan and would prefer the draft to contain the limit per kilogram only.

16. Mrs. EL OTMANI (Morocco) joined in opposing the German proposal, not only for the reasons already advanced, but also because weight was invariably a criterion in determining liability in matters of transport; moreover, the application of a limit of liability per package or other shipping unit would pose considerable problems when containers were used, given that transport terminal operators often received such articles without knowing or being in a position to determine their contents; in the case of maritime transport even bills of lading only listed what they were "said to contain".

17. Mr. ABASCAL (Mexico) approved the proposal, arguing that it offered more options to potential injured parties. Dual regulation would, moreover, make it easier to define the limits of liability and responsibility, especially in the case of goods that were not considered simply in terms of gross weight for transport purposes. Those familiar with the preparatory work in the Commission would recall the lengthy discussions of the difficulties inherent in a single limit of liability based on weight; such difficulties as might persist with regard to the definition of packages or other shipping units were surely no greater. In the final analysis, he considered the German solution to represent the lesser of two evils.

18. Mr. MUTZ (Observer, Intergovernmental Organization for International Carriage by Rail) stated, in response to the remarks made by the representative of Denmark, that a limit of liability per package was not entirely unknown in rail transport. What was more important, the German proposal permitted a maximum limit not less than the limit per kilogram of gross weight which had been set in the case of international carriage by road and by rail at 8.33 and 17 units of account respectively. In most cases, those limits guaranteed reasonable compensation, while other mechanisms connected with rail transport permitted full compensation. Recalling that the arguments put forward at the 8th meeting in favour of limits derived from the maritime sphere had been founded on the real value of merchandise transported, he urged the Committee to accept the German proposal as a logical means of taking account of the realities inherent in different modes of transport.

19. Mr. BRUNN (International Union of Marine Insurance), speaking at the invitation of the Chairman, favoured the German proposal for the fact that it could be related to the existing conventions governing modern sea transport, as well as to the Multimodal Convention. He submitted that the proposal on liability drafted by the Commission marked a retrograde step when set against the mass of containerized cargo now to be found in ports and terminals. He added that those concerned with maritime transport, as well as tribunals and insurers, would not be taken by surprise if the dual system were introduced. He pointed out that the words "whichever is the higher" in the German proposal would deter a claimant from opting for the limit of liability per package or unit if it was lower than the limit per kilogram of gross weight; the proposal thus favoured all interested parties, including the owner of the cargo.

20. The CHAIRMAN invited the Committee to vote on the proposal in paragraph 2 of document A/CONF.152/C.1/L.12.

21. The proposal was rejected by 19 votes to 14, with 4 abstentions.

22. The CHAIRMAN noted that the result of the vote rendered obsolete the proposal in paragraph 3 of document A/CONF.152/C.1/L.12.

New article 6 bis (A/CONF.152/C.1/L.13)

23. Mr. SCHROCK (Germany) introduced the proposal in document A/CONF.152/C.1/L.13. The reasons for his delegation's suggestion that the Convention should include a provision on the aggregate liability of an operator resulting from all claims arising out of a single occurrence were set out in paragraph 7 of its written comments on the draft (A/CONF.152/7), to which he referred the Committee. The matter had been deliberated at length during the Commission's preparatory work. His delegation believed that the Convention should lay down a single aggregate amount for claims;

the figure which it proposed was merely indicative, and was based on a professional assessment by a German ports authority of the highest global limit for a ship-owner liable for an amount calculated on the basis of the tonnage of an average container ship.

24. Mr. RUSTAND (Sweden) expressed his delegation's strong endorsement of the German proposal and called attention to its comments on the matter in document A/CONF.152/7/Add.1. Swedish insurers had stressed that in the absence of a global limitation on the aggregate liability of transport terminal operators, the insurance market might not be inclined, or even have the capacity, to provide coverage on the scale required by very large terminals storing or handling enormous quantities of goods at one and the same time. Moreover, the cost of such cover, if it could be found, would obviously be very high, if not prohibitive. It was consequently the Swedish delegation's view that the Conference should reflect seriously on the matter, taking the German proposal as the basis for its deliberations. For his part, he was not convinced that the indicative figure was sufficiently high: his view was that it should be set high enough to allow for all normal accidents, but not catastrophic ones. The observations of representatives of the insurance industry would be welcome on that point. He suggested that if the principle underlying the proposal was approved, the actual figure should be discussed at the same time as those to be inserted in article 6 (1) (a) and 6 (1) (b).

25. Mr. MARSHALL (United Kingdom of Great Britain and Northern Ireland) agreed most strongly that a global limit of liability was called for. As the previous speaker had indicated, in responding positively to a request for cover from an operator with an extremely high liability, an insurer might see his own business unbalanced and his entire solvency threatened; that eventuality would be of considerable concern to insurance supervisory departments of governments. Moreover, in providing cover, an insurer must fix a limit; he could not commit himself to incalculable risks involving losses far beyond his own resources or his ability to reinsure. With unlimited liability, operators would have to bear burdens beyond those actually covered by their insurance; in case of catastrophe they, or the owners of a terminal - which might be a State - could be faced with literally devastating claims. The higher the limits of liability, the higher the price of the top layers of insurance protection would be, because of reduced competition for such business and the cost of the reinsurance that it would necessitate. He added in passing that the recent history of marine insurance had seen vertiginous drops in the availability of reinsurance.

26. He agreed with the representative of Sweden that the suggested limit of 10 million units of account was somewhat too low; it was his own strictly personal view that 20-30 million units might be more appropriate. In conclusion, he submitted that without some measure of global protection for a terminal operator, not only he, but the insurance market behind him, and perhaps beyond that even the entire economy of his country, could be placed in jeopardy.

27. Ms. FAGHFOURI (United Nations Conference on Trade and Development) joined in endorsing the principle behind the proposal. The extremely high level of potential liability that would result from the absence of a global limit would cause very serious problems for terminal operators, especially in the developing countries. Conventions concerned with the liability of the carrier, whether by sea or any other mode, deal with a quantifiable maximum loss - at worst the loss of the entire cargo of a single vessel. The terminal operator was in a completely different position. He could have potentially enormous values at stake in the terminal, equivalent to the entire cargoes of many ships. If he faced unlimited accumulation of liability after an accident, even if each individual claim was limited, he would have to buy extra insurance to protect himself against the highest possible aggregate liabilities he could be exposed to. This could be far above the highest liability faced by even the largest vessel. The cost of liability insurance would rise steeply with the increase in the liability limits, because of the need for additional re-insurance protection. This was especially true in developing countries where the local insurance market usually did not have the high capacity available in some developed countries. Developing country insurers had to rely on re-insurance protection from the West and if they had to provide far higher cover for terminal operators they would have to buy yet more re-insurance, leading to a greater drain on their countries' scarce foreign exchange resources. The terminal operator would have to bear this cost.

28. Insurers also had to quantify their own aggregate exposure and decide on the maximum they would pay in any single event. As the representative of the United Kingdom had remarked, the operator might not be covered beyond that maximum even if he had been prepared to pay the high premium. Moreover, if he was to stay in business, the terminal operator must obviously cover his costs; he would naturally pass on increased charges to shippers, and that could only have an adverse effect on international trade. That being said, it would be very hard to find a commonly acceptable and realistic global liability limit that was neither too high for some nor too low for others. The matter called for further very careful consideration, and perhaps a quest for new approaches, especially in view of the constantly high levels of loss occurring in many terminals throughout the world.

29. Mr. ROJANAPHRUK (Thailand) said he found the German proposal as drafted difficult to understand. There seemed to be a contradiction between its two sentences, the first stipulating that in no case should the aggregate liability exceed 10 million units of account, the second appearing to provide for such cases. In his view, the second sentence covered the essence of the matter, but he was not sure that the article needed to refer to the proportional distribution of the amount payable; that should be an automatic procedure.

30. Mr. SWEENEY (United States of America) pointed out that the purpose of the draft Convention was to rationalize an existing industry in which, in his country, there was at present no global limit on the operator's liability insurance or one applicable to self-insured terminals. Albeit

with the best of intentions, the proposal sought to impose an artificial cap - something which had never been discussed in the Commission's preparatory work - on limits of liability. Past experience had shown such action to be an exercise in inflexibility, with the most harmful consequences, as exemplified by the International Convention on Civil Liability for Oil Pollution Damage (1969) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971). Those instruments also contained caps, yet the huge oil-related disasters which had occurred since the Torrey Canyon incident in 1967 had been overwhelmingly greater than the applicable caps in terms of damage caused and actual costs, demonstrating them to be woefully inadequate. Moreover, the consequences of the proposal might prove extremely expensive for transport terminal operators because, notwithstanding possible competition, insurance companies might use the provision as a pretext for selling only expensive policies covering the maximum liability. Lastly, he clearly recalled that when the question of the amount of insurance cover available in oil pollution disasters - and also in the case of accidents to multi-engined aircraft - had been discussed, the insurance industry had admitted to its ability to deal with catastrophic losses in the range of US\$500 million. He therefore considered that even if the principle of liability capping was approved, the figure advanced in the German proposal was clearly too low.

31. To sum up, there was no global limit at present on the liability of operators of transport terminals; such a limit had never been talked about in the past; and arbitrary caps on liability had been shown not to work. For those reasons, the United States delegation opposed the German proposal.

32. Mr. CHRISTOV (Bulgaria) said that article 6 (1) (c) of the Hamburg Rules made a clear reference to aggregate liability for losses and delays. He felt it would be best if the Convention catered for aggregate liability as laid down in that provision of the Hamburg Rules.

33. Ms. SISULA-TULOKAS (Finland) associated herself in principle with the view expressed by the United States representative. In her view, a global limit of liability was essentially a concept of maritime law. There were many activities on land where great risk was involved but liability was unlimited. It was difficult to see why the notion of limited aggregate liability should be introduced into a draft Convention which was concerned mainly with land operations.

34. Mr. FILIPOVIĆ (Yugoslavia) opposed the German proposal because he felt that a global limit was necessary only in the case of hazardous activities involving great and incalculable risk. In the operation of transport terminals, liability was contractual and already limited. He did not think it was appropriate to introduce another layer of limitation. Presumably, any ceiling on aggregate liability that might be imposed should depend on the size of the terminal.

35. Mr. ZHAO Chengbi (China) said that he did not favour the proposal. The knowledge that liability was limited to 10 million units of account might actually encourage negligence. He also felt that the Convention was being impelled to focus more on the interest of operators than on that of customers. It was necessary that both interests should be protected in order to allow the greatest possible number of countries to accept the Convention.

36. Mr. OCHIAI (Japan) endorsed the views of the United States and Chinese representatives.

37. Mr. SCHROCK (Germany) said that one of the reasons advanced by the representative of the United States for not supporting the proposal was that an organized transport terminal industry already existed in that country without benefit of a global limitation of liability. One existed in Germany as well. It should be kept in mind, however, that in many countries the operator's liability was not covered by mandatory law and he could escape it or reduce it contractually.

38. The German proposal should not have come as a surprise to the United States delegation. There were several references to such a possibility in the preparatory work for the Conference. For example, in the report of the Working Group on International Contract Practices on the work of its eleventh session in 1988 (A/CN.9/298), there was a suggestion in paragraph 97 that when the draft Convention was circulated for comments Governments might consider the possibility of establishing an overall limit to the liability of the operator in order to cover all claims arising from a single catastrophic event. His predecessor had been present at that session and had prepared a memorandum stating that the concept of global limitation was well known in maritime law; that the maximum liability that could arise under article 6 as it stood would lead to an incalculable and uninsurable risk for the operator of the transport terminal; that, since it would be difficult to find a formula that could fix a global limitation generally and uniformly for all transport terminals, the global limit might be based on the size of the terminal or on its annual turnover; and that the Secretariat might look into current practice and report to UNCITRAL on the matter at its next session. Other references to the possibility of limiting aggregate liability could be found in the UNCTAD document on the commercial risk factor in container terminal management (ST/SHIP/12) and in paragraph 3 (b) of part II of the observations made by the Federal Government of Germany as contained in the compilation of comments by Governments issued for the twenty-second session of UNCITRAL (A/CN.9/319/Add.1).

39. Mr. RUSTAND (Sweden) said that the question had indeed been raised by the delegation of the Federal Republic of Germany at the eleventh session of the Working Group on International Contract Practices. Regarding the system in force in the field of oil pollution, including that in the two oil pollution conventions to which the United States had referred, he observed that the oil pollution compensation system had operated successfully for 12 years. The system had been ratified by more than 50 States and the global limit had been exceeded only once. There had been an effort to raise the ceiling in 1984, supported at the time by the United States, and an

instrument had been drafted on lines suggested by that country. The United States Congress, however, had decided that the United States should not ratify the instrument, greatly to the regret of the rest of the world, and had opted instead for unlimited liability. There were, however, many examples of global liability limits that were working well and many States had found that it was in their interest to be parties to the instruments concerned. Finland had said that there were no examples of such limits for land-based activities, but there were in fact several in the nuclear field as well as in some transport-related conventions. It would be useful for the Committee to hear the comments of the insurance industry on the subject.

40. Mr. ILLESCAS (Spain) said that the Convention was dealing with an industrialized and land-based activity which, though linked with transport, was not in itself a transport activity. Accordingly, transport risks, and maritime risks in particular, should not apply. Land-based activities were not usually subject to a global liability limit. Also, there was no tradition of quantitative limits on liability for fault or neglect on the part of the operator under article 5 (2). His delegation could not, therefore, support the proposal.

41. Ms. SKOVBY (Denmark) opposed the proposal on the ground that the operation of a transport terminal was a land based activity. If the Committee decided to take a maritime approach, however, and introduce a global limit, it would need to be based on the area of the terminal in order to safeguard small terminals.

42. Mr. ROMAN (Belgium) said that he could support the proposal if it took into account the nature of the goods handled in a particular terminal instead of making uniform provision for all kinds of terminal.

43. Mr. MKWENTLA (Pan Africanist Congress of Azania) said that, under his country's legal system, where a provision expressed negatively contained the word "shall", the whole provision became peremptory. The first sentence of the German proposal was therefore an imperative one and there was no need for the second sentence.

44. Mr. SWEENEY (United States) said that one reason why the Convention was attractive to the United States was that laws on liability were a matter purely for its various states. Thus, there were 50 separate laws on the liability of operators of transport terminals. In some states, it was a bailee's liability, meaning strict liability; in others, it was a negligence-based contractual liability without exculpatory clauses, and in still others, a negligence-based liability with exculpatory clauses. It was a vastly complicated question. It was not correct to assume that all over the world a terminal operator could limit his liability by means of a contractual clause. It was certainly not so in the United States. In many places, a contractual clause that permitted the operator to limit his liability for negligence would be held to be contrary to public policy.

45. Mr. BRUNN (International Union of Marine Insurance), speaking at the invitation of the Chairman, said that the Union's members came from developing as well as developed countries. He therefore supported the German proposal. The representatives of Sweden and the United Kingdom had pointed to the likely financial consequences if the Convention provided for unlimited liability without a global ceiling. To impose a global ceiling would not mean that insurers would offer only policies for that figure. Competition would prevent that happening, and in any case transport terminal operators would sometimes wish to bear the remaining risk themselves.

46. Only in exceptional cases would losses exceed a reasonable maximum. Transport terminal operators were not, after all, exposed to the level of risk run by oil tanker owners. However, without a global limit it was only too likely that in many markets, especially in developing countries, the risks involved would call for costly reinsurance protection. The new Convention especially the provisions on the basis of liability and on the limits of liability and the calculation of liability according to kilograms of gross weight would radically alter the basis of liability assumed by terminal operators at present. Under the existing well-balanced system of cargo and liability insurance, cargo owners and insurers were satisfied if the operator's contractual liability was kept to a relatively low level which has an educational and cautionary value. The new system would not eliminate the need for cargo insurance, since the cargo owner needed protection against loss or damage to the cargo while in transit. Nor would cargo insurance premiums be reduced; recourse actions before foreign courts were extremely expensive and would result in increased costs for the consumer. The proposal for a global limit was not introducing a limit where there is none at present. Transport terminal operators already bought fixed amounts of insurance cover which might not be sufficient in the future. As the representative of the United Kingdom had pointed out, a system of unlimited liability would not mean the insurer granting the terminal operator unlimited cover: cover would simply be kept to a fixed limit at higher cost. The operator would have to bear the remaining burden, in order to avert the risk of bankruptcy and severe economic damage to the local trading community. That was why the International Union of Marine Insurance supported the German proposal for a global limit, provided the amount fixed was reasonable.

47. Mr. LEBEDEV (Union of Soviet Socialist Republics) noted that much had been said both for and against the introduction of a global liability limit. It should not be forgotten that the draft must be acceptable to all parties, including developing countries and industrial concerns. There was a risk that without a global limit, it would be less acceptable to the latter. It had been argued that a global limit would substantially increase premiums and would adversely affect both transport terminal operators and industry in general. That argument should not be accepted at face value without considering the experience of operators themselves in different countries with regard to liability insurance, or hearing what the insurance companies had to say. In many legal systems, the operator's liability was already limited under insurance policies. In article 6 the

aim was, of course, to fix an objective limit for liability at a high aggregate level. In his view, the proposed change was unlikely to inconvenience either operators or insurers.

48. He drew attention to the words "in no case" in the German proposal. Did the phrase signify that the amount payable by the operator would not exceed 10 million units of account even if the basis of the liability was an act of negligence on his part? In the second sentence, it was not clear how much the operator would have to pay. The representative of Germany had referred to the antecedents to the proposal for a global limit; he had also argued that the instruments governing compensation for oil pollution bore out the need for a global limit in the Convention. There was no need for such comparative exercises, because the activities envisaged in those instruments and in the present draft had nothing in common.

49. Mr. SCHROCK (Germany), replying to the observations made in the discussion of his proposal, said that the suggested new article 6 bis consisted of two sentences. He requested that a separate vote be taken on the first sentence before proceeding, if necessary, to a vote on the second. It was the first sentence that enshrined the basic principle of a global limit of liability. It was to be construed as meaning that where the aggregate liability of the operator resulted from a single occurrence, the amount payable by the operator would not exceed 10 million units of account. However, in the light of the discussion, he now proposed the following reformulation of that sentence:

"The aggregate liability of the operator resulting from all claims arising out of a single occurrence shall not exceed [...] units of account."

If the Committee accepted the principle of the global limit, it could then decide on an appropriate figure.

50. In the second sentence, the issue was the principle underlying the distribution of that sum in cases where damage caused by a single occurrence exceeded it. If the Committee approved the first sentence, some revision might be called for in the second.

51. Mr. LEBEDEV (Soviet Union) asked whether the German proposal would form a separate article, to follow article 6. If so, how would it relate to article 8, which excluded the limitation of liability in certain circumstances?

52. The CHAIRMAN explained that the scope of the reformulated proposal would be confined to article 6. It would not apply in the circumstances envisaged in article 8. Its proper place would be within and at the end of article 6, because if it was made a separate article its application would extend to the whole of the Convention. He asked the representative of Germany whether the proposed aggregate figure would apply to the limits of liability that might be agreed by the operator under article 6 (4).

53. Mr. SCHROCK (Germany) thought it unlikely that the operator could be made liable for claims which, in aggregate, exceeded the global limit. As to article 8, it was not yet clear how his proposal would be affected by it. In his view, the new article 6 bis could either stand alone or form part of article 6, depending on the Committee's decision.

54. The CHAIRMAN invited the Committee to vote on the first sentence of the new article proposed by Germany in document A/CONF.152/C.1/L.13, as orally amended by its sponsor.

55. The sentence was rejected by 18 votes to 9, with 8 abstentions.

56. The CHAIRMAN said that the result of the vote rendered obsolete the remainder of the proposal in document A/CONF.152/C.1/L.13. Since there were no further proposals for article 6, he would take it that the Committee approved the text of article 6 reproduced in document A/CONF.152/5, as amended at the 8th meeting, and referred it to the Drafting Committee.

57. It was so decided.

58. Ms. SKOVBY (Denmark) asked whether the term "consignment" in article 6 (2) referred to the goods evidenced by the document prescribed in article 4.

59. The CHAIRMAN said that under article 6 (2) the total charges payable to the operator for a consignment signified the sum payable for all his services in respect of the goods.

The meeting rose at 5.35 p.m.

11th meeting
Wednesday, 10 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.11

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 4 (concluded) (A/CONF.152/C.1/L.43)

1. Mr. INGRAM (United Kingdom of Great Britain and Northern Ireland), introducing his delegation's proposal (A/CONF.152/C.1/L.43), said that it represented a recasting of its earlier proposal for a new article (A/CONF.152/C.1/L.31), which had already been discussed. Its main purpose was to enable the carrier or other person having an interest in goods placed in charge of an operator to be sure that it was clear from the documentation that the goods he was entrusting to him were goods to which the Convention applied.
2. Under paragraph (1) of the proposal, the carrier could request the operator to confirm three points. The only new element was confirmation that the goods were in international carriage. Paragraph (2) stated what the operator must do on receipt of such a request. Both parties would then be aware that the Convention applied to the goods in question. Paragraph (3) indicated what would happen if the carrier failed to make the request in question. Paragraph (4) set out the consequences of the document that indicated that the goods were involved in international carriage.
3. The changes his delegation was suggesting were not as great as they might appear and were designed to show clearly when the Convention applied.
4. Mr. RUSTAND (Sweden) thought that the idea underlying the United Kingdom proposal could be dealt with more simply by making minor amendments to article 4 (1) (a) and (b), specifying that the goods should be identified as being involved in international carriage.
5. Mr. TARKO (Austria), referring to the words "A carrier or other person having an interest in goods" in paragraph (1), pointed out that the Convention dealt with the duties of an operator and not those of a carrier or other persons. He wondered why paragraph (1) apparently called for three documents, whereas paragraph (2) only provided for two. With respect to paragraph (4), he would like to know the exact meaning of the term "absolute confirmation", since the paragraph as drafted would cause problems in his country. The proposal was similar to the existing text, which should be kept as already amended.
6. Ms. SKOVBY (Denmark) asked why the presumption in paragraph (5) of the proposal was only that the goods had been received in good condition, and not also that they were in international carriage.
7. Mr. INGRAM (United Kingdom) said that he was more concerned with the principle behind his delegation's proposal than the drafting. It might, as the Swedish representative had suggested, be possible to provide for the intended result by amending the existing text of article 4.
8. Referring to the comments by the Austrian representative, he said that the reference to carrier or other person was designed to spell out the meaning of the word "customer" and that the text did not create any new obligation for the carrier or other person. Paragraph (1) did not provide for any new document; there were still only two, as indicated in paragraph (2). The words "absolute confirmation" meant that the presumption was not rebuttable.
9. As to the point raised by the representative of Denmark, he said that the question of the goods being involved in international carriage was dealt with in paragraph (4).
10. Mr. ROJANAPHRUK (Thailand), referring to paragraph (1) of the United Kingdom proposal, thought that the expression "goods which he has placed" should be amended to read "goods which have been placed".
11. Mr. ABASCAL (Mexico) said that the introduction of a new element which would require the operator to acknowledge that the goods were involved in international carriage could give rise to certain problems. He would like to know what would happen if an operator who had reasonable doubts as to whether the goods were involved in international carriage refused to sign the document because of those doubts.
12. Mr. MORAN (Spain) said that article 1 (c) gave a clear definition of the term "international carriage" as carriage in which the place of departure and the place of destination were located in two different States. To provide for the operator to acknowledge the fact that goods were in international carriage would be to introduce a subjective aspect, since the operator could do so on a unilateral basis. If the United Kingdom wished to press its proposal, the most appropriate solution might be to amend article 1 (c).
13. Mr. RUSTAND (Sweden) thought that the Committee should vote on the proposal and that the Drafting Committee should then be requested to prepare an appropriate text.
14. Mr. LEBEDEV (Union of Soviet Socialist Republics) thought that it might be difficult to reject a text that had already been adopted by the Committee and to replace it by the new text proposed by the United Kingdom. However, some of the elements of the proposal might be taken into account by the Drafting Committee. One of those points was to be found in paragraph (2) of the United Kingdom proposal, which gave a clear indication of when the reasonable period of time began, namely, on receipt of a request made under paragraph (1).
15. Mr. ZHAO Chengbi (China) said that article 2 showed clearly that the Convention covered goods involved in international trade. The provisions of the Convention were all designed within that general framework. Since the United Kingdom proposal provided for acknowledgement that goods were involved in international carriage, his delegation considered it to be necessary.
16. The CHAIRMAN invited the Committee to vote on the United Kingdom proposal (A/CONF.152/C.1/L.43).

17. The proposal was rejected by 27 votes to 3, with 2 abstentions.

Article 1, proposals for new subparagraphs (continued) (A/CONF.152/C.1/L.37)

18. The CHAIRMAN said he understood that an earlier proposal by the United Kingdom for the addition of a definition of "person" in article 1 (A/CONF.152/C.1/L.37) was related to the proposal that had just been rejected. He asked the United Kingdom representative if he still wished to have that proposal discussed.

19. Mr. INGRAM (United Kingdom) said his proposal for article 1 did not bear any particular relation to his proposal for article 4. The word "person" was used throughout the Convention, and his delegation believed it would be useful to define it.

20. Mr. BONELL (Italy) said that he could not support the proposal, which would introduce unnecessary complications into the Convention. The concept of "person" was understood differently in different legal systems, and if one particular definition was adopted, there would be great difficulty in finding exact equivalents in other languages.

21. Mr. OCHIAI (Japan) shared that view. Under Japanese law, a partnership or private body which was not incorporated was not a person in the legal sense, and the definition would therefore cause legal difficulties. In addition, the definition should not include States, because of the concept of national immunity.

22. Mr. INGRAM (United Kingdom) said there was in fact a long-standing precedent for the definition proposed: its wording had been taken from the 1969 Convention on Civil Liability for Oil Pollution Damage. In many cases, operators were port authorities, which were public bodies, and it was important to make clear in the definitions that such bodies were covered by the Convention.

23. Mr. GOKKAYA (Turkey) agreed that it was important to make clear that the word "person" covered not only individuals but public bodies: in his country, transport terminals were normally run by State-controlled companies. However, he suggested that a more appropriate formulation might be the one used in article 1 of the Convention on the Limitation Period in the International Sale of Goods, where "person" was defined as including any corporation, company, partnership, association or entity, whether public or private, which could sue or be sued.

24. The CHAIRMAN invited the Committee to vote on the United Kingdom proposal (A/CONF.152/C.1/L.37).

25. The proposal was rejected by 24 votes to 5, with 4 abstentions.

Article 7 (A/CONF.152/C.1/L.14)

26. Ms. ZAWITOSKI (United States of America) said that the discussions that had already taken place in the Committee on the subject of aggregate liability had met her delegation's concern regarding article 7 (3). It would therefore withdraw its proposal (A/CONF.152/C.1/L.14).

27. Article 7 was approved.

Article 8 (A/CONF.152/C.1/L.3, L.25)

28. Miss VAN DER HORST (Netherlands), introducing her delegation's proposal (A/CONF.152/C.1/L.25), said her Government had serious objections to the inclusion of agents and servants in paragraph (1) of article 8. In order to exercise his profession, an operator needed to be able to assess the risks involved and to insure against them. If the limit on the operator's liability could easily be broken, the whole concept of limitation would become illusory, since operators would still have to insure themselves for the full amount of damages. Increased risk for the operator would inevitably be reflected in increased charges by insurers of the liability of the terminal operator. In any event, the party interested in the goods would normally have taken out transport insurance to cover the goods through the entire transport process. In practice this would often mean a double insurance of the goods. Limits of liability should be broken only in exceptional cases, if the value and significance of those limits were not to be reduced.

29. Deletion of the words "himself or his servants or agents" in paragraph (1) would mean that the operator would not lose entitlement to limitation of liability unless the act leading to the loss or damage could be attributed to him personally or, where the operator was in fact a corporation, to a person acting at managerial level in that corporation. That would be in line with article 8 of the Hamburg Rules and with article 21 of the Multimodal Convention. Her delegation's proposal was all the more necessary in view of the fact that, under article 5, the operator is also liable for his servants or agents acting outside the scope of their employment. In which case article 8 is also applicable.

30. She pointed out that the comments made by the International Maritime Committee on article 8 (A/CONF.152/7/Add.2, p. 6) were in line with her delegation's views on the matter.

31. Mr. TARKO (Austria) could not support the proposal. The principle of unlimited liability for acts or omissions committed with intent or with recklessness was already accepted in many States, and it was only right that the operator should be fully liable for such acts. It was also

generally known that in many cases the operator was not a physical person but a legal entity - including a State, or a subdivision of a State. It was hardly likely that acts resulting in loss or damage would be committed by such entities themselves; they were more likely to be committed by the operator's servants or agents, who were actually dealing with the goods. According to the principle of culpa in eligendo, the operator had a duty to choose suitable persons as his servants or agents, and he should be liable without limitation for any acts or omissions on their part. There were thus good reasons why the existing text of paragraph (1) should be kept.

32. Mr. INGRAM (United Kingdom) regarded the amendment proposed by the Netherlands as the most crucial of all those that had been put forward. Article 8 as now drafted was the provision which had caused the greatest alarm to all the commercial interests that his delegation had consulted. It was vital that liability should be insurable and that it should have reasonable limits. A provision which would remove all limits in the case of acts or omissions by servants or agents would have disastrous implications for insurance, and he would urge that the Netherlands proposal be adopted.

33. Mr. FILIPOVIĆ (Yugoslavia) pointed out that the limits of liability set in the draft Convention were in fact very low: as he saw it, low limits were not compatible with the principle of unbreakability. He was therefore opposed to the proposal.

34. Mr. CHRISTOV (Bulgaria) said that he too was unable to support the proposal.

35. Ms. SKOVBY (Denmark) urged the Committee to consider carefully the implications of excluding from the article acts or omissions committed by servants or agents. In a recent case in her country, the chief security officer at the Scandinavian Airlines System cargo centre had been accused of misappropriating a sum equivalent to AS 100 million over a period of five years.

36. Mr. BRUNN (International Union of Marine Insurance), speaking at the invitation of the Chairman, supported the Netherlands proposal, and endorsed the arguments advanced by the United Kingdom representative. It would be very expensive, if not impossible, for an operator to obtain insurance cover for unlimited liability for fraud committed by his servants or agents. The principle of breakability was justified if the operator himself acted fraudulently, but that principle should not be applied to acts committed by servants or agents. He pointed out that in case an insurance cover for such liability would be available the increased cost of that insurance cover for such liability would ultimately be borne by the consumer and would thus have economically disastrous repercussions.

37. Mr. SWEENEY (United States) also opposed the proposal. In practice, it would be very difficult to prove that the persons concerned had acted with intent, recklessly, or with knowledge that loss or damage would probably result. Breaking liability limitations was justified only in extreme cases, where the very existence of an enterprise was at risk. In any event, servants or agents of the operator employed in sensitive areas, such as in the handling of jewellery or currency, would normally be bonded. He saw no need for the proposed deletion.

38. Mr. BONELL (Italy) said he too opposed the proposal. In modern commerce, it was most unlikely that any acts resulting in damage would be committed by the operator himself; normally, it would be the behaviour of his servants or agents that would be at stake.

39. The CHAIRMAN invited the Committee to vote on the Netherlands proposal (A/CONF.152/C.1/L.25).

40. The proposal was rejected by 21 votes to 8, with 4 abstentions.

41. Mr. SCHROCK (Germany), introducing the proposal contained in the second paragraph of document A/CONF.152/C.1/L.3, said that the same proposal had been made during the preparatory work on the draft Convention and stood halfway between the Commission's text and the proposal just voted upon by the Committee. In addition to the two models referred to in the third paragraph of the document, he also wished to mention article 7 (2) of the draft under consideration, as adopted by the Committee, which also included a reference to the scope of employment, a concept well known in many jurisdictions.

42. The proposal contained in the first paragraph of document A/CONF.152/C.1/L.3 was withdrawn in view of the rejection of the proposal in document A/CONF.152/C.1/L.25.

43. Mr. SERVIGON (Philippines) said that in his country's legal system, the concept of intent included the knowledge that loss, damage or delay would probably result from an act or omission. His delegation would therefore prefer paragraphs (1) and (2) of article 8 to end with the word "recklessly", the remainder of the text of both paragraphs being omitted.

44. The CHAIRMAN said that the interpretation just given by the Philippine representative was not universally accepted; moreover, the expression in question appeared in a large number of international conventions and could not be dropped without the risk of an a contrario interpretation of the provisions of those instruments.

45. Mr. RUSTAND (Sweden) said that he supported the proposal and endorsed the introductory remarks made by the German representative. A similar provision also appeared in article 10 of the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD) adopted at Geneva in 1989.

46. Ms. SKOVBY (Denmark) said that she also supported the German proposal, which coincided with the interpretation adopted in her country. Raising a further point in connection with article 8,

she asked whether the absence of a reference to "other persons" in paragraph (1) was due to an oversight, given that paragraph (2) referred to "another person".

47. The CHAIRMAN said that the omission was deliberate and represented a compromise solution adopted following lengthy discussions during the preparatory work on the draft.

48. Mr. FALVEY (United States) said that when the issue raised in the German proposal had been discussed in the Commission, his delegation had made the point that if an act done with intent to cause loss, damage or delay was performed within the scope of the employment of the person committing the act, then it was the operator himself, as that person's employer, who was responsible. He could not support the German proposal.

49. Mr. FILIPOVIĆ (Yugoslavia) said that if the proposal were adopted, the burden of proof would be so heavy that the operator would, in effect, never lose the right to the benefit of the limitation of liability in a case of loss, damage or delay resulting from an act or omission by his servants or agents. He, too, was unable to support the proposal.

50. Mr. LEBEDEV (Soviet Union) said that a distinction had to be drawn between transport conventions and a convention dealing with transport terminals; to invoke the provisions of certain transport conventions was not necessarily convincing in the present context. Referring to the question raised by the Danish representative, he said that although the question of intentionally harmful or reckless acts or omissions by other persons of whose services the operator made use for the performance of the transport-related services was not expressly settled in the Convention, it would be incorrect to conclude that such acts or omissions could not lead to the operator's loss of his right to the benefit of the limitation of liability. The question had to be settled in each separate case on the basis of the applicable national law.

51. The CHAIRMAN invited the Committee to vote on the proposal by Germany in the second paragraph of document A/CONF.152/C.1/L.3.

52. The proposal was rejected by 22 votes to 10, with 3 abstentions.

53. The CHAIRMAN said that, in the absence of further proposals on article 8, he would take it that the article had been adopted.

54. It was so decided.

Article 9 (A/CONF.152/C.1/L.40, L.55)

55. Mr. ROMAN (Belgium), introducing his delegation's proposal on article 9 (A/CONF.152/C.1/L.40), said that the passage whose deletion was being proposed placed a very heavy burden of proof upon the operator. Moreover, the concept of negative proof was unfamiliar in his legal system, as in many others.

56. Mr. BONELL (Italy) said that, as he understood the provision in the chapeau of article 9, negative proof was not required; what had to be proved was the operator's actual knowledge of the goods' dangerous character.

57. Mr. HORNBY (Canada) concurred with that interpretation. While sympathizing with the Belgian delegation's concern, he considered the present text to be satisfactory.

58. The CHAIRMAN wondered whether the meaning of the provision might not be made clearer if the words "and if" were replaced by the words "or if".

59. Mrs. PIAGGI DE VANOSI (Argentina) said that the text would be much clearer if the negative language at present employed ("... does not otherwise know ...") were replaced by a positive formulation.

60. The CHAIRMAN thought that the point just raised, as well as his own suggestion, might be referred to the Drafting Committee.

61. Mr. OCHIAI (Japan) expressed support for the draft in its present form. Article 13 (2) of the Hamburg Rules, which had served as the model for article 9, contained the expression "and ... does not otherwise have knowledge of their dangerous character".

62. Mr. ZHAO Chengbi (China) said that he also preferred the existing text, which was equally fair to both the operator and the customer. It should not be forgotten that the storage and transport of dangerous goods involved many issues and could affect many persons other than the operator or the customer; it was quite natural, therefore, that special requirements should be addressed to both.

63. Mr. BONELL (Italy), with reference to the drafting amendment suggested by the Chairman, felt that it would be difficult to substitute "or" for "and" in the fourth line of article 9, since, in his understanding, the text was intended to stipulate when the operator was entitled to take extraordinary measures. If the dangerous goods were not marked, labelled, packaged or documented in accordance with any law or regulation relating to dangerous goods applicable in the country where the goods were handed over, an additional condition was laid down, namely, that the operator did not otherwise know of their dangerous character. In consequence "and" was needed rather than "or".

64. As for the suggestion by the representative of Argentina that the article should be formulated in positive rather than negative terms, he agreed that such an approach would make for a clearer and more straightforward provision. Indeed, such a positive formulation had been employed in the early stages of discussion several years before, when the text had stated that the customer must label or otherwise inform the operator in the case of dangerous goods, but the Working Group had changed to the present approach because the Convention dealt with the liability of the operator of a transport terminal and not with any contract between the operator and his customer. It had considered that the duties of the customer lay outside the scope of the Convention. The provision had therefore been shortened to deal solely with the rights of the operator and given a negative formulation. A return to the original approach of a formulation in positive terms would call for additional work that could not be left to the Drafting Committee.

65. Mr. INGRAM (United Kingdom) supported the Belgian proposal. The rights conferred on the operator were not absolute: he was entitled merely to take all precautions the circumstances might require and to be reimbursed for their cost, and it was irrelevant whether or not he knew unofficially that the goods were dangerous.

66. Mr. CHRISTOV (Bulgaria) supported the Belgian proposal.

67. Mr. RUSTAND (Sweden) expressed his full agreement with the comments made by the representative of Italy.

68. Ms. SKOVBY (Denmark) observed that article 9 constituted in fact an exception to the provisions of article 5, because if the operator took in dangerous goods without knowing that they were dangerous, he was not liable for loss or damage to the goods resulting from the measures provided for in article 9. In her view, as she had already suggested on a previous occasion, article 9 should be placed closer to article 5. She also opposed the deletion proposed by Belgium since, in many cases, it was left by agreement to the operator to mark or label dangerous goods and the proposed deletion might give him an opportunity to disclaim responsibility. The words in question were also needed in such cases because it was of great importance to a subsequent carrier that dangerous goods be marked.

69. The CHAIRMAN invited the Committee to vote on the Belgian proposal (A/CONF.152/C.1/L.40).

70. The proposal was rejected by 29 votes to 3, with 1 abstention.

71. Ms. SISULA-TULOKAS (Finland), introducing her delegation's proposal (A/CONF.152/C.1/L.55), said that its purpose was to avoid unnecessary danger and liability situations by inserting a straightforward sentence before the first sentence of article 9 (1) to the effect that the operator must be informed of the dangerous character of the goods.

72. Mr. BONELL (Italy) said that it might be argued that the proposal stated an obligation of the customer and therefore lay outside the scope of the Convention. However, in the light of the discussion and of the points made by the representative of Belgium, he considered it worth clarifying the matter. Since the wording of the proposal avoided an explicit statement of the customer's duty, he felt able to support the amendment, especially as it would avoid possible misunderstandings with respect to the other provisions.

73. Mr. PAMBOU-TCHIVOUNDA (Gabon) expressed his support for the Finnish proposal, since it clarified a situation that had been left implicit. The original text considered only a negative possibility. The Finnish proposal had the advantage of making explicit the obligations of all parties, and especially of the customer or person who handed the goods over to the operator.

74. Ms. SKOVBY (Denmark) also supported the proposal.

75. Mr. FATHALLA (Observer, United Nations Environment Programme) also supported the proposal, which was along the same lines as provisions in several other conventions, such as article 13 (2) of the Hamburg Rules.

76. Mr. LEBEDEV (Soviet Union) said that the Finnish proposal was fully understandable and in substance not a divisive issue. However, the suggested sentence was modelled on the first sentence of article 13 (2) of the Hamburg Rules and used language that, in his opinion, was not appropriate for article 9 of the present draft Convention, which assumed that the customer would mark, label and submit documents concerning goods that were dangerous in keeping with the rules and regulations applicable in the country where the goods were to be delivered. The addition of the proposed sentence appeared to him to be inconsistent in the context of article 9 and would make it necessary to reconstruct that provision. The whole issue of the dangerous character of goods varied according to the nature of the operation concerned. The functions of the operator of a transport terminal and of a carrier were different in that respect. In his view, the present text was sufficiently flexible and therefore preferable.

77. Mr. ROJANAPHRUK (Thailand) said that although the idea behind the Finnish proposal was acceptable he did not think that such a sentence should be included in article 9, or even anywhere in the present Convention. The text was modelled on the first sentence of article 13 (2) of the Hamburg Rules, but those Rules contained a general provision on the subject. It was the task of the Conference to adopt a Convention on the liability of operators of transport terminals. The purpose of article 9 was that if the operator had not known that the goods were dangerous, he was entitled to receive reimbursement for all costs incurred by him in taking special measures with regard to them. It was thus inappropriate that it should contain a provision requiring the dangerous nature of the goods to be specified.

78. Mr. TARKO (Austria) said that under the Finnish proposal the operator must be informed about the dangerous nature of the goods, but no provision was made for a sanction if he was not so informed. It would therefore be preferable to stick to the present text.

79. Mr. OCHIAI (Japan) asked who would have the duty of informing the operator about the dangerous character of the goods. He supported the present text.

80. Mr. SOLIMAN (Egypt) expressed his support for the Finnish proposal.

81. Mr. ZHAO Chengbi (China) said that he had abstained in the vote on the Belgian proposal. The aim of article 9 should be to make the operator take all necessary precautions when handling dangerous goods. The Finnish proposal made it necessary to inform the operator and draw his attention to the dangerous character of the goods. Even if dangerous goods were so marked, the operator might not pay attention or might not realize the nature of the danger or might be unfamiliar with certain special categories of dangerous goods. He therefore supported the proposal, but suggested that it be forwarded to the Drafting Committee for further improvement.

82. Mr. RUSTAND (Sweden) agreed with the representatives of the Soviet Union and Austria concerning the discrepancy between the obligation placed upon the person handing over the goods and the lack of sanction to back up that obligation. In the Hamburg Rules, for instance, the shipper was liable to the carrier. Since it was difficult to introduce an obligation without also introducing a sanction, he preferred to stick to the basic text.

83. He also drew attention to the notion of "property" in subparagraph (a), because it was not clear to him whether the danger to property referred to included danger to the environment. Other recent conventions had tried to make explicit mention of danger to the environment rather than include it under the notion of "property". It was a question of drafting rather than of substance to which he hoped attention would be given.

84. The CHAIRMAN said that, in his personal view, the term "property" as used in the present Convention covered the environment and its protection.

85. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that he supported the idea contained in the Finnish proposal, but found it difficult to see how the compulsory element could be fitted in. He agreed with the representative of Japan that the person who should inform the operator had not been clearly identified.

86. Mr. RAO (India) said that there appeared to be certain misconceptions regarding the scope of the proposal. At the beginning of the discussion, the representative of Italy had drawn attention to the important fact that if the dangerous goods were marked in accordance with the law applicable in the country where they were to be delivered, the present provision did not apply. In other words, the aims behind the proposal were already taken care of, albeit indirectly, in the present provision. The Finnish proposal was incomplete in certain respects since it did not deal with the duty of the customer or person handing dangerous goods over to the operator to mark, label, etc., the goods concerned. As that was covered in article 9 as it stood, no amendment was needed.

87. Mr. SCHROCK (Germany) expressed his agreement with the representative of India.

88. Mr. NAOR (Israel) said that his delegation supported the Finnish proposal. He suggested that, to clarify matters, the information must be given to the operator by the person referred to as having been required to do so in article 9 (b).

89. The CHAIRMAN invited the Committee to vote on the Finnish delegation's proposal (A/CONF.152/C.1/L.55).

90. There were 15 votes in favour, 15 against and 4 abstentions.

91. The proposal was not adopted.

The meeting rose at 12.35 p.m.

12th meeting
Wednesday, 10 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.12

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 9 (concluded) (A/CONF.152/C.1/L.21, L.50)

1. The CHAIRMAN called attention to document A/CONF.152/C.1/L.21, submitted by the delegation of Spain. It was pointed out that the English version of draft article 9 used the expression "handed over to an operator". The Spanish delegation had suggested that the expression used should be "taken in charge by an operator", in order to bring the wording of the provision into line with the rest of the Convention, and particularly article 3.

2. The suggestion in document A/CONF.152/C.1/L.21 was referred to the Drafting Committee.
3. After a procedural discussion between the CHAIRMAN and Mr. FATHALLA (Observer, United Nations Environment Programme) concerning the admissibility of the proposal submitted by the United Nations Environment Programme (UNEP) in document A/CONF.152/C.1/L.50, Mr. RUSTAND (Sweden) and Mr. SOLIMAN (Egypt) formally endorsed the proposal for consideration by the Committee, without prejudice to the position they might take on the change for which the proposal called.
4. Mr. FATHALLA (Observer, United Nations Environment Programme) said that UNEP believed that article 9 as drafted failed to take certain international legal instruments into consideration, in particular the International Convention for the Safety of Life at Sea (SOLAS, 1974), the Hamburg Rules and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989). The instruments in question prohibited the transport, including the export, of dangerous goods unless they were marked, labelled or packed in accordance with various rules and regulations. Moreover the introductory wording of the article, as drafted by the Commission, did not take account of the fact that if the rules and regulations he had alluded to were not respected, the transport of dangerous goods could be considered illegal and treated accordingly.
5. According to the Commission's introductory wording, the operator was presumed not to know of the dangerous character of the goods in question; at the same time, he would be fully entitled under paragraph (a) of the article to take a number of radical measures, which included destroying the goods. UNEP viewed that entitlement with considerable misgivings: it would be technically very difficult for an operator ignorant of the nature of the dangerous goods to take the proper steps to deal with them, however lawful those steps might be. Indeed, his action might be counter-productive and even destructive, not only to the environment but also to himself and his property as an operator. That was why, under the UNEP proposal for paragraph (a), such steps were limited to precautionary ones, which must be taken in accordance with international or national rules and regulations.
6. In sum, UNEP was seeking to point to the existence of international as well as national rules and regulations concerning the handling of dangerous goods, proposing that they should govern the manner of dealing with such goods under article 9, and endeavouring thereby to secure the operator's respect for well-established principles whose aim was to protect not only the environment but also his own interests. UNEP fully understood that the principal objective of article 9 was to protect the operator by liberating him from any obligation to pay compensation for damage caused by his actions thereunder and by ensuring that he would be reimbursed for all costs incurred in so acting. That objective was left untouched in the UNEP proposal.
7. Mr. SOLIMAN (Egypt) supported the UNEP proposal.
8. Mr. ZHAO Chengbi (China) saw little difference in substance between the UNEP proposal and the Commission's draft. He understood the "international or domestic rules and regulations" referred to in the former to be subsumed under the expression "any law or regulation relating to dangerous goods applicable in the country where the goods are handed over" which appeared in the latter. On balance, his delegation preferred the Commission's text. He did, however, appreciate the more discretionary provision proposed by UNEP for paragraph (a). Operators of transport terminals functioned in many different ways and in many different geographical and other contexts; as had been pointed out, they were presumed to be ignorant of the nature of the dangerous goods, and yet entitled, in the Commission's draft, to take measures which might prove harmful to the environment or to property. The UNEP draft did not preclude such measures but merely diverted attention from them to precautions permitted by international or national rules or regulations, thereby strengthening the possibility of proper control.
9. Ms. SKOVBY (Denmark) suggested that the international instruments referred to by the observer for UNEP were of only limited relevance to the matter covered by article 9. She opted for the Commission's draft as being more specific and relevant to the concerns addressed in the article.
10. Mr. PAMBOU-TCHIVOUNDA (Gabon) suggested that UNEP's preoccupation with international rules and regulations might be accommodated in the Commission's draft if the introductory wording were amended to refer to any relevant law or regulation. What seemed to be an innovative notion of compensation for damage resulting from precautions, mentioned in paragraph (a) of the UNEP text, might usefully be incorporated in paragraph (a) of the Commission's draft.
11. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) favoured the Commission's draft as far as the introductory wording was concerned.
12. Mr. FILIPOVIĆ ((Yugoslavia) said that the UNEP proposal, albeit interesting, addressed the issue from the point of view of international public law and was concerned with issues such as precautions, prevention and responsibility, while the principal purpose of the draft article was to cover the specific matters of compensation and liability. The wording of the UNEP proposal was, he believed, unsuitable for the Convention and he could not endorse it.
13. Mr. ILLESCAS (Spain) was also unable to approve the UNEP proposal. With regard to the introductory wording, the Commission's draft was both broader-based - since the laws or regulations it referred to could be either international or domestic - and more specific, in that they were clearly described as being those relating to dangerous goods. Moreover, with regard to paragraph (a), he submitted that most international or domestic rules and regulations on the subject of dangerous goods covered, by and large, all types of transport operators, and not merely

operators of transport terminals. The introduction into the present draft Convention of direct references to instruments of wider scope could lead to difficulties, if only in treaty law, by inadvertently opening the door to looser interpretations of those instruments and consequent harm to their scope and application. His delegation preferred the Commission's text of paragraph (a), which had the merits of clarity, of specifically addressing the case of transport terminal operators, and of indicating what the operator could and must do in the case spelt out in the introductory wording. It offered the additional advantage of pointing to specific and lawful measures for dealing with the situation.

14. Mr. FALVEY (United States of America) favoured the existing text, for the reasons put forward by the previous speaker. While his delegation had great respect for the concerns of UNEP, it believed that the original text merely provided a special rule to deal with a limited set of circumstances that might confront the operator, enabling him to take certain precautionary actions, all in accordance with existing law, and subsequently to recover their cost. His delegation also thought, however, that there was a legitimate basis for concern that that special rule might be interpreted on some future occasion as the only rule governing dangerous goods in the custody of the operator of a transport terminal. He therefore suggested that the report of the Conference should include the essence of a report by UNCITRAL in its *Yearbook*, volume XX: 1989 (p. 17, para. 124), which made it clear that that was not the case. There were many other rules dealing with the terminal operator's right of recourse with respect to liabilities he might incur towards third persons as a result of having dangerous goods imposed on him and on his premises. The concerns of UNEP could be dealt with similarly, by expanding the appropriate paragraph in the Conference's own report so as to make it clear that the special rule did not pre-empt other rules and regulations, including those in international conventions, that dealt with the marking, labelling, packaging and disposal of dangerous goods, as well as those that might provide rights of recourse for protection against liability towards third persons harmed by those goods.

15. Mr. HORNBY (Canada) said that his delegation was inclined to support the proposal. He believed that the purpose of the rule in article 9 was to establish the notion, consistent with the various conventions on liability, that the operator of a transport terminal might take certain precautions when handling unmarked dangerous goods and that he was entitled to receive reimbursement for the costs so incurred. The article was not intended to set out rules for the handling of goods but was a *renvoi* to applicable national law or international law. The language proposed by UNEP met that purpose better, making it clear that the Convention was not establishing rules on the handling of dangerous goods but was restricted to the narrower question of liability and reimbursement. The proposed rewording established that the precautions were to be taken in accordance with international or national rules and regulations and were not necessarily limited to those listed in subparagraph (a) of article 9 as drafted by the Commission.

16. Mrs. PIAGGI DE VANOSI (Argentina) said that her delegation would support the original text, for the reasons given by the representative of Spain.

17. The CHAIRMAN invited the Committee to vote first on the introductory wording of article 9 as proposed by UNEP in document A/CONF.152/C.1/L.50.

18. The proposal was rejected by 21 votes to 6 with 4 abstentions.

19. The CHAIRMAN invited the Committee to vote on subparagraph (a) of the UNEP proposal.

20. Subparagraph (a) was rejected by 19 votes to 9 with 2 abstentions.

21. The CHAIRMAN invited the Committee to vote on subparagraph (b) of the UNEP proposal.

22. Subparagraph (b) was rejected by 21 votes to 4 with 6 abstentions.

23. The proposal as a whole was rejected.

24. Mr. FATHALLA (Observer, United Nations Environment Programme) requested the Executive Secretary to read out a statement by the International Maritime Organization (IMO) on article 9 of the draft Convention. The statement had been given him for presentation to the Conference so that it could be reflected in its report.

25. Mr. BERGSTEN (Executive Secretary) read out the statement. It noted that, in accordance with chapter VII of the International Convention for the Safety of Life at Sea (SOLAS, 1974), the carriage of dangerous goods by sea was prohibited unless provisions incorporated in that Convention concerning the treatment of such goods were strictly observed; that since SOLAS had been ratified by 111 States, those provisions were legally enforceable world-wide; and that the minimum requirements for the transport of dangerous goods by all modes contained in the United Nations recommendations prepared by the United Nations Committee of Experts on the Transport of Dangerous Goods enjoyed similar universal acceptance. The statement added that no operator could be expected, in the light of that background, to take in charge dangerous goods that had not been properly documented, marked, packaged and labelled; that in the case of dangerous goods, the precautions to be taken related primarily to the moment at which the operator took the goods in charge; that precautions at that stage were decisive for consideration of the operator's liability or any exemption from that liability; that the introductory wording of draft article 9 did not seem to reflect that situation; and that the article also seemed to relate primarily to dangerous goods in packaged form and should perhaps be amended by the Committee to include the operator's handling of dangerous goods and substances in bulk.

26. The statement then pointed out that, although the draft Convention established the channelling of liability on the basis of damage caused to the goods, precautionary measures to be taken in respect of dangerous goods necessarily related to damage caused by the goods, not only to "any person or property" as specified in the draft Convention, but also to the environment; and that, while IMO was primarily concerned with pollution from vessels, the importance of avoiding pollution of the marine environment from land-based sources was frequently the subject of consultations between IMO and UNEP. The statement concluded by saying that, in that regard, the need for the operator to take emergency precautions to avoid not only damage to persons or property but also environmental damage which might occur as a result of the introduction of dangerous substances into the marine environment, as in the case of the leaking of such substances after the operator had taken them in charge, should be taken into account.

27. Mr. RUSTAND (Sweden), speaking in explanation of his vote, reiterated that his delegation had not endorsed the substance of the proposal but the right of the observer for UNEP to present it.

28. The CHAIRMAN said that article 9 had been approved without amendment, subject to the decision of the Drafting Committee on the proposal by Spain (A/CONF.152/C.1/L.21).

29. Article 9, as worded by the Commission, was referred to the Drafting Committee on that understanding.

Article 10 (A/CONF.152/C.1/L.15, L.16, L.54)

30. Mr. SCHROCK (Germany) introduced the first part of his delegation's proposal in document A/CONF.152/C.1/L.16, concerning the first sentence of article 10 (1). He noted that the Japanese Government had made a similar suggestion in paragraph 3 of its written comments on the draft Convention (A/CONF.152/7). Article 10 (1) provided a right of retention for the operator during the period of his responsibility. At its twenty-second session, UNCITRAL had adopted a proposal that, in substance, gave the operator a right of retention over the goods for the cost of services rendered after his period of responsibility, as defined in article 3, had expired. That decision had been reflected in detail in paragraph 126 of the report of UNCITRAL on the work of its twenty-second session (A/44/17), which stated that the proposal had been accepted and referred to the drafting group. That decision was embodied in substance in the first part of the German proposal. It had not been given effect by the drafting group, as the Commission had noted in paragraph 207 of the report. His delegation felt that the Conference should implement the decision and amend the draft Convention accordingly.

31. Mr. OCHIAI (Japan) said that his delegation supported the German proposal for article 10 (1).

32. Mr. RUSTAND (Sweden) said that the decision in question had been taken in response to a proposal from the delegations of Finland and Sweden. Paragraph 9 of his Government's written comments on the draft Convention (A/CONF.152/7/Add.1) also spelt out the failure to reflect it in the draft Convention. The text of article 10 (1) on which the Committee was to base its discussion should therefore be amended by the German proposal.

33. Ms. SISULA-TULOKAS (Finland), Mr. TARKO (Austria) and Mr. HORNBY (Canada) supported the German proposal for article 10 (1).

34. The CHAIRMAN said that the proposal was intended to cover the marginal period when the operator no longer had responsibility for the goods but still had them in his keeping. Storage fees, for example, might accrue after the time when the goods should have been collected by the person entitled to receive them.

35. Mr. FILIPOVIĆ (Yugoslavia) said that under the Yugoslav legal system the right of retention depended on the goods still being in the operator's hands. It should be made clear, therefore, that the addition of "and after" meant that the goods must still be in the operator's custody.

36. Mr. SCHROCK (Germany) said that it was implicit in the right of retention that the goods should be in the hands of the operator. He would hesitate to introduce the notion of "having in custody" since the Convention contained the general principle of "taking in charge". Personally, he would prefer to have the paragraph more closely related to article 3, an idea implicit in the conclusions reached on the subject by UNCITRAL at its twenty-second session.

37. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that his delegation preferred the text of the Commission's draft. The use of the term "after" might imply that there was no time limit to the right of retention. The operator could enter into a separate contract with regard to costs incurred after the goods had been placed at the disposal of the person entitled to receive them.

38. Mr. ROJANAPHRUK (Thailand) agreed with the representative of Yugoslavia that the right of retention had nothing to do with the period of responsibility. The aim of the German proposal was to cover the entire period of custody by the operator, but the sentence as it stood did that anyway, since there could be no right of retention if there were no goods to be retained. He suggested that the first sentence of article 10 (1) should end with the words "in respect of the goods".

39. Mr. SOLIMAN (Egypt) observed that under article 10 (1) of the Commission's text the operator would have no special priority in exercising his right over the goods. He therefore supported the proposed amendment, which would strengthen the operator's right of retention.

40. Mr. AL-ZABEN (Saudi Arabia) said he would not object to the addition of the words "or after" to the first sentence of article 10 (1). According to article 3, however, the operator's period of responsibility began when he received the goods and ended when he delivered them to the customer. Who would be responsible if the goods were damaged after that?

41. Mr. SULEIMAN (Nigeria) welcomed the enhanced right of retention which the operator would enjoy under the German proposal.

42. Mr. LEBEDEV (Union of Soviet Socialist Republics) was reluctant to accept the proposed amendment. The addition of the words "or after" might create an imbalance among the respective rights and duties of the parties under the Convention. The extended period was undefined; it might be a week, a year or even more. Moreover, the period of the operator's responsibility was that defined in article 3; it ended when the operator placed the goods at the customer's disposal. However, under article 10 he might retain the goods subsequently. The term "retention" might have different meanings in different legal systems; it might be construed to mean either that the goods could be held in the same place, or that they could be held wherever they were. Also, the addition of the words "or after" to the first sentence might conflict with the second sentence of the paragraph, which referred to arrangements "extending" the operator's security in the goods. That term too might prove misleading if, as in Russian, it implied an extension in time. All in all, he felt that the proposed amendment would not effect any practical improvement in the relationship between the operator and the customer. Admittedly, the purpose of the amendment was to facilitate transport operations after the expiry of the operator's period of responsibility, but it was uncertain whether the contractual relationship between operator and customer would continue once the goods were no longer in the operator's charge.

43. Mr. RUSTAND (Sweden) was surprised by the objections voiced to the German proposal for article 10 (1), since it was not a true amendment to the text in document A/CONF.152/5 but simply a correction of it to bring it into line with the text approved by UNCITRAL in 1989. The origin of the present difficulty lay perhaps in the wording of article 3, which provided that the period of responsibility ended with the handing over of the goods to the customer or, alternatively, with them being placed at his disposal. The right of retention must of course cease either when the customer paid his debt to the operator or when the operator exercised his right under the applicable national law to sell the goods. But it would be inequitable if, when the customer came to collect the goods, the operator was obliged to surrender them without compensation for extra costs incurred because of delay imputable to the customer.

44. The CHAIRMAN said that in the French legal system the right of retention covered all costs incurred by keeping goods in storage.

45. Mr. WOOLLEY (Institute of International Containers Lessors), speaking at the invitation of the Chairman, asked the representative of Germany whether national law would govern the duty of care involved in services performed after the end of the operator's period of responsibility.

46. Mr. SCHROCK (Germany) confirmed that it would.

47. Mr. RAO (India) said that the German proposal for article 10 (1) was acceptable and he could support it. In the Indian legal system, the principle it enshrined was found in the contract of bailment: if the bailee rendered services associated with his duties in respect of the bailed goods, he was entitled, in the absence of a contractual provision to the contrary, to retain them until he had been duly reimbursed for those services. If the proposal was thought to be too open-ended, a provision might be added to the effect that the right of retention would cease when the operator was reimbursed for the costs and claims incurred. That would spell out an idea which was already implicit in the proposed amendment.

48. Mr. SCHROCK (Germany) said the existing text of the amendment was adequate for that purpose.

49. The CHAIRMAN said that the addition suggested by the representative of India might prove a useful clarification and could be added by the Drafting Committee. He invited the Committee to vote on the German proposal for article 10 (1) (A/CONF.152/C.1/L.16).

50. The proposal was adopted by 21 votes to 7, with 8 abstentions.

51. Mr. SCHROCK (Germany), introducing the proposal in document A/CONF.152/C.1/L.16 to delete paragraph 3 of article 10, observed that paragraphs 1 and 3 of the article dealt with different issues. Paragraph 1 introduced the notion of a right of retention of the goods, a right which would not necessarily entitle the holder to sell them unless national law so allowed. The first sentence of paragraph 3 appeared to state a rule of conflict of laws that the right to sell the goods was governed by the place where the goods were located; that at least was the interpretation given by members of the United States delegation in an article published in October 1990 in the Journal of Maritime Law and Commerce. During the preparatory work for the Conference it had been accepted that possible conflicts between the right of sale and any property rights of third parties in the goods should not be dealt with by the Convention. However, the second sentence of paragraph 3 excluded from the right of sale containers, pallets and similar articles of transport or packaging, thus apparently setting aside the conflict of laws rule. As a result the entire paragraph was somewhat obscure. On a literal construction of the second sentence, the conflictual rule in the first sentence would not apply, giving way instead to the general principles of private international law.

52. His Government had doubts about splitting up the conflict of laws rule as between different categories of goods. In the first sentence of the text a unified conflict of laws rule was laid

down for movables in general, but was immediately followed by a provision implying that containers would be dealt with according to the applicable national law. It would be better not to include in the draft any provisions dealing with the property rights of third parties in the goods. All issues relating to the sale of goods and the rights of third parties in the goods should be dealt with by the applicable national law according to the general principles of private international law.

53. Mr. TARKO (Austria) supported the proposal to delete paragraph 3. The first sentence of the paragraph was not helpful; it merely stated a conflict of laws rule without any attempt at unification, whereas the purpose of the Convention was to unify the law on the subject. A mere reference to the law of the State where the goods were located added nothing and the sentence could well be deleted. As to the second sentence, it was not clear what was supposed to happen to containers, pallets and other articles of transport or packaging. Was the operator entitled to sell them? Was that question governed by national law, and if so by which national law? If the Committee decided to delete paragraph 3, it should also delete paragraph 4; without the paragraph about the right to sell the goods, there was no need to stipulate how the right was to be exercised.

54. Mr. SULEIMAN (Nigeria) said his delegation would support the proposal to delete paragraph 3 provided that the Convention nevertheless safeguarded the operator's right to sell all or part of the goods to defray his expenses.

55. Mr. FILIPOVIĆ (Yugoslavia) supported the German proposal to delete paragraph 3, for the reasons given by the sponsor.

56. Mr. WOOLLEY (Institute of International Container Lessors), speaking at the invitation of the Chairman, said that the German proposal would not materially affect the industry he represented. For the benefit of those who were unfamiliar with the container leasing industry, it would be useful to explain how the kind of provision in question had arisen.

57. The Institute of International Container Lessors was the trade association for the international container leasing industry and its comments on the draft Convention were contained in document A/CONF.152/7. To understand how the exception for containers, pallets or similar articles appeared in paragraph 3 of article 10, it was necessary to understand something of the business relationships involved. There were 6.2 million 20-foot equivalent units of containers in the world, permanently marked with the owner's code, which was registered with the International Container Bureau; in addition, each container had a number particular to it. Containers were permanent means of transport with an approximate life of 7-15 years. They were not goods in the general sense and were regulated by the customs convention on containers, which allowed containers to enter a country as an instrument of international traffic without payment of duty. Half of the world's containers were owned by leasing companies, the other half by ship lines; those owned by leasing companies were leased to and used by ship lines. They were leased for periods of a much shorter duration than their useful life, from two months to five years. While on lease to ship lines, the leasing company did not know where the containers were. When the container went on lease, it started from a depot where it had been stored; when it was returned to the leasing company it was returned to the depot. There were approximately 1,000 depots around the world and the relationships between depots and leasing companies and between depots and ship lines were regulated by contract. One of the Institute's concerns was that unless due care was taken, depots would be construed as terminals.

58. Its major concern, however, was where a ship line went bankrupt and left containers at a terminal. The Institute did not consider that the terminal should be able to sell the containers belonging to the leasing company and believed that under the laws of many countries represented at the Conference the terminal had the right of retention, but that that right did not necessarily give it the right of sale. Under some circumstances there might be a right of sale but usually only with a court order. The German proposal to delete paragraph 3 of article 10 would, as he understood it, put the issue back in paragraph 1, which gave the operator the right of retention of the goods, namely the containers with other goods in them. The national law would then apply as to what the nature of that right of retention was. While in many countries it was fairly clear, in the United States it would be confusing. Marginally, therefore, the Institute was in favour of retaining paragraph 3. That would allow a claim to be made, or the possibility of satisfying a claim by sale to the extent permitted by the law of the local State, except for containers, pallets or similar articles. It would also illustrate to a common law lawyer what was meant by the right of retention. In the absence of that provision, lawyers in countries like the United States were likely to wonder what the right of retention meant. The resulting situation would be very confusing. At present there were probably jurisdictions in the United States where there would be a right of sale and others where there might not. He had not seen any decisions that would confer a right of sale but there were some that would prevent one.

59. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) supported the German proposal to delete paragraph 3.

60. Mr. ZHAO Chengbi (China) said that in his delegation's view, the operator's right of retention and his right of sale were totally different legal notions, but they should be connected at a certain level. If the operator was given the right of retention only, and deprived of the right of sale, he would be unable to get proper compensation. That would cause considerable difficulties for operators and might even result in their bankruptcy. The law on the right of retention varied greatly from country to country and the draft Convention was intended to settle such conflicts of law and bring about some uniformity in the matter. The text as it stood took

into account the operator's rights and interests and the differences between national laws. His delegation was therefore unable to support the German proposal to delete paragraph 3.

61. Mr. ROMAN (Belgium) said that his delegation fully understood the reasons for the proposal, but given that the Convention was intended to apply world-wide, it preferred to retain paragraph 3 for the sake of clarifying it.

62. Mr. RUSTAND (Sweden) said that the problem with the Convention was that it had very little unifying effect with regard to the right to sell the goods by referring to the applicable national law. The Swedish delegation would have preferred the Convention to contain rules that would have such an effect, but acknowledged that it was impossible to introduce them at such a late stage in the consideration of the Convention. Sweden had no problems with the second sentence of paragraph 3, as its own laws were adequate to cover the matter. However, it believed that from a strictly logical and legal point of view the whole of paragraph 3 might usefully be deleted and, as a consequential amendment, paragraph 4 as well.

63. Mr. ABASCAL (Mexico) said that his delegation preferred to retain the text as drafted by the Commission and did not agree that the first sentence of paragraph 3 failed to add anything to the Convention. The reference to the law of the State where the goods were located was a specific and important stipulation which helped to meet the objective of uniformity - something particularly useful in view of the differences between national laws, which the discussion had highlighted. Another reason for its retention, put forward by the representative of the Institute of International Container Lessors (IICL), was that it would make the Convention more acceptable generally. Finally, the paragraph expressly stated that the operator had the right to sell the goods even though that right was subject to the law of the State where the goods were located. That would make the Convention more attractive to terminal operators because it would guarantee their rights more forcefully.

64. Mr. NAOR (Israel) supported the German proposal to delete article 10 (3). His delegation considered that paragraph 4 should also be deleted and requested Germany's opinion on that point.

65. Ms. ZAWITOSKI (United States) said that her delegation could not support Germany's proposal to delete paragraph 3, for the reasons stated by the representatives of China, Mexico and IICL. The first sentence of the paragraph did add something to the Convention as far as the United States was concerned, because her country had perhaps as many as 50 different laws regarding an operator's right to sell goods which he had retained. The United States delegation therefore considered that the force of a treaty provision was needed in order to give some uniformity to the laws within its own country, not to mention uniformity on a world scale.

66. Mr. FILIPOVIĆ (Yugoslavia) said that the problem really lay in the stipulation of a conflict of laws rule in paragraph 3, because if the Convention implied that for the right of sale the law was immaterial, the national law would have to apply and would not be affected by the international instrument. Where the right to sell existed, the most important issue was how the goods were to be sold, whether privately or publicly. As such matters could not be covered by the Convention, the deletion of paragraph 3 would eliminate the conflict of laws rule; it would not help to introduce a right of sale into a national law.

67. Mr. SCHROCK (Germany) said that the second sentence of paragraph 3 did not reflect a statement which had been made in the article in the Journal of Maritime Law and Commerce to which he had referred earlier, namely that UNCITRAL had agreed that containers already marked as being owned by third party lessors should not be subject to sale. The sentence simply stated that the preceding sentence did not apply.

68. Before the Committee voted on his delegation's proposal for article 10 (3), he wished to know what principle the Committee would be voting on: whether on the unified exclusion of the right of sale with respect to containers; or on the issue that with respect to containers the general conflict of laws rules should apply, and with respect to any other movables the unified conflict of laws rule, which referred to the place where the goods were located, should apply.

69. The CHAIRMAN said that it was clear from the historical background to paragraph 3 of article 10 that the provision laid down a unified rule of law; indeed, the first sentence contained a general rule recognizing that the operator had the right to sell the goods over which he had already exercised his right of retention. The provision could not therefore be interpreted as a conflict of laws rule. He doubted whether any State represented at the Conference would wish the operator, having exercised his right of retention over the goods, to be unable to exercise a right of sale over them, and consequently wish the existing text to be discarded. If the reference to the law of State where the goods were located was not strictly necessary, it might be deleted.

70. Mr. ABASCAL (Mexico) said that his delegation could not agree to the deletion of that reference because it would bring the Convention into direct conflict with some of Mexico's constitutional provisions.

71. Mr. RUSTAND (Sweden) said that in the case of a federal State composed of 50 States, the reference to the applicable law could not possibly have a unifying effect.

72. Mr. ZHAO Chengbi (China) said that if the Convention stated clearly that the operator had the right of sale, it would go a long way towards unifying national laws. If the Committee voted against the German proposal to delete paragraph 3, the Commission's text would clearly need some

amendment. He agreed with the Chairman's suggestion that some thought might be given to whether the Committee should maintain the reference to the law of the State where the goods were located.

73. Ms. ZAWITOSKI (United States) said that her delegation supported the Chairman's view that if paragraph 3 were retained the phrase "to the extent permitted by the law of the State where the goods were located" might be deleted.

74. Mr. SCHROCK (Germany) said that he did not consider that his question regarding the interpretation of the second sentence had been fully answered. As a judge himself, he considered that any judge who had to decide a case on the basis of the text of that sentence alone, without reference to its history, would be at a loss to know how to interpret the first part of that sentence.

75. Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic) said that the German proposal certainly had its merits and deserved close attention. However, the problems it raised might be solved if the text of the paragraph were made more explicit, although as far as his delegation was concerned the existing text was sufficiently flexible and well balanced.

76. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that if paragraph 3 was deleted the sale of retained goods would not be possible because it would not be mentioned. It would then be logical to delete paragraph 4, which stemmed from the idea contained in paragraph 3.

77. The CHAIRMAN invited the Committee to vote on the German proposal to delete paragraph 3 of article 10 (A/CONF.152/C.1/L.16).

78. The proposal was rejected by 21 votes to 9, with 3 abstentions.

79. The CHAIRMAN said that the Committee might now decide whether to amend paragraph 3; delegations might consider the possibility of deleting the phrase "to the extent permitted by the law of the State where the goods are located", although he was aware that that would create serious problems for some States, including Mexico.

80. Mr. SCHROCK (Germany), speaking on a point of order, requested that any amendments proposed to paragraph 3 should be circulated in writing before being discussed.

The meeting rose at 5.35 p.m.

13th meeting

Thursday, 11 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.13

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 10 (concluded) (A/CONF.152/C.1/L.15, L.54)

1. The CHAIRMAN, referring to the discussion at the end of the previous meeting regarding article 10 (3), and in particular the phrase concerning the law of the State where the goods were located, said that, although such a reference to local law was not conducive to the uniformity of law that the Convention was seeking to achieve, its deletion would raise constitutional problems for certain States. Other States, on the other hand, while they might consider the phrase an unnecessary addition, at least did not regard it as positively harmful. In such circumstances, he wished to close discussion on the matter.

2. Mr. OCHIAI (Japan) said that he fully supported the point of view expressed by the Chairman. Deletion of the phrase "to the extent permitted by the law of the State where the goods are located" might well make it possible to interpret the text as allowing the operator to exercise the right to sell the goods unconditionally, which many States would regard as harmful.

3. Mr. OURZIK (Morocco), introducing his delegation's proposal relating to article 10 (3) (A/CONF.152/C.1/L.54), said that its purpose was to clarify a point that was not made clear in other provisions of the Convention, namely, the legal status of empty containers in a transport terminal, which should be treated as goods for the purposes of the Convention.

4. The CHAIRMAN said that article 10 (3), in its present form, permitted the operator to sell containers only in the event of claims for the cost of repairs of or improvements to them. As he understood the proposal, it aimed at treating empty containers as goods with the result that the operator would be able to exercise a right of retention over them.

5. Mr. OURZIK (Morocco) confirmed that interpretation.

6. Mr. WOOLLEY (Institute of International Containers Lessors), speaking at the invitation of the Chairman, said that the Moroccan proposal would be very difficult to accept for two reasons. Firstly, in his view, there should be no right to sell containers, whether empty or full, since they belonged to a party not involved in the claim. Secondly, the definition of empty containers as goods for the purposes of the Convention would cause problems. There existed throughout the world as many as a thousand industrial depots where empty containers were usually stored. If empty containers were defined as goods, there would be a real risk that such depots would be treated as container terminals. At present the relations between such depots and the leasing companies and shipping lines were based on contractual arrangements.

7. Mr. ZHAO Chengbi (China) said that treating empty containers as goods could raise many problems affecting not only the customer, but also the interests of third parties. He therefore felt unable to support the proposal.

8. Mr. LARSEN (United States of America) said that he could not support the proposal either, for the same reasons as the representative of China.

9. Mr. OURZIK (Morocco) said that he was aware that the question raised the problem of third parties, but wondered how the operator could recover his costs if the containers were not claimed by the owner or by the person entitled to take delivery of them. He fully understood the position of the Institute of International Containers Lessors (IICL). Although his delegation had been anxious to clarify a situation not covered by the Convention, it would not press the matter to a vote.

10. Introducing his delegation's proposal relating to article 10 (4), he said that its purpose was to give the operator the possibility of selecting one of the three persons with respect to whom he should make "reasonable efforts to give notice of the intended sale" rather than having to notify all three of them, namely, the owner of the goods, the person from whom the operator received them and the person entitled to take delivery of them, as at present required by the text.

11. Mr. MORAN (Spain) felt that the Moroccan proposal could be detrimental to the rights of the owner of the goods, since he would not have to be notified. The present text rightly stipulated that "reasonable efforts" must be made to give him notice; that might, for instance, mean sending a fax message. He felt unable to support the Moroccan proposal.

12. Mr. LEBEDEV (Union of Soviet Socialist Republics), noting that according to the present text, the operator was required to inform all three persons, said it might be thought that failure to give notice to any one of them meant that the operator could not sell the goods because he had failed to discharge all his responsibilities under the Convention. In practice, however, that situation would not be acceptable; and in any case such an interpretation of paragraph (4) would not be proper, since it called only for "reasonable efforts". If, for example, the operator did not know the address of one, or even two, of the persons concerned, but gave the information to the third one, that would constitute reasonable efforts to give notice and the operator would then be allowed to sell the goods. In other words, such a possibility already existed in the very language of the provision as it stood. There was therefore no need to change the present text.

13. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) agreed with the representative of Spain that it would be preferable to keep the existing text of paragraph (4).

14. Mr. TARKO (Austria) said that to sell the goods would be a drastic remedy. The operator must, therefore, give notice to all the persons concerned. In his view, the words "reasonable efforts" provided a flexible and satisfactory formulation. If the address of a person were not known, "reasonable efforts" to contact that person would be sufficient.

15. Mr. SCHROCK (Germany) fully supported the observations made by the representative of Austria. In substance, article 10 (3) made the right of retention a "lien", the legal effect of which would be that the operator could probably sell the goods even if they were not owned by his customer. Accordingly, he should at least make reasonable efforts to give notice to the actual owner of the goods. In the case of a precious item, for example, it was indispensable for its owner to be informed of an impending sale.

16. The CHAIRMAN invited the Committee to vote on the Moroccan proposal relating to article 10 (4) (A/CONF.152/C.1/L.54).

17. The proposal was rejected by 21 votes to 2, with 6 abstentions.

18. Ms. ZAWITOSKI (United States), introducing the United States amendment to article 10 (A/CONF.152/C.1/L.15), said that her delegation's proposal would grant the right of security in unclaimed or abandoned goods in respect of unpaid costs or claims due to the operator. It sought to tackle the problem of how long the operator must wait before exercising his right of security in such goods and starting the process of notice and sale mentioned in article 10 (3) and (4). The proposal sought to specify a uniform period of time after which the goods would be considered as having been abandoned. Without such a provision the period would be governed by national or local law and vary widely from State to State. Such a provision would promote certainty and provide a uniform definition of when goods could be deemed to be abandoned for the purpose of exercising rights of security. Although her delegation had proposed adding a new paragraph (5) and placing the second sentence of paragraph (3) in a new paragraph (6), she hoped that voting on the question would be focused on the principle underlying the proposal. If the principle was accepted, it could then be left to the Drafting Committee to refine the wording and decide on the best place for the amended text within article 10.

19. Mr. ROMAN (Belgium), observing that his delegation had submitted a similar proposal concerning the period of responsibility under article 3, fully supported the United States proposal.
20. Mr. TARKO (Austria) had some doubts as to the consequences of the proposed new paragraph (5) in article 10. As explained by the representative of the United States, the operator would be able, after a certain period of time, to consider the goods "abandoned". In the law of his country, the term "abandoned" would signify that they were given outright to the operator, who could then do what he wanted with them. His delegation would feel able to support the proposal if it were drafted in such a way that abandonment did not mean that the operator could do what he wanted, but was merely the first stage in a process leading to the right to sell the goods.
21. Mr. ZHAO Chengbi (China) thought that the period of responsibility after which the operator could treat the goods as abandoned was too short and wondered how many days could be considered a reasonable period. The proposal was acceptable in principle but needed to be drafted more carefully.
22. Mr. RUSTAND (Sweden) said that his delegation was of the view that the substance of the United States proposal already followed from article 3, since to "place at the disposal of" implied giving notice and calling on someone to collect the goods. If the customer or the person entitled to take delivery of the goods did not do so, the operator would be entitled to sell them. In other words, the only element added by the United States proposal was to specify the period of time after which that could be done. In his delegation's view, a specified period was unnecessary and would make the situation less flexible; it would be better to leave the matter for the operator to decide in the light of the circumstances. He agreed with the representative of Austria that the concept of "abandonment" might cause problems. He could, however, go along with the proposal, as he did not consider the issue a major one.
23. Mr. OCHIAI (Japan) said that terminal operators who were disadvantaged in the way in question ought to be covered by the right to sell the goods. Therefore, his delegation could not support the United States proposal.
24. Mr. ABASCAL (Mexico) said that customers frequently did not claim their goods and abandoned them. The United States proposal dealt with the matter in a reasonable manner and his delegation therefore supported it.
25. Ms. ZAWITOSKI (United States), replying to a question by the CHAIRMAN, said that the period of time in question might be 90 days. However, her delegation was prepared to consider alternatives.
26. Mr. HORNBY (Canada) said that his delegation supported the United States proposal, which it considered would add an element of certainty to the provision. With regard to the comments made by the representative of Sweden, he pointed out that the period of responsibility referred to in article 3 was rather vague.
27. Ms. SISULA-TULOKAS (Finland) said that the United States proposal would create more problems than it resolved.
28. Mr. CHRISTOV (Bulgaria) thought that the United States proposal deserved support.
29. Ms. SKOVBY (Denmark) said that her delegation fully supported the United States proposal.
30. Mr. PAMBOU-TCHIVOUNDA (Gabon) said that everyone was familiar with the problem of lack of space in harbours and ports caused by the fact that customers failed to collect their goods properly. Nevertheless, his delegation had some doubts about including the United States proposal in the draft Convention. First of all, the duration of the period of responsibility had not yet been defined in article 3, and it was therefore difficult to indicate the point in time at which the operator would be entitled to sell or dispose of the goods. Secondly, account must also be taken of the different levels of development of countries involved in international trade. Some countries, such as those which were land-locked, were wholly dependent on others, and it would be difficult for them to accept an obligatory rule of a deadline after which terminal operators would be able to sell or dispose of goods. If those points were dealt with, his delegation might be in a position to support the proposal.
31. Mr. FRANCONI (Instituto Argentino Uruguayo de Derecho Comercial), speaking at the invitation of the Chairman, considered that the Committee should not adopt the United States proposal. In the national legislation with which he was familiar, there was a clear-cut distinction between the procedure for exercise of the right of retention and the procedure consequent upon abandonment or surrender. In the latter case, it would be necessary to obtain judicial authorization, which would determine whether the period of time required in order to decide that they had been abandoned had actually elapsed.
32. Mr. BONELL (Italy) said that article 3 had little to do with the issue raised in the United States proposal, since it was intended to define the period of responsibility. It tried to fix the time-limit after which the terminal operator would no longer be responsible for loss or damage to the goods because he would have fulfilled his contract. That did not mean that the goods would then be regarded as abandoned, but that they would remain at the terminal at the customer's risk. If no one came to the terminal, gave notice or explained why the customer was absent, that could sooner or later be regarded as abandonment of the goods by the customer. If the customer was prevented by force majeure from coming to the terminal to collect his goods and gave notice to that effect, paragraph (5) proposed by the United States would never apply.

33. With regard to the situation where after a certain time the goods were treated as abandoned by the customer because he had not collected them or given any notice to the terminal operator, the problem arose whether the Committee should decide on what was a reasonable period of time or leave it to be settled by national legislation. It would be preferable to resolve the question in a uniform manner, and he thought that the United States proposal could serve as a useful basis for further deliberations.

34. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that, in view of the difficulties that it would create for developing countries, his delegation was unable to support the United States proposal.

35. Mr. ROMAN (Belgium) thought that the United States suggestion of a period of 90 days was reasonable. However, if there were special circumstances, such as inclement weather conditions, it should be possible to extend the period between the time the goods were claimed and when they were collected. However, his delegation could not agree that the goods could remain for ever in the terminal, even at the customer's risk.

36. Mr. ZHAO Chengbi (China) said that the United States proposal was designed to solve a serious problem. The key issue was the number of days that could elapse after notice had been given before the goods could be regarded as abandoned. If the period was too short, it might be prejudicial to owners who were prevented from collecting the goods earlier by objective factors rather than subjective whim. That would create particular difficulties for developing countries. Although there was some support for a period of 90 days, the question was whether it could be universally applicable. All in all, he thought that the problem might better be left to individual Governments to decide.

37. Mr. ROJANAPHRUK (Thailand) pointed out that the period of 90 days suggested by the United States after which the goods would be regarded as abandoned was the period within which the goods were to be claimed, not collected. In his opinion, that period was sufficient, but since the national law of countries varied, it might be more appropriate to say "within a reasonable period of time" and leave it to individual Governments to specify the duration.

38. Mr. SCHROCK (Germany) shared the views of the Italian representative on how article 3 should be interpreted. If the Committee should decide to adopt a specific time-limit, it should be longer than three months, since where property rights were involved, it was best to proceed with caution.

39. Mr. FILIPOVIĆ (Yugoslavia) said that although the proposal was a useful one, it would be difficult, if not impossible, to agree on a time-limit which would suit all States. He suggested that it should be left to the operator of the terminal where the goods were held to fix a time-limit which would take account of such factors as storage capacity and local weather conditions.

40. Mr. ASTAPENKO (Byelorussian Soviet Socialist Republic) said it seemed clear from the discussion that the United States proposal was unlikely to gain universal acceptance, since it gave rise to a number of problems, notably the problem of the time-limit. The idea that at the end of a certain period of time the operator would be entitled to claim the goods was already reflected in the existing text of article 10, and he agreed with the view that in such a case the national law of the country in which the goods were situated would be applicable.

41. Mr. NAOR (Israel) agreed that the question was one which should be decided by national law. In fact, once the goods had been abandoned, they would have a different legal status.

42. Mr. INGRAM (United Kingdom) said that the discussion had shown that there was considerable uncertainty as to how the proposal was to be interpreted from a legal viewpoint. To attempt to cover a number of different de facto situations by one simple general rule was not really feasible. Accordingly, his delegation would abstain on the proposal.

43. Mr. SULEIMAN (Nigeria) said that in his country, there were already regulations covering the disposal of abandoned goods: after three months, they would be the subject of notices in the official gazette, which would mean that they were liable to be handed over to receivers. Invariably, some 75 per cent of such goods were claimed by the owners.

44. Mr. RUSTAND (Sweden), in reply to the Italian representative, said he had not been suggesting that article 3 already covered the point raised by the United States, but rather that the legal concept of placing goods at the disposal of a person entitled to take delivery of them would provide the operator with a means of getting rid of them. If a customer failed to collect the goods within a certain period of time, storage fees would begin to accrue, and the operator could use his right of retention and sell the goods. The operator's interests were thus sufficiently protected, and there was no need to introduce the concept of abandoned goods. The proposal was unnecessary and would lead to a loss of flexibility.

45. Ms. ZAWITOSKI (United States) considered that a period of 90 days would be sufficient to give some degree of security to terminal operators operating on a world-wide basis. The period would not begin to run until after the expiry of the time during which the operator had agreed to keep the goods. Even after 90 days, there would be a further period during which the notice and sale provisions would apply. The time-limit would be for claiming the goods concerned, not for taking delivery of them. If some delegations had difficulty with the word "abandoned", her delegation would be willing to consider an alternative suggested by the Drafting Committee.

46. The CHAIRMAN invited the Committee to vote on the first of the two United States proposals (A/CONF.152/C.1/L.15).

47. The proposal was rejected by 12 votes to 11, with 9 abstentions.

48. Ms. ZAWITOSKI (United States) said that her delegation's consequential proposal for an addition to article 12 (A/CONF.152/C.1/L.18) would now fall. Her delegation withdrew its second proposal for an amendment to article 10 (A/CONF.152/C.1/L.15).

49. Article 10 was approved.

Article 11 (A/CONF.152/C.1/L.41, L.46, L.52)

50. Mrs. EL OTMANI (Morocco), introducing her delegation's proposal (A/CONF.152/C.1/L.52), said that in every paragraph of article 11, reference was made to "handing over" the goods rather than to "placing them at the disposal" of the person entitled to take delivery of them. That wording raised a number of questions: for example, what would happen to the goods if the customer failed to appear when the operator had placed the goods at his disposal, and was thus no longer responsible for them? What would be the time-limit applicable in such circumstances?

51. As now drafted, paragraphs (1) and (2) were highly unfavourable to the operator in that they allowed the customer, after taking delivery of the goods, to challenge the condition in which they had been received, and to claim compensation, merely by giving notice within a certain period of time. The customer could even make a claim against the operator for non-apparent damage when the goods had reached the final recipient, provided that notice was given within 15 days of their arrival. The paragraphs should be amended to provide that the period of notice would run from the date when the customer acknowledged the goods as his while they were still in the charge of the operator. Any such notice should be followed by investigations of the alleged damage, on the part of the customer and the operator respectively, while the goods were still in the warehouse and in the charge of the operator. The person entitled to take delivery of the goods would in any case be able to ascertain any loss or damage at the time the goods were handed over.

52. In her view, the physical handing over of the goods freed the operator from his obligation to safeguard them, and he was thus no longer responsible for any damage or loss sustained after the goods had been taken out of the storage area in the port. The periods allowed for notice by the customer under paragraph (2) were far too long and might lead to unlimited claims being made against the operator. Paragraph (3) made no provision for proof of participation by the operator in a survey or inspection of the goods.

53. The proposed amendment to paragraph (5) of article 11 consisted in the insertion of references to "placing the goods at the disposal of the person entitled to take delivery of them". Similar language appeared in paragraphs (3) and (4) of article 5 as approved by the Committee, and her delegation considered it necessary to harmonize the text of the draft Convention in that respect.

54. As regard the proposal to insert the words "the carrier" in paragraph (4) she said that to draw a parallel between article 11 (4) of the draft under consideration and article 19 (4) of the Hamburg Rules would be unfounded in view of the difference between the types of contract involved. Inspection and tallying of the goods could be properly carried out only with the participation of the person who had placed the goods in storage, or, in other words, the carrier or his representative.

55. In conclusion, she drew attention to the general comment appearing in the first paragraph of her delegation's proposal, to the effect that article 11, with the possible exception of paragraph (4), was superfluous and should be deleted.

56. The CHAIRMAN, noting that the Moroccan delegation's tentative proposal to delete article 11 with the exception of its paragraph (4) had received no support, invited the Committee to consider its amendments concerning paragraphs (1), (2), (3) and (5) of article 11 (A/CONF.152/C.1/L.52).

57. Mr. SOLIMAN (Egypt) said that he supported the amendments as a whole, and especially that relating to article 11 (1).

58. The Moroccan proposal relating to article 11 (1), (2), (3) and (5) was rejected by 18 votes to 4, with 11 abstentions.

59. Mrs. EL OTMANI (Morocco) expressed regret at the fact that none of the delegations voting against the proposal had seen fit to explain its position.

60. The CHAIRMAN invited the Committee to consider the proposal by Morocco concerning paragraph (4) of article 11 (A/CONF.152/C.1/L.52, p. 2).

61. Mr. BONELL (Italy) said that he considered the proposed addition of a reference to the carrier to be useful and would endorse it. He could not, however, go along with the proposal to add the words "at the place of storage or at any other place decided on by common agreement" at the end of the paragraph.

62. Ms. SKOVBY (Denmark) said that a reference to the carrier was unnecessary, since it was to be hoped that he would be identical with the "person entitled to take delivery of the goods". As to the proposed addition at the end of the paragraph, she thought that it was superfluous and would only create confusion.

63. Mr. INGRAM (United Kingdom of Great Britain and Northern Ireland) said that he shared the Italian delegation's views on both aspects of the proposal. He suggested that they should be put to the vote separately.

64. The CHAIRMAN said that he, for his part, could see some advantage in the carrier being present during the inspection and tallying of the goods.

65. Mr. LARSEN (United States) said the paragraph was adequate as it stood and the insertion of a reference to the carrier was unnecessary.

66. Mrs. PIAGGI DE VANOSI (Argentina) said she found the first part of the proposal acceptable, but could not support the second part.

67. Mr. RUSTAND (Sweden) said that he was prepared to support both parts of the Moroccan amendment.

68. Mr. SCHROCK (Germany) said that, while understanding the object of the first part of the proposal, he would probably abstain on it because the draft under consideration was intended to govern the relationship between the operator and the customer and should not include any provisions relating to the carrier.

69. Mr. ILLESCAS (Spain) said that he was opposed to the second part of the Moroccan proposal, which imposed an unnecessary restriction upon the customer's prerogative of deciding where inspection and tallying of the goods should take place. He took a more favourable view of the first part of the proposal, which might be useful in the hypothetical case that the person entitled to take delivery of the goods was not the carrier.

70. Mr. OCHIAI (Japan) said that he would oppose both parts of the amendment. Where the carriage of the goods involved several contracts, the identity of the carrier referred to might be difficult to establish.

71. Mr. SULEIMAN (Nigeria) said that he supported the proposal, in view of the carrier's central role in the operation of landing the goods.

72. Mrs. EL OTMANI (Morocco), replying to the point raised by the representative of Denmark, said that under the Hamburg Rules a carrier who had handed the goods over to the operator was released from his obligations and could no longer be defined as a "person entitled to take delivery of the goods" for the purposes of inspecting and tallying them. In reply to the representative of Japan, she said that the carrier referred to in the proposal was, as it were, the one at the end of the line, or, in other words, the one who handed the goods over to the operator.

73. The CHAIRMAN invited the Committee to vote on the first part of the Moroccan proposal on article 11 (4) (A/CONF.152/L.52), namely, the insertion of the words "the carrier" in the second line of the paragraph.

74. The proposal was adopted by 17 votes to 11, with 6 abstentions.

75. The CHAIRMAN invited the Committee to vote on the second part of the proposal, namely, the addition of the words "at the place of storage or at any other place decided on by common agreement" at the end of the paragraph.

76. The proposal was rejected by 19 votes to 5, with 9 abstentions.

77. Mr. LEBEDEV (Soviet Union) said that the addition of a reference to the carrier to article 11 (4) did not in any way affect article 15, still to be discussed by the Committee. Furthermore, the new wording did not render the carrier's presence imperative; non-participation on the carrier's part could not affect the interests of the operator or of the person entitled to take delivery of the goods.

78. The CHAIRMAN concurred with those views. The amendment just adopted did not imply any change in article 15 of the present draft or in the transport conventions. While the carrier was under an obligation to co-operate with the operator and the person entitled to take delivery of the goods, failure on his part to do so would not stand in the way of inspecting and tallying the goods.

79. Mr. LARSEN (United States) also associated himself with the points made by the Soviet representative.

The meeting rose at 12.40 p.m.

14th meeting
Thursday, 11 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.14

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 11 (concluded) (A/CONF.152/C.1/L.41, L.46, L.52)

1. Mr. ZHAO Chengbi (China) said that at the previous meeting he had voted against the Moroccan proposal to amend paragraph 4 of article 11. The aim of the original paragraph 4 was to ensure that the operator and his customer should give each other reasonable facilities to investigate actual or apprehended loss or damage to the goods. Bringing in the concept of the carrier could create serious problems. It was not clear what sort of facilities the carrier could provide or indeed why he should provide them. His legal position would be confused; requiring him to provide facilities might place him in a very difficult situation. The Committee's approval of that amendment therefore caused his delegation great concern.

2. Mr. GOKKAYA (Turkey), introducing the proposal for paragraph 2 of article 11 in document A/CONF.152/C.1/L.54, said that his delegation had no objection to the other paragraphs of article 11 or to the requirement that, where loss or damage was apparent, notice should be given to the operator within three working days. In the case of loss or damage that was not apparent, the period of 60 days for giving notice that was stipulated in paragraph 2 was very long. His delegation accepted that a relatively long time might elapse before the goods were opened and the loss or damage was discovered but, even so, it felt that a period of 7 rather than 15 days, and of 30 rather than 60 days, was sufficient for proper notice in the two cases in question. His delegation considered that, when a customer received goods, his first duty was to check their condition. Successful trading demanded business reliability, which would be jeopardized by allowing so long a time for giving notice of damage. The rights of the terminal operator as well as those of the customer should be considered and the article should accordingly provide for a shorter period of notice.

3. The CHAIRMAN invited the Committee to vote on the Turkish proposal (A/CONF.152/C.1/L.46).

4. The proposal was rejected by 22 votes to 4, with 9 abstentions.

5. Mr. FUSAMURA (Japan) introduced his delegation's proposal for paragraph 2 of article 11 (A/CONF.152/C.1/L.41). An understanding had been reached at the eleventh session of the Working Group on International Contract Practices that the term "final recipient" used in that paragraph would be a person in a position to inspect the goods (A/CN.9/298, para. 69). His delegation believed that understanding should be spelt out in the article. It might be said to be self-evident from the existing text, but an express provision on the point would nevertheless be beneficial.

6. Mr. BONELL (Italy) said that, if the Japanese proposal was taken literally, his delegation would have no objection to it even though he felt it was superfluous. The words "final recipient" had been included in the draft deliberately because such a recipient was assumed to be a person who was in a position to inspect the goods. He was afraid, however, that the real aim of the Japanese proposal was to introduce wording that could be taken as a condition meaning "provided that he is in a position to inspect them". If that was so, his delegation would be unable to support the proposal. It was necessary to assume that the final recipient would be in a position to inspect the goods and the time-limit should run from the moment when the goods reached him.

7. Mr. RUSTAND (Sweden) agreed with the representative of Italy. In an earlier version of the draft Convention there had been a reference to the "final destination" of the goods. That term had been felt to be ambiguous, and in order to clarify it it had been decided to use the words "final recipient", on the understanding referred to by Japan. It was clear from the background, therefore, what the term meant and his delegation was not in favour of expanding it.

8. Mr. SCHROCK (Germany) associated himself with the views expressed by the Italian and Swedish representatives. Adding language on the lines suggested in the Japanese proposal might give the impression that some final recipients were in a position to inspect the goods and some were not, which might lead to litigation. If it was assumed that the final recipient was, by definition, able to inspect the goods, the Japanese proposal added nothing.

9. Mr. FUSAMURA (Japan) said that he would withdraw the proposal if his delegation's interpretation was confirmed by the Committee and the Committee regarded an explicit reference to ability to inspect as unnecessary.

10. The CHAIRMAN said that the time-limit of 60 days was an overall one for giving notice. The terminal operator should not be held responsible beyond that time, whether or not he had reached a person able to inspect the goods.

11. Mr. FUSAMURA (Japan) withdrew the proposal.

12. The CHAIRMAN said that if he heard no objection, he would take it that the Committee approved the wording of article 11 reproduced in document A/CONF.152/5, as amended at the previous meeting, and referred it to the Drafting Committee.

13. It was so decided.

Article 12 (A/CONF.152/C.1/L.17, L.47, L.53, L.58)

14. The CHAIRMAN observed that the proposals submitted for paragraph 1 of article 12 by the delegations of Turkey (A/CONF.152/C.1/L.47) and Morocco (A/CONF.152/C.1/L.53) were identical in substance. Both proposed to reduce the limitation period for actions from two years to one year.

15. Mrs. EL OTMANI (Morocco) said that a two-year period had been stipulated in the Commission's text chiefly for the benefit of maritime transport undertakings and port terminals. She believed that the aim of that had been to align the draft Convention with the Hamburg Rules.

16. Mr. BONELL (Italy) said he was prepared to support the change. It should not be forgotten that, although the Hamburg Rules provided for a period of two years, the other transport-related conventions, as a rule, provided for a period of one year. The latter would be more appropriate for transport terminals which were chiefly land-based.

17. Mr. HORNBY (Canada) supported the proposal to alter the limitation period. One year was the period most usually applicable to carriers, and a guiding principle of the Convention was that the operators of transport terminals should receive no less favourable treatment than that granted to carriers.

18. Mr. SWEENEY (United States of America) regretted that his delegation could not support the proposed change. The Hague Rules, adopted in 1924, had set a period of one year, but the Hamburg Rules, adopted in 1978, and the Multimodal Convention, adopted in 1980, stipulated two years. In drafting the existing text, account had been taken of developments at the conferences at which the Hamburg Rules and the Multimodal Convention had been adopted: some countries, including the United States, had found a limitation period of one year sufficient, but a number of developing countries had objected that one year worked against the interests of shippers in developing States. Enough examples had been given to influence the decision to choose a period of two years. He believed that the Convention should follow the same path.

19. Mr. RUSTAND (Sweden) agreed with the United States representative that it was unnecessary to shorten the limitation period. There might be cases in which legal steps preceded court proceedings; shortening the period would put pressure on parties who might have been willing to settle a dispute amicably to take it to court. His delegation was in favour of retaining the period of two years in order to accommodate countries which had problems with a shorter period.

20. Mr. LAVIÑA (Philippines) said that his delegation shared the views expressed by the representative of the United States. A two-year rule would favour the interests of developing countries more. The two-year limitation period should therefore be retained.

21. Ms. SISULA-TULOKAS (Finland) agreed that the two-year period should remain.

22. Mr. ZHAO Chengbi (China) said that the two-year period was in conformity with the Hamburg Rules and the Multimodal Convention, and should be retained. A number of prospective parties to the Convention might be reluctant to accept it if the limitation period was reduced to one year.

23. The CHAIRMAN invited the Committee to vote on the proposal to reduce the limitation period stipulated in article 12 (1) from two years to one year.

24. The proposal was rejected by 19 votes to 10, with 5 abstentions.

25. Mrs. EL OTMANI (Morocco) introduced her delegation's proposal for paragraph 5 of article 12 in document/A/CONF.152/C.1/L.53. It had become more pertinent than before in the light of the Committee's decision to retain the basic limitation period of two years. Recourse actions under the Convention were bedevilled with difficulties. First there was the problem of damage that was attributable both to the carrier and to the terminal operator; links were bound to exist between the carrier, who deposited the goods, and the operator, who took charge of them. Secondly, in seeking to establish the respective liabilities of the carrier and of the operator in a given action, it was difficult to obtain the necessary evidence, because of the manner in which the goods changed hands from one to the other. Third, the recipient was obliged by the contract of carriage to proceed against the carrier, the operator being regarded as a mere intermediary; taking proceedings against the operator alone would offer only partial protection for the recipient's interests, since the operator could only be liable for loss or damage directly attributable to him.

26. The solution originally proposed by her delegation, which the Committee had just rejected, was to impose the same limitation period for the carrier as for the operator. That proposal had been prompted by the alarming discrepancies between the Hamburg Rules and the present draft. For the carrier, the starting point for the limitation period under article 12 was the day when the goods were handed over either to the recipient, or to the operator if the recipient did not collect them. The period of storage in the terminal was included in that period. For the operator, however, the limitation period began on the day when the goods were handed over to the person entitled to take delivery. If that person failed to collect them after several months in storage, the limitation period would be extended accordingly. In her view, the limitation period should begin, even for the operator, on the day when he received the goods, or at least on the day when he placed them at the disposal of the person entitled to take delivery.

27. A further discrepancy between the present draft and the Hamburg Rules was that in the latter, the period allowed for taking recourse proceedings against the carrier, even after the expiration of the limitation period, was governed by the law of the State where the proceedings were instituted; the present draft made no reference to the law of that State. Furthermore, the limitation period for a recourse action against the operator was 90 days after the person instituting the action had himself been found liable, in other words, at the end of the proceedings taken against him, whereas for the carrier the 90-day period began as soon as a claim was filed, namely at the beginning of the proceedings. Her delegation therefore proposed that a recourse action by a carrier or other person against the operator should be permitted even after the expiry of the limitation period, provided it began within 30 days after the carrier or other person had been sued. The reference to entering suit in the text of the Moroccan proposal meant, in effect, the giving of notice to the carrier or other person that proceedings had been instituted against him.

28. It must be clearly understood that under the existing text of article 12 (5), an operator could be sued as much as several months after he had delivered the goods. In developing countries, where legal process was often a protracted affair, the interval could be as long as several years. An action for damages against the carrier, including the appeal stages, could well last for years. The operator should not have to defend himself against a claim for damages after such a long interval, nor should he be required to keep his records indefinitely in case he was sued.

29. Mr. BONELL (Italy) said that the reasoning behind the Moroccan proposal would be clearer if the Committee were given some assistance in reviewing the drafting history of article 12 (5).

30. The CHAIRMAN said that the origin of the provision was in the 1980 Multimodal Convention. In that instrument, a similar problem had arisen from the differing limitation periods in other agreements, referred to by implication, which might run to two years or more. It was therefore necessary to provide that the operator could be sued after the two-year period had expired. Where proceedings were instituted against the carrier, perhaps three years after the goods were handed over, the carrier must be able to sue the operator if he considered the latter to be liable for the damage.

31. Mr. BONELL (Italy) pointed out that the corresponding provision in article 25 (4) of the Multimodal Convention - similar to article 20 (5) of the Hamburg Rules - was completely different from the present draft. It provided that a recourse action might be instituted even after the expiration of the limitation period provided for in the Convention "if instituted within the time allowed by the law of the State where proceedings are instituted". He noted in the report of UNCITRAL on the work of its twenty-second session (A/44/17) a statement in paragraph 157 that "a proposal was made to align paragraph (5) with article 20 (5) of the Hamburg Rules by providing that the recourse action might be instituted within the time allowed by the law of the State where the proceedings were instituted, but that the time allowed should not be less than the 90-day period ...". That proposal had not been accepted.

32. Mr. KATZ (Secretary of the First Committee) added that the Working Group on International Contract Practices had referred at its eleventh session to the absence of any reference in the draft Convention to the period allowed by national law, unlike what was provided for in article 20 (5) of the Hamburg Rules.

33. Mr. HORNBY (Canada) recalled that at UNCITRAL's twenty-second session his delegation had observed that article 12 (5) of the present draft created considerable uncertainty for the operator because, as the representative of Morocco had pointed out, recourse actions could be instituted against him several years after he had handed over the goods. Instead of altering the limitation period, as proposed by Morocco, he was inclined to recommend something hinted at by the representative of Italy, namely that article 12 (5) should be modelled on the corresponding provision of the Hamburg Rules. It was appropriate to refer to national law where recourse actions were concerned.

34. Mr. RUSTAND (Sweden) said that the problem raised by the representative of Morocco was largely a practical one: the length of time which could elapse between the goods being handed over and proceedings being instituted against the operator. The problem was not insurmountable. Certainly it might be difficult to obtain oral testimony after a lengthy interval, but the operator's written records would probably be retained for at least 10, if not 20, years. There was another important aspect which should not be overlooked: the possibility that an action against the carrier or other person might also be time-barred. Certain transport conventions allowed a limitation period as short as one year and recourse actions against the carrier would have to be instituted under the relevant instrument. In practical terms, it was unlikely that many years would elapse before proceedings were taken against the operator, since the Convention's paragraph 5 required the operator to be notified of the filing of the claim against the carrier. Reducing the limitation period from 90 to 30 days would have only a very marginal effect. He had no objection to paragraph 5 as it stood.

35. Mr. KATZ (Secretary of the First Committee) said that the origin of paragraph 5 could be traced to the first draft rules considered by the Working Group on International Contract Practices. At its eighth session the Working Group had endorsed the idea that the carrier should be able to institute recourse action against the operator after the expiry of the limitation period; and that he should be allowed a specific period, such as 90 days, after he had been held liable (A/CN.9/260, para. 59). The resulting draft provision referred only to a period of 90 days, not to any period provided by national law. Subsequently, when considering article 12 of the present draft, the Working Group had focused on the question of when the limitation period would begin. Only at UNCITRAL's 1989 session had it been realized that the draft text, unlike the Hamburg Rules, contained no reference to national law.

36. Mr. BONELL (Italy) thanked the Secretary for his explanation. He believed the problem would be most appropriately solved by modelling article 12 (5) on the corresponding provision of the Hamburg Rules. He made an oral proposal to that effect. Like the Hamburg Rules and the Multimodal Convention, the text of the draft Convention should contain a reference to the law of the State where the action was brought. He felt unable to support the Moroccan proposal.

37. Mr. SWEENEY (United States) agreed with the representative of Sweden that the matter should not cause any special difficulty, in view of the fact that paragraph 5 of the Commission's draft provided for notification to the operator. He endorsed the Italian proposal to align the paragraph with the corresponding provision of the Hamburg Rules, which contained a reference to

national law. The problem of recourse actions had been dealt with in article 1 (3) of the Hague-Visby Rules by providing that they could be brought even after the expiry of the one-year limitation period "if brought within the time allowed by the law of the Court seized of the case". That period, however, must not be less than three months from the day the person bringing the action had settled the claim or "been served with process in the action against himself". That provision had inspired the drafting both of article 20 (5) of the Hamburg Rules and the present text.

38. The CHAIRMAN observed that there was little support for the Moroccan proposal. He asked the Committee whether it wished to model article 12 (5) on the corresponding provision of the Hamburg Rules.

39. Mrs. EL OTMANI (Morocco) said she would be satisfied with that solution.

40. Mr. RUSTAND (Sweden) counselled caution. In some cases there might be a gap in the national law which would prevent recourse proceedings from being instituted as provided by the Hamburg Rules.

41. Mr. SCHROCK (Germany) said he had no objection to modelling the text on the Hamburg Rules. However, article 20 (5) of the Rules allowed recourse actions "if instituted within the time allowed by the law of the State where proceedings are instituted". Its second sentence stated that the time allowed must not be less than 90 days from the day "when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself". There, the Moroccan proposal used the words "has been sued", whereas the Commission's draft provided for a period of 90 days after the carrier or other person had been "held liable", presumably by virtue of a court decision. Perhaps both those elements should be reflected in the text of the Convention.

42. Mr. ILLESCAS (Spain) said that his delegation was opposed to the incorporation of article 20 (5) of the Hamburg Rules into the draft Convention because it would allow an indefinite period of time in which recourse actions could be instituted. That period had to be specified in the Convention and not left to the law of the State where the proceedings were instituted; that would exacerbate an already difficult situation. Furthermore, Morocco's proposal to reduce the limitation period from 90 to 30 days represented too great a reduction. The Spanish delegation therefore preferred paragraph 5 as it stood.

43. Mr. ZHAO Chengbi (China) said that, as his delegation understood it, both the Hamburg Rules and the Multimodal Convention recognized that other parties could institute proceedings against the carrier, but only on certain conditions. One was that the national law of the country in which the proceedings were instituted allowed it, and another was the imposition of a 90-day limitation period. The insertion of a reference to national law in paragraph 5 would not add substance to the text as far as many countries were concerned because it was already clear that an action was to be instituted within 90 days, and most countries provided for recourse actions of that kind. The Chinese delegation therefore considered that paragraph 5 should remain as it was.

44. Mr. ABASCAL (Mexico) proposed, as a compromise, that paragraph 5 should be retained as it stood but that a new paragraph should be added along the lines of article 23 of the Convention on the Limitation Period in the International Sale of Goods, adapted as necessary.

45. The CHAIRMAN said that the Committee should first take a decision on Morocco's proposal for paragraph 5 in document A/CONF.152/C.1/L.53. He asked the representative of Morocco whether she wished to maintain that proposal.

46. Mrs. EL OTMANI (Morocco) withdrew the proposal.

47. Mr. BONELL (Italy) said that paragraph 5 had to be considered as a whole. The Committee was now faced with three basically different approaches. The philosophy behind the Hamburg Rules was to refrain from interfering with national law, and in that context the representative of Sweden had been right; that would only be proper if national laws granted a right of recourse on the condition that proceedings were brought not less than 90 days after the end of the primary action which had been brought against the carrier. The approach of the present draft was almost exactly the opposite, in that it allowed a recourse action which was intended to be settled exhaustively, but which was only possible to a limited extent, given the proviso that the action should be instituted within 90 days after the end of the process initiated against the carrier or other person; the Committee should bear in mind that such an action could last indefinitely. The Mexican proposal could be a most attractive alternative in that it would add a time-limit of 10 years and provide a comprehensive solution to the problem. He requested that the text of article 23 of the 1974 Convention on the Limitation Period in the International Sale of Goods should be read out.

48. Mr. BERGSTEN (Executive Secretary) read out the article as requested.

49. The CHAIRMAN invited the Committee to vote on the Italian proposal to adapt the text of paragraph 5 to the Hamburg Rules.

50. The proposal was rejected by 14 votes to 5, with 4 abstentions.

51. The CHAIRMAN invited the Committee to vote on whether it wished to add to the text a sentence on the lines of article 23 of the Convention on the Limitation Period in the International Sale of Goods.

52. The proposal was rejected by 12 votes to 6, with 12 abstentions.

53. The Committee approved paragraph 5 as it stood.

54. Mr. SCHROCK (Germany) introduced the proposal in document A/CONF.152/C.1/L.17. Generally speaking, draft article 12 was precise in furnishing the elements required for determining the period for limitation of actions, according to the circumstances; it even went so far as to specify - and in so doing, remove one source of litigation - that the period did not include the day on which it commenced. Where total loss of goods was involved, however, some doubt persisted as to whether the limitation period would begin with the dispatch or the receipt of the notification of loss. In order to maintain the precision found elsewhere in the article - not so much for legal as for mathematical purposes - the German delegation proposed the replacement of the words "on the day the operator notifies the person entitled to make a claim" by the words "on the day the person entitled to make a claim receives notice from the operator". Thus the period of limitation would commence with receipt. If the Committee endorsed his delegation's reasoning but preferred the period to commence from the time of dispatch, he would have no objection, provided that the ambiguity was removed from the text in all its versions. That task might be left to the Drafting Committee.

55. Mr. LARSEN (United States) said that his delegation did not favour the imposition on the operator, albeit indirectly, of the additional burden of determining whether his notification had been received. It therefore believed that the notion of dispatch as the point of departure for the limitation period should be retained. It found the Commission's text, at least in the English version, unambiguous in that respect.

56. Mr. TARKO (Austria) remarked that receipt could not necessarily be presumed from dispatch. It would appear only fair to the person entitled to make a claim if the limitation period commenced from the time when he received notification of loss. He was therefore inclined to support the German proposal.

57. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the Russian version of the draft text employed a verb which described an action by the operator, but encompassed the notions both of dispatch and of receipt. He fully concurred with the idea that, whatever the fate of the German proposal, the Drafting Committee should be requested to ensure full conformity and lack of ambiguity among all the versions of the text.

58. The CHAIRMAN invited the Committee to vote on the substance of the German proposal.

59. The proposal was adopted by 13 votes to 11, with 11 abstentions.

60. Mrs. EL OTMANI (Morocco) asked what would happen if the addressee refused or denied receipt of notification.

61. The CHAIRMAN replied that although most legal systems made provision for such an eventuality by assimilating receipt to the capacity to receive, the risk of such complications had, during the Commission's preparatory work, been an argument in favour of making the start of the limitation period coincide with the time of dispatch. But the Committee had just voted for a different principle.

62. Mr. LARSEN (United States) recalled that at the 3rd meeting (A/CONF.152/C.1/SR.3, para. 22) his delegation had raised the question of the use of the term "declaration in writing", which appeared in article 12 (4). It appeared to him that the Committee might have to decide whether to refer the word "writing" to the Drafting Committee for definition, or to replace the words he had mentioned by the term "notice", defined in article 1. His delegation would be quite satisfied with the latter solution.

63. Mr. PAMBOU-TCHIVOUNDA (Gabon) asked whether, in order to facilitate verification, it might not be specified that the notice should be written.

64. The CHAIRMAN pointed out that that would raise once again the issue of defining what was meant by "written".

65. The Committee decided to replace the words "declaration in writing" in article 12 (4) by the word "notice".

66. Mr. MKWENTLA (Pan Africanist Congress of Azania) remarked that the title of article 12 might give rise to some confusion, in that the term "limitation" could be interpreted in several different ways. Perhaps "Prescription of actions" might be a more suitable title.

67. The CHAIRMAN suggested that the Drafting Committee should take note of that comment. He invited the Committee to approve the text of article 12 reproduced in document A/CONF.152/5, as amended, for referral to the Drafting Committee in the light of the comments made during the discussion.

68. It was so decided.

Article 15 (A/CONF.152/C.1/L.7, L.57)

69. Mr. LARSEN (United States) said that the purview of the draft Convention was the gap left by existing international instruments relating to the international carriage of goods, and notably

that moment in international trade which immediately followed or immediately preceded carriage by a carrier. If the gap was clearly delineated as a result of the efforts of the working group set up at the 3rd meeting in order to determine whether a definition of the term "carrier" should be included in the Convention (A/CONF.152/C.1/SR.3, para. 61), article 15 might prove superfluous, and his delegation would propose its deletion. At all events, he would firmly oppose the inclusion in article 15 of what he termed the intolerable notion that international law might be superseded by national law.

70. The CHAIRMAN said that the statement by the previous speaker would be kept in mind. It was not, of course, the sole purpose of article 15 to avoid overlapping between operators and carriers: its equivalent appeared in the majority of international conventions dealing with transport.

71. Mr. SMITH (Australia) referred to his delegation's proposal in document A/CONF.152/C.1/L.57. There was an important connection between the existing text of article 15, the proposed definition of the term "carrier" in article 1 and the proposal by the United States of America to amend article 2 (A/CONF.152/C.1/L.7). The Committee's deliberations might render article 15 superfluous, but if it decided to retain it in some form or other, his delegation suggested that it should be reworded in the manner set out in its proposal. Its primary concern was to clarify the meaning of the expression "derived from". The possibility of States adopting international conventions through their national legislation without formally ratifying those instruments should be reflected in the present draft. The words "derived from" would perhaps permit too much licence in interpretation, and - for example - allow a State which adopted most or some of the provisions of a Convention, while altering others, to claim that national law would have precedence over this Convention. The Australian delegation had consulted the report of the Commission's debate on the subject at its twenty-second session and found there what it believed to be the felicitous wording "derived from and corresponding with". That seemed an appropriate way of describing those national laws which should enjoy the equivalent of treaty status as far as the scope of application of the Convention was concerned. Some further thoughts on the matter were reflected in Australia's revised proposal for a definition of the term "carrier" to be included in article 1 (A/CONF.152/C.1/L.56/Rev.1).

72. The CHAIRMAN said that the Committee's decision on that proposal and the definition of the term "carrier" awaited from the working group would have a bearing on the fate of article 15. He therefore suggested that the discussion of that article be suspended.

73. It was so agreed.

Article 16

74. Article 16 as reproduced in document A/CONF.152/5 was approved without comment.

The meeting rose at 5.30 p.m.

15th meeting

Friday, 12 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.15

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Articles 1 (proposals for new subparagraphs), 2 and 15 (continued) (A/CONF.152/C.1/L.7, L.8, L.19, L.32, L.44/Rev.1, L.56/Rev.1, L.57, L.61)

1. Mr. SCHROCK (Germany), introducing the proposal to amend the introductory wording of article 2 (1) (A/CONF.152/C.1/L.8), said that the intention of the proposal in seeking to add the words "or procured" was to bring the text of article 2 into line with that of article 1 (a), which defined the operator as a person who undertook to take certain goods in charge in order both to perform and to procure the performance of certain services. If the Committee considered that the proposal had no substantive implications he would have no objection to its being referred directly to the Drafting Committee.

2. Mr. LARSEN (United States of America) endorsed the suggestion that the German proposal should be referred to the Drafting Committee.

3. Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic) said that he agreed with the idea underlying the German proposal but would prefer the words "or procured" to be inserted after the word "performed" in subparagraphs (a) and (b) of article 2 (1) rather than in the introductory wording. In subparagraph (c), the words "performed or procured by an operator" should be inserted after the words "transport-related services".

4. The proposal in document A/CONF.152/C.1/L.8, together with the suggestions made by the representative of the Ukrainian SSR, was referred to the Drafting Committee.

5. Mr. SOLIMAN (Egypt) introduced his delegation's proposal (A/CONF.152/C.1/L.32) for the addition of the words "to the Convention" after the words "State Party" in each of the three subparagraphs of article 2 (1). He suggested that it might be referred directly to the Drafting Committee.

6. It was so agreed.

7. Mr. LARSEN (United States), introducing the proposal relating to articles 2 and 15 in document A/CONF.152/C.1/L.7, stressed his Government's interest in the draft Convention and said that the provisions which the Committee had approved so far were acceptable to the United States. A fundamental problem arose, however, in connection with the legal status of treaties. Should the Convention expressly permit unilaterally enacted domestic laws to prevail over it? His delegation had sought to solve the problem by joining in the Committee's efforts to redefine the term "operator" in article 1 (a) and by participating in the work of the ad hoc working group set up to consider a definition of the term "carrier". The definition of those two terms, when accomplished, might obviate the need for article 15 or for a change in the introductory wording of article 2 (1). If, however, that process did not prove sufficient, his delegation proposed that the essence of article 15 should be transferred to article 2 (1) in the manner indicated in the fourth paragraph of its proposal.

8. The CHAIRMAN said that an overall approach to articles 1, 2 and 15 had much to recommend it. He invited the Committee to consider the outstanding proposals relating to those three articles as a whole.

9. Mr. SCHROCK (Germany), speaking as the Chairman of the ad hoc working group set up to consider the inclusion in the Convention, and possible wording, of a definition of the term "carrier" (A/CONF.152/C.1/SR.3, para. 15), said that the working group had been composed of his own delegation and those of Sweden, the United Kingdom, the Union of Soviet Socialist Republics and the United States of America. It had held three meetings. Its work had resulted in the proposal for the addition of a new subparagraph to article 1 contained in document A/CONF.152/C.1/L.44/Rev.1. The substance of the proposal lay in the fact that not all States were parties to all the existing transport conventions; the inclusion in the present one of a reference to relevant national law was therefore considered necessary. The working group's aim had been to draft a provision which was sufficiently flexible on the one hand and sufficiently strict on the other. The Committee might feel that the draft lacked precision, but no other formulation would have commanded a consensus in the working group.

10. Mr. ILLESCAS (Spain), replying to a question put by the CHAIRMAN, confirmed that in the Spanish version of document A/CONF.152/C.1/L.44/Rev.1 the word "relevant" was rendered as "aplicable", a term considered appropriate by his delegation.

11. Mr. SMITH (Australia), introducing his delegation's proposal for the addition of a new subparagraph to article 1 defining the term "carrier" (A/CONF.152/C.1/L.56/Rev.1), said that it touched upon two separate points. The first had been mentioned by the United States representative, namely the relationship between the future Convention and national law. While appreciating the efforts which the ad hoc working group had made to deal with that issue, he considered that the expression "relevant national law" employed in its proposal was too broad. A country might, for example, ratify the Convention and then adopt a law that excluded all or some operators from the Convention. Such a law, although undoubtedly relevant, should not be permitted to determine the scope of application of the Convention. The situation could give rise to difficult problems of principle as well as of a practical nature. The phrase "and corresponding with such a convention" was intended to overcome the difficulty. His delegation's proposal for article 15 in document A/CONF.152/C.1/L.57 touched on the same point.

12. The second and, in his opinion, more important point raised by the Australian/proposal for article 1 was whether the Convention should allow independent stevedores to exclude themselves from the Convention by obtaining benefits under the "Himalaya" and similar bill-of-lading clauses. In view of what had been said on the subject at the twenty-second session of the Commission and earlier in the present Conference, it was his impression that, as a matter of policy, most delegations were in favour of stevedores being covered by the Convention. The matter was of considerable importance, particularly to common law countries such as his own. His delegation felt that it deserved a clear-cut decision, regardless of whether the United States proposal for article 2 was approved and whether article 15 was retained.

13. Mr. BONELL (Italy) said that his delegation considered it important for the Convention to include a definition of the term "carrier" but could not agree with the wording chosen by the ad hoc working group, for the reasons advanced by the representative of Australia. He strongly recommended using the definition proposed by Australia, but without the second part of the sentence, beginning with the words "but not a non-carrying intermediary". In his view, the first part dealt with virtually all the problems relating to independent stevedores.

14. The CHAIRMAN said that draft article 15 and the United States and Australian proposals for articles 1, 2 and 15 (A/CONF.152/C.1/L.7, L.56/Rev.1, L.57) embodied the notion of derived law. He asked the Secretary of the Committee to explain, in the light of the history of draft article 15, whether derived law meant national legislation inspired by or copied from an international convention, or national legislation designed to implement an international convention.

15. Mr. KATZ (Secretary of the First Committee) said that the idea of subordinating the present Convention to international conventions relating to the carriage of goods had been embodied in the draft Convention from an early stage. The first draft of article 15, prepared by the Secretariat (A/CN.9/WG.II/WP.56, p. 24), had provided, within square brackets, that the Convention should be subordinated to any national law relating to the international carriage of goods. In its subsequent discussion of the draft article the Working Group on International Contract Practices had felt that the draft Convention should be subordinated to national law that implemented international transport conventions; it had agreed (A/CN.9/298, para. 77) that the language of the article should be changed so as to subordinate the Convention only to national laws giving effect to a convention relating to the international carriage of goods, and not to other national laws on the same subject. The wording it had eventually approved for that purpose (A/CN.9/298, para. 112) subordinated the draft Convention to any international convention relating to the international carriage of goods and also to any law of a State "giving effect to or derived from a convention relating to the international carriage of goods"; a proposal made at that stage to delete the words "or derived from" had failed. The accompanying explanation (*ibid.*, para. 111) was that "the words 'derived from' referred to laws in other countries derived from and corresponding with the provisions of international transport conventions to which the country had not become a party". In its consideration of draft article 15 UNCITRAL, after further discussion, had agreed to adopt the language approved by the Working Group, stating in its report its understanding "that the language in question did not subordinate the draft Convention to national laws that were not derived from or did not give effect to a convention relating to the international carriage of goods" (A/44/17, para./162).

16. The CHAIRMAN said it might be preferable for the Convention to omit any reference to derived legislation since the inclusion of that notion had given rise to ambiguity. He asked the Committee whether it thought the Convention should be subordinated strictly to international legislation based on and implementing international conventions.

17. Mr. SWEENEY (United States) said that if article 15 was retained, his delegation would prefer it to refer only to international conventions. That was necessary to promote the uniformity of international law and, by subordinating the present convention only to other international agreements, to avoid the possibility of the application of the Convention being affected by means of subsequent domestic legislation.

18. With respect to the proposal submitted by the ad hoc working group (A/CONF.152/C.1/L.44/Rev.1), he had thought at first that the word "relevant" might cater adequately for the point raised by the representative of Germany that not all States were parties to all the existing transport Conventions. He noted, for example, that the USSR had not signed the Hamburg Rules but had incorporated much of their content into its domestic legislation. However, the equivalent terms used in the French and Spanish versions of the proposal appeared to raise serious and possibly substantive problems.

19. The Working Group on International Contract Practices had used article 25 of the Hamburg Rules as a general model for draft article 15, but the former article had been very narrowly expressed in order to deal with specific topics; it was not until its fifth and last paragraph that it contained a general formulation of the kind used by the Working Group for article 15 of the present text. In other words, the language of draft article 15 had been taken from a rather narrow provision and given a broader purport. In his view, article 15 might not be necessary if a satisfactory subordination of the Convention were achieved by the definitions contained in article 1.

20. With regard to the provision about non-carrying intermediaries in the Australian proposal (A/CONF.152/C.1/L.56/Rev.1), the working group had consistently maintained that independent stevedores should be covered by the Convention. The fact of the matter was that they were not carriers even though they might be entitled to some of the protection available to carriers. His delegation opposed the Australian provision on the subject since it would outlaw the "Himalaya clause" principle, followed in many common law jurisdictions in the British Commonwealth and the United States, whereby the carrier's protections under international conventions and national laws could be extended to stevedores to give them the same protection in actions against them founded on tort.

21. Ms. SKOVBY (Denmark) said that there should be no definition of a carrier in the present Convention because it was not a transport convention. However, if it was decided to include one, she preferred the formulation proposed by the ad hoc working group, though the term "relevant" raised problems; in her view, it referred to national law of similar effect to that of an international convention. She believed that article 15 was needed and that it should not refer to existing special conventions.

22. Mr. RUSTAND (Sweden) said that his delegation had raised the question of including in the Convention a definition of the term "carrier" (A/CONF.152/C.1/SR.3, para. 50). The solution suggested by the ad hoc working group was necessarily a compromise; the word "relevant" was indeed imprecise but that was part of the compromise. He felt unable to take a position on the key question of the position of non-carrying intermediaries under the Australian proposal owing to his limited knowledge of Anglo-Saxon law. If it proved impossible to achieve a clear definition of the term "carrier", it would be better to leave it out. On the other hand, he considered it important to retain article 15 and did not agree with the United States representative that it could be taken to suggest that any national law could take precedence over the Convention. He found the words "giving effect to and derived from" very specific and believed that they should appear in the article; otherwise, problems might arise in countries

where international conventions as such were not applicable as domestic law. He thought that the clear understanding of the matter expressed by the Commission at its twenty-second session (A/44/17, para. 162) should meet the concerns of the United States delegation.

23. Mr. OCHIAI (Japan) said that draft article 1 (a) as amended by the Committee excluded carriers from the application of the Convention. In his delegation's view, that did not entitle stevedores to avoid its application by claiming carriers' protections made available to them under a bill-of-lading clause. He therefore approved in substance the provision made for them in the Australian proposal (A/CONF.152/C.1/L.56/Rev.1). Regarding the proposal submitted by the ad hoc working group (A/CONF.152/C.1/L.44/Rev.1), he considered that the word "covering" was ambiguous and should be replaced by the word "governing". On the subject of article 15, his delegation was in favour of deletion of the reference to national law.

24. Mr. ABASCAL (Mexico) said that his delegation would prefer not to include a definition of the term "carrier" in the Convention, among other reasons because it was not a transport convention. Regarding the mention of national law in article 15, it considered that the article should refer exclusively to laws implementing international conventions and not to other national legislation, because including a reference to the latter would be detrimental to the uniformity that the Convention sought to achieve.

25. Mr. PAMBOU-TCHIVOUNDA (Gabon) said that if the Committee felt that a definition of the term "carrier" should be included, the definition should be functional rather than formal, in other words, based on the activity performed by the carrier rather than on his status. Once that activity had been defined it would be possible to determine the resulting rights and obligations of the carrier. His delegation further believed that any reference to national law, even that derived from other legislation, should be avoided.

26. Mr. INGRAM (United Kingdom of Great Britain and Northern Ireland) said that the comments on the use of the word "relevant" in the definition of the term "carrier" proposed by the ad hoc working group had convinced it that the definition was too imprecise. Nevertheless, it was best to include a definition of the term and the one proposed by Australia was clearer, although he did not favour the portion which dealt with non-carrying intermediaries.

27. He felt it would be desirable to retain article 15, but he believed that the Committee should delete the words "or derived from". He regarded the phrase "giving effect" as broader in meaning and as enabling national law to diverge considerably from the Convention. The Australian proposal used the words "and corresponding with" to show clearly that national law must be the same as what was in the Convention. It was important to make it clear that the text gave primacy to international conventions.

28. Mr. ZHAO Chengbi (China) said his delegation too believed that article 15 should be retained. The Convention was based on a dual system of sources of law and it was important to stress its universal nature; if the text emphasized national law unduly, it would lose its significance and scope of application. In his delegation's view, national laws should be discussed within the scope of international conventions as a whole. Where there was a certain area in the Convention in which emphasis should be placed on national law, that should be done accordingly.

29. With regard to the word "carrier", his delegation had already said that it would not oppose a good definition. It did not consider that the definition proposed by the ad hoc working group was ideal, particularly in its reference to relevant national law, which could cause serious problems of application. On balance, therefore, his delegation had decided to oppose the inclusion of a definition of the term "carrier" in the Convention.

30. Mr. ERIKSSON (Finland) said that his delegation would prefer not to have a definition of the term "carrier" in the Convention because it believed that the term was already dealt with adequately in various transport conventions. If a majority of delegations wished to have the definition included, an effort must be made to ensure that it was as clear as possible. He recalled that after the Committee had decided to employ the word "carrier" in article 11 (4) (A/CONF.152/C.1/SR.13, para. 74), it had been pointed out that that did not affect article 15.

31. Mr. SOLIMAN (Egypt) said that article 15 governed the relationship between the draft Convention and other international transport conventions to which a State might be party. The rule appearing in article 15 did not affect the rights and obligations arising from the Convention. Every convention had its scope of application and the text before the Committee was balanced and in harmony with the general principles of international law. Moreover, it was based on article 25 of the Hamburg Rules. His delegation was in favour of retaining the existing text of article 15.

32. Mr. HORNBY (Canada) said his delegation believed that if the term "carrier" was adequately defined in article 1, there would probably be no need for article 15 to be included in the Convention. However, if a majority of delegations thought that article 15 should be retained, it would be preferable to delete from it the words "or derived from" in order to make it quite clear that the text established the primacy of carriage conventions and other international conventions and their relationship with the new Convention.

33. With regard to the definition of the term "carrier", his delegation strongly supported the text proposed by Australia. The last part of that text would ensure that stevedores were covered by the Convention. It was essential because without it the question might arise in certain countries as to whether stevedores could use clauses in a bill of lading to escape liability.

34. Mr. NAOR (Israel) said that, in his delegation's opinion, there was no need for the Convention to define the word "carrier". Nevertheless, if delegations thought that it should, his delegation would support the text proposed by the ad hoc working group (A/CONF.152/C.1/L.44/Rev.1).

35. Mr. TARKO (Austria) said that, since the Committee had introduced the notion of a carrier into the Convention, it should define the term in the text. His delegation was in favour of the Australian definition and considered that the words "and corresponding with" were of great value. He thought that the Committee should retain article 15 and that it might be improved by including those words.

36. Mr. ILLESCAS (Spain) said that, if the Committee decided to include a definition of the term "carrier" in the draft Convention, his delegation would prefer the text proposed by the ad hoc working group. He believed that the working group's proposal meant that the scope of application of the Convention would reflect the realities of international transport of goods. If the first part of the Australian definition was accepted, carriers engaged in international operations would be excluded from the coverage of the Convention. His delegation therefore preferred the ad hoc working group's text. The second part of the Australian definition was completely unacceptable to his delegation.

37. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the text prepared by the ad hoc working group probably contained the best definition of the term "carrier" because it could be recognized as a universal one, despite its shortcomings. His delegation had serious objections of principle to the Australian definition. The ad hoc working group's proposal applied to all countries; by stating that a carrier under the Convention was a person who was a carrier by virtue of an international convention or relevant national law, it encompassed any country irrespective of whether it was a party to a convention. The Australian definition contained the rather harsh requirement that the national law had to correspond to an international convention.

38. The new Convention would be applied most widely in relation to the carriage of goods by sea where operations were carried out under the Hague Rules, to which only about 50 States were parties. In the other States, there were domestic laws which might differ from the Hague Rules in some respects. Consequently, there was always the danger of a dispute in which it would be asserted that the domestic law of a State which was not a party to the Hague Rules was not in accordance with those Rules. A person who was considered a carrier under his national law might not be viewed as a carrier for the purposes of the new Convention.

39. His delegation considered that if the Committee decided to approve a definition of the term "carrier", the text proposed by the ad hoc working group would be preferable to that of the Australian proposal, which would necessitate the inclusion in the Convention of provisions to enable States to ensure recognition of their national laws in which the term "carrier" was defined. His delegation believed that the Japanese proposal to replace the word "covering" in the working group's proposal by the word "governing" was rational.

40. On the question of article 15, the rules of law in operation in all countries provided in principle for international conventions to be given priority over domestic legislation. The existing text of article 15 raised some doubts in that it could be regarded as providing for the possibility that national legislation might have priority over the Convention. He thought the Committee should reflect on the matter and approve a text that would avoid such implications.

41. Mr. SCHROCK (Germany) said that, if article 15 was retained, he would be prepared to accept the Austrian suggestion to insert in it the words "and corresponding with" in order to meet the concern expressed in the Committee. If the Australian definition of the term "carrier" was not accepted, the Committee might consider approving the definition proposed by the ad hoc working group. He fully agreed that the word "covering" should be replaced by the word "governing".

42. With regard to the word "relevant", the Committee might decide whether the part of the sentence in which it appeared should be made more substantial through the use of the words "and corresponding with" or whether the vague language represented by the ad hoc working group's text was preferable.

43. Mr. MESCHERYAK (Ukrainian Soviet Socialist Republic) said that the purpose of article 15 was to correlate the rules in the draft Convention with those of other international carriage conventions and regulate the manner in which they were transformed into national legislation. He did not think it necessary for the Convention to go into great detail on that subject and believed that it might be best to delete article 15 from the draft.

44. Mr. SMITH (Australia) reminded the Committee of his delegation's proposal for the redrafting of article 15 (A/CONF.152/C.1/L.57). Australia could accept the Japanese suggestion that the word "governing" should replace the word "covering" in its proposed definition of the term "carrier" (A/CONF.152/C.1/L.56/Rev.1). The representative of the Soviet Union had objected that the use of the expression "and corresponding with" in the Australian definition would imply that the State whose national law was invoked for the purposes of the Convention would have had to adhere to the international instrument which the definition mentioned. That was not Australia's interpretation: the phrase would merely imply that the State concerned had chosen to incorporate the international instrument into its national law, despite the fact that it had no treaty obligation to do so. The correspondence to which the Australian definition referred was one of content, not of source of obligations.

45. In reply to the point made by the United States representative that the Australian provision for non-carrying intermediaries would prejudice the application of the "Himalaya clause" in common

law jurisdictions, he said that it was certainly not his delegation's intent to interfere with judicial decisions taken in any other State's jurisdiction. Such decisions would be within the realm of national law, whereas the Conference was seeking to develop uniform rules, and the question at issue was to what extent national law was relevant for that purpose. In fact, because of the way articles 1 and 15 were drafted at present, national laws could still have an impact on how the Convention was interpreted in specific jurisdictions. It was that point which had been of concern to his delegation.

46. He had been glad to hear from the representative of Japan that its delegation interpreted the text of article 1 (a), as amended by the Committee, to include stevedores even if they were operating under the benefit of a "Himalaya" or similar bill-of-lading clause. In fact, if that was the understanding of the Committee as a whole, his delegation would be happy to withdraw the second part of its proposal in document A/CONF.152/C.1/L.56/Rev.1. The intent of that proposal had simply been to remove any possible ambiguity about the construction to be placed on the Convention in that respect by States with different systems of jurisprudence. If the Committee accepted the Australian definition in principle, he would be willing to let the Drafting Committee find more appropriate wording for the phrase "corresponding with".

47. The CHAIRMAN suggested that in the first instance the Committee should vote on the principle whether a definition of the term "carrier" should be included in article 1.

48. The Committee decided by 17 votes to 8, with 6 abstentions, that the draft Convention should not include a definition of the term "carrier".

49. Mr. BONELL (Italy) said he wished to place on record the strong desire of his delegation that, in interpreting the notion of "carrier" for the purposes of the Convention, an autonomous and, if possible, internationally uniform approach should be followed.

50. The CHAIRMAN invited the Committee to consider the part of the Australian proposal in document A/CONF.152/C.1/L.56/Rev.1 which dealt with non-carrying intermediaries.

51. Mr. SMITH (Australia) explained to the Committee that the purpose of that part of its proposal was that stevedores should be covered by the Convention regardless of whether they were operating under the benefit of a bill-of-lading clause.

52. Mr. LARSEN (United States) said he would appreciate some further clarification. He understood the Australian representative to have said that the proposal did not intend to deny the applicability of the "Himalaya clause" principle in jurisdictions in which it was established.

53. The CHAIRMAN said that as he understood it, Australia's intent was to make it clear that the Convention would apply to stevedores in all circumstances, whether or not they were operating under the benefit of a "Himalaya" or similar clause which would otherwise allow them to benefit from the limitations of liability applicable to carriers.

54. Mr. LARSEN (United States) said that his delegation took the view that the Convention should safeguard the operation of the "Himalaya clause". The stevedore needed to have a clear idea as to whether or not he would benefit from the clause. If he did, he would not necessarily be covered by the Convention, but in all other circumstances he would. That was the interpretation which the United States placed on the definition of the term "operator".

55. Mr. ILLESCAS (Spain) said his delegation was concerned that, since the Committee had decided not to include a definition of the term "carrier" in article 1, the second sentence of subparagraph (a) of that article, as amended by the Committee, would not have the same meaning as before. He suggested that the Committee should revert to the wording of subparagraph (a) set out in document A/CONF.152/5.

56. Mr. LARSEN (United States) supported that suggestion.

57. Mr. RUSTAND (Sweden) said that he too supported the suggestion. The ad hoc working group that had had the task of formulating a definition of the term "carrier" could always, as a last resort, have fallen back on the wording of the second sentence of article 1 (a) that would have resulted from acceptance of the Japanese proposal (A/CONF.152/C.1/L.19).

58. Mr. SMITH (Australia) asked whether the Committee would have the opportunity to vote on the Japanese proposal, which had not been discussed at the time.

59. The CHAIRMAN said that it would mean reopening the debate on subparagraph (a) of article 1.

60. Mr. BONELL (Italy) suggested that the Committee should first decide whether to retain the text it had approved. If it rejected that text, it could then look at alternative formulations, including the Japanese proposal.

61. The CHAIRMAN invited the Committee, in accordance with rule 33 of the rules of procedure, to vote on the motion to reopen the debate on subparagraph (a) of article 1.

62. The motion was adopted by 16 votes to 6, with 10 abstentions.

63. The CHAIRMAN observed that the Committee had before it the text of article 1 (a) which it had approved, the Japanese proposal (A/CONF.152/C.1/L.19) and a proposal submitted by Belgium (A/CONF.152/C.1/L.61). For the present, however, it might wish to resume its discussion of article 15. It seemed to him that the Committee was of the opinion that the draft Convention should take precedence over national laws of any kind. Under article 15, only international conventions or national laws implementing them could limit the scope of the Convention. That being so, some difficulty arose in regard to the phrase "or derived from", which was subject to different interpretations. It had been proposed that the phrase should be deleted.

64. Mr. RUSTAND (Sweden) said his delegation could not approve its deletion. He understood that many representatives favoured it, possibly with the addition of the words "and corresponding with".

65. The CHAIRMAN did not think that such wording would clarify the position; rather, it would give the impression that States could model national laws on other international conventions which they had not ratified and that those laws could take precedence over the Convention under discussion.

66. He invited the Committee to vote on the suggestion to delete the phrase "or derived from" in article 15.

67. The suggestion was approved by 20 votes to 4, with 9 abstentions.

68. Mr. SMITH (Australia) said that, following that decision, his delegation would withdraw its proposal in document A/CONF.152/C.1/L.57.

The meeting rose at 12.40 p.m.

16th meeting

Friday, 12 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.16

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Articles 1, 2 and 15 (concluded) (A/CONF.152/C.1/L.7, L.19, L.61)

1. Mr. RUSTAND (Sweden), speaking in explanation of vote concerning the amendment made at the previous meeting to article 15, said that the Committee had taken a retrograde step in deciding to delete the words "or derived from". The result was to cast doubt on the effect of international conventions in countries which, without ratifying them, had incorporated their main provisions into domestic law. For instance, although Sweden had not ratified the Convention relating to the Carriage of Passengers and their Luggage by Sea, its domestic maritime law was based on the principles of that Convention. The original wording of article 15 clearly subordinated national to international law. As a result of the Committee's decision, however, courts dealing with the rights and duties relating to the carriage of goods would be unable to take due account of relevant national laws derived from international transport conventions.

2. The CHAIRMAN said that the Committee now had three options for the last sentence of article 1 (a): to keep the wording already chosen by the Committee, namely: "however, a person shall not be considered an operator whenever he is a carrier"; to return to the original wording used in the Commission's text (A/CONF.152/5), thus reopening the discussion on the paragraph; or, finally, to replace the general reference to "a carrier" by a more complex formulation proposed by the Japanese delegation (A/CONF.152/C.1/L.19).

3. Mr. OCHIAI (Japan), introducing his delegation's proposal (A/CONF.152/C.1/L.19), said that the main difference between it and the original text concerned the treatment of stevedores. The proposal would make it clear that stevedores were included within the scope of the Convention, as most members of the Committee wished, regardless of any so-called "Himalaya" clause in the bill of lading. In the original text, it was unclear whether stevedores were included. A second reason for the proposal was the notorious difficulty of defining the "carrier". The words "under applicable rules of law governing carriage" resolved that difficulty.

4. The CHAIRMAN noted that the aim of the Japanese proposal was to exclude the effects of the "Himalaya" clause: even if a stevedore was covered by the Himalaya clause, he would be covered by the Convention. Under the existing text, in his view, stevedores were covered by the Convention, but there might be a problem of interpretation in that connection.

5. Miss VAN DER HORST (Netherlands) said she could not support either the original text of the last sentence of article 1 (a), or the Japanese proposal, since both used the word "responsible". In preference to either, she supported the German proposal already adopted by the Committee, according to which the last sentence of article 1 (a) would read: "However, a person shall not be considered an operator whenever he is a carrier." The result of the original wording would be

that a carrier who had legally - e.g. under the Hague-Visby Rules - been exonerated from liability for the goods before loading and after unloading, could be regarded as liable under the present Convention. That was the difficulty inherent in the word "responsible". She could, however, accept the Japanese proposal if the words "responsible for the goods" were deleted. If she had known that rejecting the proposal to define "carrier" would mean returning to the original text of article 1 (a), she would have voted for a definition of "carrier".

6. The CHAIRMAN invited the Committee to vote on the Japanese proposal (A/CONF.152/C.1/L.19).

7. There were 8 votes in favour, 8 against and 12 abstentions.

8. The proposal was not adopted.

9. The CHAIRMAN invited the Committee to vote on the proposal to restore the original text of the last sentence of article 1 (a) (A/CONF.152/5).

10. The proposal was adopted by 12 votes in favour, 8 against and 8 abstentions.

11. Mr. ROMAN (Belgium), introducing his delegation's proposal (A/CONF.152/C.1/L.61), said that its purpose was to protect the operator from being held liable in circumstances where he could not exercise any effective control.

12. The CHAIRMAN invited the Committee to vote on the Belgian proposal.

13. There were 11 votes in favour, 11 votes against and 6 abstentions.

14. The proposal was not adopted.

15. The CHAIRMAN pointed out that the Committee's decision that article 1 (a) should no longer refer to the carrier affected the scope of application of the Convention. The United States was proposing that a reference to other international conventions should be introduced in article 2 (A/CONF.152/C.1/L.7).

16. Mr. SWEENEY (United States of America) withdrew the proposal.

Article 13 (A/CONF.152/C.1/L.22)

17. Mr. MORAN (Spain) withdrew his delegation's proposal (A/CONF.152/C.1/L.22) to omit the opening phrase of article 13 (1), "Unless otherwise provided in this Convention". He had had the impression that the phrase was confusing and redundant. However, he was aware that it was a standard formula in treaty texts, and now felt that article 13 (1) was best left unaltered.

18. The CHAIRMAN observed that the phrase in question had a bearing on the waiver contained in article 6 (4), whereby the operator could agree to higher limits of liability.

19. Mr. SMITH (Australia) requested the Chairman's permission to introduce an oral proposal to insert in article 13 a new paragraph 1 bis, which arose out of the debate at the previous meeting.

20. The CHAIRMAN, while pointing out that it was contrary to the rules of procedure to introduce an oral amendment, invited the representative of Australia to explain his proposal.

21. Mr. SMITH (Australia) explained that his proposal was intended to resolve a difficulty of interpretation concerning the inclusion of stevedores within the scope of the Convention. He had earlier referred to the differing jurisprudence on the matter as between the United States and Australia or the United Kingdom, for example. In the Australian view, stevedores were of course covered by the Convention even when covered by clauses in a bill of lading. But to rule out any possible doubt on the subject he would propose a new paragraph 1 bis, stating that the operator could not exculpate himself from any liability he might have under any maritime or other bill of lading governing the carrier. At most, a stevedore would benefit from the legal protection available to a carrier; he would not escape all liability. The proposed text was: "The operator shall not be exculpated from his liability under any maritime or other bill of lading governing carriage".

22. Mr. LARSEN (United States) said that in the United States, as a matter of policy, the operator was not able to exculpate himself from liability. His delegation therefore had no objection whatsoever to Australia's proposal and would vote in favour of it.

23. The CHAIRMAN asked whether there were any objections to voting on the Australian proposal.

24. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that as the proposal had been made orally, his delegation needed more time to consider it.

25. Mr. ZHAO Chengbi (China) agreed with the representative of the Soviet Union. The draft Convention had been worked out over a number of years and if such changes were introduced at the present stage, there could be serious consequences. The Committee should not take a vote on the Australian proposal immediately.

26. Mr. STURMS (Netherlands) said that the Australian proposal appeared to be open to two interpretations: either it meant that the bill of lading could not depart from the Convention or that the operator could not be exonerated by the Convention from the bill-of-lading clauses.

27. The CHAIRMAN suggested that the representative of Australia should submit his proposal in writing to the plenary.

28. He took it that the Committee wished to approve article 13 as it stood.

29. It was so decided.

Article 20 (A/CONF.152/C.1/L.30, L.59, L.60)

30. Miss VAN DER HORST (Netherlands), introducing her delegation's proposal (A/CONF.152/C.1/L.59), said that the draft Convention applied to terminal operators handling goods involved in international carriage by sea, air, road and inland waterways. There were a wide variety of operators dealing with different types of goods and performing different types of services. Furthermore, those operators represented a wide range of technical and operational sophistication. In view of those circumstances, her Government was not convinced that the different branches of terminal operators should necessarily be governed by the same liability system. For instance, according to article 5 of the draft Convention, liability was based on the principle of presumed fault or neglect. Because of the many differences in the terminal operating industry, it would in many cases, for certain kinds of operators, be very difficult if not impossible to prove that they were not liable. In practice, many operators handled huge amounts of widely varying goods without being in a position to assess their condition and quality. It was also difficult for them to determine in advance what measures should be taken, since documents did not always adequately reveal the specific nature of individual goods. Operators could not be expected to possess sufficient knowledge of all the goods received to allow appropriate measures to be taken in all cases. Although the draft Convention should result in improvements in some branches of the terminal industry, her Government wished to have the opportunity to ratify the Convention with the reservation that the rules were only applicable to certain types of terminal operators, depending on specific circumstances in the industry.

31. Mr. INGRAM (United Kingdom of Great Britain and Northern Ireland) expressed support for the Netherlands proposal. His delegation had frequently referred to the problems that might arise if insurance was not available. The Netherlands proposal might mean that operators who could not get insurance if the Convention was applied to them could be excluded from the application of the Convention in their country. If so, it would give the Convention some chance of acceptance by more countries.

32. Mr. RUSTAND (Sweden) said that while his delegation respected the thinking behind the Netherlands proposal, it considered it more important to maintain the uniform character of the Convention. If the Conference were to agree that the Convention would not apply to certain types of terminal operators, the result could be that each individual country would be able to decide for itself on the sort of terminal to which the Convention would apply.

33. The CHAIRMAN invited the Committee to vote on the Netherlands proposal (A/CONF.152/C.1/L.59).

34. The Netherlands proposal was rejected by 18 votes to 5, with 10 abstentions.

35. Mr. ROMAN (Belgium), introducing his delegation's proposal (A/CONF.152/C.1/L.30), said that it had been submitted for the same reasons as those given by the Netherlands, but was narrower in scope.

36. The CHAIRMAN invited the Committee to vote on the Belgian proposal (A/CONF.152/C.1/L.30).

37. The proposal was rejected by 21 votes to 3, with 7 abstentions.

38. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran), introducing his delegation's proposal (A/CONF.152/C.1/L.60), said that it was aimed at encouraging the largest possible number of countries to ratify the Convention. While his delegation hoped that States would accede fully and without reservations, recognition of the right of reservation would make it possible for some States which might have legal problems with certain provisions of the draft Convention to become parties to it. The proposal highlighted the contradiction in certain areas, such as article 12, between the Convention and national law, particularly in countries which had adopted the Islamic legal system. In order that the right of reservation should not limit the scope of application of the draft Convention, the proposal made specific reference to article 19 of the Vienna Convention on the Law of Treaties, which was intended to defend and preserve the main purpose of any given Convention.

39. The CHAIRMAN invited the Committee to vote on the proposal (A/CONF.152/C.1/L.60).

40. The proposal was rejected by 23 votes to 2, with 7 abstentions.

41. Article 20 was approved.

Proposal for new article (A/CONF.152/C.1/L.48)

42. Mr. INGRAM (United Kingdom), introducing his delegation's proposal (A/CONF.152/C.1/L.48), said that it was usual in liability conventions to have an article specifying where a claimant might sue, the purpose being to avoid differing national rules as to when a court might hear a case. Such a provision assisted a claimant in giving him the certainty that certain courts would hear a case and also assisted the operator, or defendant, in that he would know that he could only be sued in a limited number of jurisdictions. That seemed particularly important in the draft Convention, which had left much to national law and contained a number of uncertainties.

43. The most appropriate place for litigation on matters arising from the Convention was where the damage occurred or, as the draft Convention put it, where the transport-related services were performed. The United Kingdom proposal provided a further option to cater for cases where the defendant might have only a small operation in the country where the damage occurred. However, where the transport-related services of the operator were performed in one place only, the courts of that State should be the chief place of litigation.

44. Lastly, States whose port authorities were public bodies might not wish them to be sued in any State party to the Convention, in view of the risk that some courts would award high damages, breaking the limitation of liability, and then seek to enforce the award against the State itself. Without an article such as that proposed, the mere fact that a State was party to a Convention might be regarded by the courts of some countries as giving them jurisdiction, with the risks already referred to. The United Kingdom proposal seemed a useful safeguard and he accordingly commended it to the Committee. The final wording could be left to the Drafting Committee, as could the task of ensuring that it was correctly aligned with article 2.

45. The CHAIRMAN reminded the Committee that rules of jurisdiction and competence had been debated at length in the Working Group, which had decided against them because of the large number of existing conventions, both bilateral and multilateral, on the subject, notably the Brussels and Lugano Conventions.

46. Mr. TARKO (Austria) said that his delegation was unable to support the proposal because of the number of international conventions on the subject. If such a clause were inserted, others would be required on recognition and enforcement, and that would only complicate the draft Convention.

47. Mr. LEBEDEV (Union of Soviet Socialist Republics) confirmed that the inclusion of an article on competent jurisdiction had been discussed during the preparatory work on the draft Convention. At the time Soviet experts had been in favour of it, but the majority of members of the UNCITRAL Working Group had decided against. It would thus be difficult to reopen the issue, and all the more so in view of the imperative and exhaustive nature of the United Kingdom proposal, which excluded all possibility of bringing actions before any court other than those which it enumerated, and seemed also to exclude the possibility of recourse to arbitration.

48. Mr. PAMBOU-TCHIVOUNDA (Gabon) suggested that since article 12 (1) implied that the institution of judicial proceedings was possible, there might be some merit in the United Kingdom proposal, which addressed itself to the practical aspects of such an eventuality.

49. Mr. ZHAO Chengbi (China) observed that the question of competent jurisdiction was complicated firstly by the fact that the operators of transport terminals were involved with several different modes of transport, and secondly by the fact that the rules of jurisdictional competence were not the same in all States. It would be hard to achieve the uniformity that seemed to be the purpose of the United Kingdom proposal, which did not provide for arbitration. For those reasons, his delegation could not support the proposal.

50. Mr. INGRAM (United Kingdom) withdrew the proposal.

Article 5 (concluded) (A/CONF.152/C.1/L.49)

51. The CHAIRMAN called attention to the proposal submitted by Morocco (A/CONF.152/C.1/L.49). Noting that no Moroccan representative was present in the room to introduce the proposal, he said it would be difficult for the Committee to discuss it under those circumstances.

Article 12 (concluded) (A/CONF.152/C.1/L.58)

52. The CHAIRMAN called attention to the Egyptian proposal (A/CONF.152/C.1/L.58). It had been submitted to the Secretariat after the normal deadline and too late for consideration during the Committee's discussion of the article. The representative of Egypt was, of course, at liberty to submit the proposal to the plenary meeting.

53. Mr. SOLIMAN (Egypt) said that since the proposal was one of wording, his delegation intended to submit it without delay for the consideration of the Drafting Committee.

54. The CHAIRMAN declared that the Committee had completed the substantive part of its work.

The meeting rose at 4 p.m.

17th meeting

Monday, 15 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.17

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (concluded) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 14

1. Article 14 as reproduced in document A/CONF.152/L.5 was approved without comment.

CONSIDERATION OF THE REPORT OF THE DRAFTING COMMITTEE TO THE COMMITTEE (agenda item 4) (A/CONF.152/C.1/L.62)

2. Mr. RAO (India), speaking as the Chairman of the Drafting Committee, introduced the Committee's report in document A/CONF.152/C.1/L.62. He said the Drafting Committee had made a few changes of a mainly editorial nature to the texts referred to it by the First Committee. He suggested that the Secretary of the Drafting Committee should give the Committee details of the changes.
3. Mr. BERGSTEN (Executive Secretary), speaking as the Secretary of the Drafting Committee, said the report covered articles 1 to 16, but not article 20, which had been dealt with in the Drafting Committee's report to the Second Committee. Certain minor changes had been made to the Russian, Spanish and Arabic versions of the articles in order to conform with usage, and some changes had been made in the tenses of verbs in the English version for the same reason. All the substantive amendments approved by the First Committee had, of course, been incorporated in the text: he would draw attention only to the few significant changes that the Drafting Committee had made in the text in the interests of greater clarity.
4. In the introductory wording of paragraph 1 of article 4, the Committee had made some adjustments to the non-English versions of the text in order to make it clear that the phrase "within a reasonable period of time" applied both to the case where the customer had requested a document and to the case where the operator issued a document without being requested to do so. In the first sentence of paragraph 2 of that article, the words "he is rebuttably presumed to have received the goods in apparent good condition" had been amended to read "he is presumed to have received the goods in apparent good condition, unless he proves otherwise".
5. In the introductory wording of article 9 the phrase "at the time the goods are handed over to him" had been amended to read "at the time the goods are taken in charge by him", in order better to reflect the circumstances which that article contemplated.
6. In paragraph 1 of article 10, the phrase "during the period of his responsibility for them" had been amended to read "both during the period of his responsibility for them and thereafter", thus reflecting the German proposal for that provision (A/CONF.152/C.1/L.16), which the Committee had adopted in principle. In paragraph 3 of the same article, the words "the preceding sentence does not apply to containers" had been amended to read "this right to sell does not apply to containers", for the sake of greater clarity.
7. In paragraph 4 of article 12, the expression "declaration in writing" had been replaced by the term "notice".
8. The CHAIRMAN suggested that the Committee should consider the text prepared by the Drafting Committee article by article.

Article 1

9. Mr. MORAN (Spain) pointed out that in the Spanish version the last sentence of subparagraph (a) should be brought into line with the English version, which reproduced the wording of the original text (A/CONF.152/5).
10. Mr. ABASCAL (Mexico) supported that suggestion.
11. Mr. BERGSTEN (Executive Secretary) asked that any further requests for changes to the non-English language versions of the text designed to bring those versions into line with the English version should be submitted to the Secretariat in writing after the meeting.
12. Mr. TUVAYANOND (Thailand) proposed that the words "identified as being" should be deleted from subparagraph (c), since it might give rise to conflicting interpretations.
13. The CHAIRMAN pointed out that that proposal concerned a point of substance: the article had already been discussed at length, and the debate could not be re-opened. The Committee now had to confine itself to the drafting aspects of the text.
14. Article 1 was approved.

Articles 2 and 3

15. Articles 2 and 3 were approved.

Article 4

16. Mr. ABASCAL (Mexico), supported by Mr. MORAN (Spain), pointed out that changes should be made to the Spanish version of paragraphs 1 and 2 in order to bring them into line with the English version, which was now the same as in the original text.
17. Article 4 was approved.

Article 5

18. Mr. LEBEDEV (Union of Soviet Socialist Republics) asked whether the use of the phrase "as well as for delay in handing over the goods" in paragraph 1 was intentional. He pointed out that the corresponding phrase in article 5 of the Hamburg Rules was "as well as from delay in delivery", and that in paragraph 5 of article 11 of the Drafting Committee's text (A/CONF.152/C.1/L.62) the phrase used was "loss resulting from delay in handing over the goods". As now worded, article 5 (1) seemed to imply that the operator was liable for any delay, rather than simply for loss resulting from delay.

19. Mr. KATZ (Secretary of the First Committee) said there had been no intention on the part of either the UNCITRAL Working Group on International Contract Practices or the Commission itself to depart from the principles of the Hamburg Rules on that point. The use of the word "for" instead of "from" was an error, which would be rectified.

20. Article 5 was approved subject to that correction.

Articles 6 to 10

21. Articles 6 to 10 were approved.

Article 11

22. Mrs. MANSOUR (Guinea) pointed out that in the French version of paragraph 4 the words "le transporteur" should be added after the words "l'exploitant" in order to bring it into line with the English version.

23. Article 11 was approved subject to that correction.

Articles 12 to 16

24. Articles 12 to 16 were approved.

25. Mr. ZHAO Chengbi (China) gave notice of a number of corrections which his delegation wished to make in the Chinese version of document A/CONF.152/C.1/L.62.

26. Mr. BERGSTEN (Executive Secretary) said that delegations would have ample opportunity to correct the various language versions of articles 1 to 16 before the Secretariat produced the document containing the report of the First Committee to the plenary Conference. The Secretariat had noted the corrections mentioned at the present meeting.

27. Mr. SOLIMAN (Egypt) said that his delegation's numerous drafting comments on the Arabic version of document A/CONF.152/C.1/L.62 had been duly taken into account.

28. Mr. INGRAM (United Kingdom of Great Britain and Northern Ireland) inquired whether, in addition to articles 1 to 16, the Committee was not also required to approve article 20.

29. Mr. BERGSTEN (Executive Secretary) said that, technically speaking, that was the case. However, in view of a decision in the Drafting Committee to reverse the order of articles 20 and 21, it would now be more logical if all the final clauses were approved by the Second Committee.

The meeting rose at 11.05 a.m.

18th meeting

Wednesday, 17 April 1991, at 9.30 a.m.

Chairman: Mr. BERAUDO (France)

A/CONF.152/C.1/SR.18

CONSIDERATION OF THE REPORT OF THE COMMITTEE TO THE PLENARY CONFERENCE (agenda item 5) (A/CONF.152/11; A/CONF.152/C.1/L.2/Rev.1 and L.2/Add.1-9)

1. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran), Rapporteur, drew attention to the Committee's draft report in document A/CONF.152/C.1/L.2/Rev.1 and L.2/Add.1-9 and to the Committee's report in document A/CONF.152/11, covering articles 1 to 16 of the draft Convention.

2. Mr. KATZ (Secretary of the Committee) said that, at the suggestion of the Chairman, a new sentence should be inserted, for the sake of clarity, after the first sentence of document A/CONF.152/C.1/L.2/Rev.1, part I, paragraph 6. The new sentence would read: "The articles were considered in the following order: articles 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 2, 13, 14, 20."

3. In addition, document A/CONF.152/C.1/L.2/Add.1, paragraph 4, should read: "The First Committee considered article 3 at its fourth and seventh meetings on 4 and 8 April 1991".

4. Finally, document A/CONF.152/C.1/L.2/Add.2, paragraph 4, should read: "The First Committee considered article 4 at its fifth, sixth, seventh and eleventh meetings on 5, 8 and 10 April 1991", and, in paragraph 8 of the same document, the words "subparagraph (a)" in the second sentence should read "subparagraph (b)".

5. The report of the Committee to the Plenary Conference, as thus revised, was adopted.

COMPLETION OF THE COMMITTEE'S WORK

6. Mr. RUSTAND (Sweden) paid tribute to the Chairman for guiding the Committee so ably through its difficult deliberations.

7. The CHAIRMAN announced that the Committee had completed its work.

The meeting rose at 10.20 a.m.

SUMMARY RECORDS OF MEETINGS OF THE SECOND COMMITTEE

1st meeting

Monday, 8 April 1991, at 9.30 a.m.

Chairman: Ms. J. VILUS (Yugoslavia)

A/CONF.152/C.2/SR.1

ADOPTION OF THE AGENDA (item 1 of the provisional agenda) (A/CONF.152/C.2/L.1)

1. The provisional agenda (A/CONF.152/C.2/L.1) was adopted.

ELECTION OF A VICE-CHAIRMAN AND A RAPPORTEUR (agenda item 2)

2. The CHAIRMAN invited nominations for the offices of Vice-Chairman and Rapporteur.

3. Mr. LARSEN (United States of America) suggested that the election of officers should be postponed until full consultations had been held.

4. It was so decided.

CONSIDERATION OF ARTICLES 17 TO 19, AND 21 TO 25, OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (A/CONF.152/5, 6 and 7 and Add.1 and Add.1/Corr.1 and Add.2)

5. The CHAIRMAN invited the Committee to consider the draft articles one by one.

Article 17

6. Article 17 was approved by 13 votes to none.

Article 18

7. The CHAIRMAN drew attention to paragraph 1, where it remained to be determined how long the Convention would be open for signature.

8. Mr. LARSEN (United States) said that the one-year rule applicable in other transport conventions would be acceptable to his delegation, as would a longer period if such was the desire of the Committee.

9. Mr. GORODISSKY (Union of Soviet Socialist Republics) supported the proposal for a one-year period.

10. The CHAIRMAN said she took it that the Committee agreed to insert the date 30 April 1992 at the end of article 18 (1).

11. It was so decided.

12. Article 18 was approved by 13 votes to none.

Article 19

13. Mr. HORNBY (Canada) said that his delegation had submitted a written proposal which had not yet been circulated. Its purpose was to amend article 19 (3) in such a way as to reflect the three criteria for the application of the Convention which were now contained in article 2 (Scope of application). The three criteria were place of business of the operator, place of performance of the transport-related services, and the rules of private international law. Article 19 (3), as it stood, referred only to the place of business. Pending receipt of his delegation's written proposal, he requested that the discussion on article 19 should be deferred.

14. Mr. SERVIGON (Philippines) said that his delegation was submitting written proposals on articles 19 and 21, and accordingly requested that consideration of both articles should be postponed.

15. It was so decided.

Article 22 (A/CONF.152/C.2/L.3, L.4, L.5)

16. The CHAIRMAN said that the three proposals that the Committee had before it relating to article 22 (1), submitted respectively by the United States of America (A/CONF.152/C.2/L.3), Germany (A/CONF.152/C.2/L.4) and the Netherlands (A/CONF.152/C.2/L.5), all concerned the number of ratifications required. The United States proposal was not an amendment, but merely expressed support for the existing provision that the Convention should enter into force when five States had ratified or acceded to it. The German and Netherlands proposals were identical and sought to replace the word "fifth" by "fifteenth" in article 22 (1), so as to require 15 ratifications or accessions for entry into force.

17. Mr. LARSEN (United States) said that his delegation's proposal was prompted by the long delayed entry into force of conventions requiring a large number of ratifications. An example was the Multimodal Convention of 1980, which required 30 ratifications and had still not entered into force. The draft Convention under consideration was a very useful instrument and was unique in that it applied to the internal affairs of States. His delegation therefore supported the Commission's conclusion in advocating ratification by five States.

18. Mr. HENGSTENBERG VON BORSTELL (Germany) said that, while he fully understood the United States concerns, his delegation favoured a larger number of ratifications - 15 being a reasonable figure - in order to secure broader acceptance of the Convention. There would be little point to the Convention if the courts of only five States applied its provisions.

19. Mr. HORNBY (Canada) said that his delegation supported a small number of ratifications for much the same reasons as the United States delegation. The Convention dealt essentially with matters of private international law, particularly domestic law. Most of the obligations it contained required States parties to bring their domestic law into line with the Convention, and if States wished to comply, they should be encouraged to do so. His delegation would even have accepted a smaller number of ratifications.

20. Mr. MARSHALL (United Kingdom of Great Britain and Northern Ireland) said that his delegation had originally expected the number of ratifications to tally with the number required in related transport conventions but, having heard previous speakers, would be prepared to agree to 15, which still allowed for wide international representativity. A convention ratified by only a few States would be meaningless.

21. Mr. FUJISHITA (Japan) and Mr. ZHANG Kening (China) expressed support for the text as it stood.

22. Mr. SERVIGON (Philippines), Mr. FARIDI ARAGHI (Islamic Republic of Iran) and Ms. STROLZ (Austria) expressed support for the German and Netherlands proposals.

23. The CHAIRMAN invited the Committee to vote on the German and Netherlands proposals.

24. The German proposal contained in document A/CONF.152/C.2/L.4 and the Netherlands proposal contained in document A/CONF.152/C.2/L.5 were rejected by 8 votes to 5.

25. Article 22 was approved by 8 votes to 3, with 1 abstention.

Article 23

26. Article 23 was approved by 13 votes to none.

Article 24

27. Mr. FARIDI ARAGHI (Islamic Republic of Iran), supported by Mr. ASTAPENKO (Byelorussian Soviet Socialist Republic), suggested that wording should be added to article 24 (7) to provide that the depositary would inform States parties of the entry into force of amendments.

28. The CHAIRMAN said she understood that the existing practice of the Secretary-General as depositary was to notify all States parties of the entry into force of amendments.

29. Mr. LARSEN (United States) said that, if the Vienna Convention on the Law of Treaties made provision for States to be notified of their obligations, he considered that to be sufficient. There needed to be the possibility of speedy adjustment in the Convention under discussion, so he supported the wording of article 24 (7) as it stood.

30. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that, as it was already the practice of the depositary to notify the entry into force of amendments, he could accept the text of paragraph 7 as it stood.

31. Mr. MARSHALL (United Kingdom) said that the inclusion of article 24 (2) might lead to the convening of a superfluous meeting. The possibility of changing the amounts stipulated in article 6 was adequately covered under articles 23 (1) and 24 (1); article 24 (2) was therefore unnecessary.

32. Mr. LARSEN (United States) said that erosion of amounts had been a serious problem with certain other conventions, and liability limits should be reviewed periodically. He therefore favoured the existing draft.

33. The CHAIRMAN drew attention to General Assembly resolution 37 107, on provisions for a unit of account and adjustment of limitations of liability adopted by the United Nations Commission on International Trade Law, which recommended that all international conventions containing limitation of liability provisions should contain a paragraph such as the one under discussion.

34. Mr. MARSHALL (United Kingdom) said that, in view of the lack of support for his suggestion, he would withdraw it.

35. Article 24 was approved by 12 votes to none.

Article 25

36. Article 25 was approved by 12 votes to none.

The meeting rose at 11 a.m.

2nd meeting

Wednesday, 10 April 1991, at 9.30 a.m.

Chairman: Ms. J. VILUS (Yugoslavia)

A/CONF.152/C.2/SR.2

ELECTION OF A VICE-CHAIRMAN AND A RAPPORTEUR (agenda item 2) (concluded)

1. Mr. HORNBY (Canada) nominated Mr. Fujishita (Japan) for the office of Vice-Chairman.
2. Mr. GORODISSKY (Union of Soviet Socialist Republics) nominated Ms. Strolz (Austria) for the office of Rapporteur.
3. Mr. Fujishita (Japan) and Ms. Strolz (Austria) were elected Vice-Chairman and Rapporteur, respectively.

CONSIDERATION OF ARTICLES 17 TO 19, AND 21 TO 25, OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (concluded) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 19 (concluded) (A/CONF.152/C.2/L.7)

4. Mr. HORNBY (Canada) said that the purpose of the proposed amendment to paragraph 3 of article 19 was to reflect in that article the criteria for the scope of application of the Convention that were contained in subparagraphs 1 (a), (b) and (c) of its article 2.
5. It was standard practice to include a federal-state clause in a private international law convention, and the acceptance of his proposed amendment would facilitate his country's accession to the Convention.
6. He hoped that the Committee would approve the proposal, subject to minor changes by the Drafting Committee.
7. Mr. FUJISHITA (Japan) supported the proposed amendment but thought it was unnecessary to include the word "if" at the beginning of subparagraph (b). However, a decision on that point could be left to the Drafting Committee.
8. Mr. LARSEN (United States of America) supported the proposal, as he believed it was intended to bring about broader application of the Convention.
9. Mr. ZHANG Kening (China) supported the Canadian proposal.
10. Mr. GORODISSKY (Soviet Union) had some reservations regarding the proposal. Although he agreed that the provisions of article 2 and article 19 should correspond, Committee 1 had yet to make a decision on article 2.
11. The CHAIRMAN said that articles 2 and 19 were indeed closely connected, and Committee 1 had not yet considered article 2. However, the representative of Canada had indicated that his proposal was subject to adjustment by the Drafting Committee. The Drafting Committee could be instructed to adjust the wording of the proposal so as to bring it into line with any changes that Committee 1 might make to article 2. She suggested that the Committee might wish to approve the Canadian proposal on that understanding.
12. Mr. HORNBY (Canada) confirmed that the Chairman's summary accurately reflected his position.
13. The Canadian proposal was approved, subject to adjustment by the Drafting Committee, by 9 votes to 1, with 3 abstentions.

Article 21 (A/CONF.152/C.2/L.6, L.8)

14. The CHAIRMAN invited the Committee to debate the Philippines amendment (A/CONF.152/C.2/L.8) first, since it was the furthest removed from the original text.

15. Mr. BELLO (Philippines) said the purpose of article 20 was to prevent reservations from being made to the Convention. Article 21, however, provided a loophole for reservations, since declarations could take the form of reservations, and for that reason its deletion was proposed.

16. Mr. FUJISHITA (Japan) said he did not consider article 21 to be incompatible with article 20 since the word "declarations" therein referred only to declarations made under the provisions of article 19 and not to any interpretative declaration made in the context of international public law.

17. Mr. HORNBY (Canada) pointed out that articles virtually identical to articles 20 and 21 were to be found in the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980). The existence of such articles was therefore standard practice in international trade law conventions.

18. Mr. ZHANG Kening (China) said he shared the Japanese view that the declarations referred to in article 21 were those mentioned in article 19. They were therefore not incompatible with article 20.

19. Mr. SOLIMAN (Egypt) said he considered article 21 to be clear and precise. It should be maintained in its present form.

20. Mr. ASTAPENKO (Byelorussian Soviet Socialist Republic) said he, too, considered there to be no direct link between articles 20 and 21. However, in order to avoid confusion and make clear that the declarations referred to in article 21 were those mentioned in article 19, he proposed that the text of the Convention should be rearranged so that those two articles were next to each other and article 20 no longer came between them. The Philippines might find that an acceptable solution.

21. Mr. KEINAN (Israel) said that, for the reasons given by Egypt and Canada, article 21 should be left as originally drafted.

22. Mr. BELLO (Philippines) said his principal objection to article 21 was that it referred declarations to the Convention as a whole; restriction of their application to article 19 might be acceptable.

23. Mr. LARSEN (United States) said there appeared to be some confusion over the use of the word "declaration". In treaty practice, States were entitled to make declarations as to the interpretation they gave to a convention, which would remain in effect unless challenged by other Contracting States. The declarations mentioned in article 21 therefore might not pertain to article 19 only, but to the entire Convention. Article 21 should therefore remain unchanged.

24. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said the article should remain as drafted.

25. Mr. BELLO (Philippines) said that the comment by the United States strengthened his concern over the implications of the wording of article 21. However, in view of the lack of support for his proposal, he would withdraw it.

26. The CHAIRMAN invited the Committee to consider the amendment to article 21, paragraphs 1 and 4, proposed by Japan (A/CONF.152/C.2/L.6).

27. Mr. FUJISHITA (Japan) said his delegation's amendment was intended to clarify the point that the declarations mentioned in article 21 referred to those provided for in article 19 only. Provisions similar to those in articles 19 and 21 appeared in many international conventions, and he doubted whether the view that interpretative declarations were possible under the terms of article 21, and especially of its paragraphs 3 and 4, was valid.

28. Mr. SOLIMAN (Egypt) said that the declarations mentioned in article 21 referred to the Convention in its entirety. The text of the article should therefore remain as drafted.

29. Mr. ASTAPENKO (Byelorussian Soviet Socialist Republic) endorsed the proposed amendment. A point of substance was involved. With regard to the United States' reference to interpretative declarations, the Vienna Convention on the Law of Treaties, in its Part III, Section 3, "Interpretation of treaties", nowhere made reference to declarations. Use of a declaration for such a purpose in an international contract could therefore not be considered acceptable. The only way for a State to object to a given provision in a convention would be by making a reservation, but in the present instance that had been excluded. Although there was nothing to hinder the Conference from adopting provisions to enable States to make declarations giving their interpretation of the Convention, that would run counter to the intention of its authors, which was to make the provisions of article 21 refer exclusively to article 19.

30. Mr. ZHANG Kening (China) expressed support for the Japanese amendment and agreed, as proposed by the representative of the Byelorussian SSR, that articles 19 and 21 should be next to each other.

31. Mr. LARSEN (United States) said the reference by the representative of the Byelorussian SSR to the coverage of declarations in the Vienna Convention on the Law of Treaties was correct. He therefore had no further objection to the Japanese amendment.

32. Mr. GORODISSKY (Soviet Union) said the Japanese amendment was quite acceptable. However, there were other articles of the draft Convention, such as article 23 (Revision and amendment), for which article 21 might have implications. It might therefore be preferable to retain the original wording.

33. Mr. ZHANG Kening (China) said that the representative of the Soviet Union had made an important point. However, he felt the objection could be met by retaining the Japanese amendment with a blank left after article 19 for insertion of the numbers of other relevant articles.

34. The CHAIRMAN put the Japanese amendment (A/CONF.152/C.2/L.6) to the vote, on the understanding that the question of a possible change in the sequence of articles 19, 20 and 21 and the citation of any further article numbers in article 21 would be referred to the Drafting Committee.

35. On that understanding, the amendment was adopted by 9 votes to 5.

Closing formula

36. The CHAIRMAN invited the Committee to consider the last two paragraphs of the draft Convention.

37. The final two paragraphs (closing formula) were adopted and referred to the Drafting Committee, on the understanding that the details of place and time would be inserted subsequently.

The meeting rose at 11 a.m.

3rd meeting

Friday, 12 April 1991, at 9.30 a.m.

Chairman: Ms. J. VILUS (Yugoslavia)

A/CONF.152/C.2/SR.3

CONSIDERATION OF THE REPORT OF THE DRAFTING COMMITTEE TO THE COMMITTEE (agenda item 4)

1. Mr. SAHAYDACHNY (Secretary of the Committee), informed the Committee that the report of the Drafting Committee to the Second Committee would be submitted to the Committee for its consideration before it referred the articles of the Convention to the Plenary, and a paragraph to that effect would be inserted into the Committee's report.

CONSIDERATION OF THE REPORT OF THE COMMITTEE TO THE PLENARY CONFERENCE (agenda item 5)
(A/CONF.152/C.2/L.2 and Add.1-3)

2. The CHAIRMAN invited the Committee to consider its draft report to the plenary Conference.

I. Introduction (A/CONF.152/C.2/L.2)

3. The introduction was adopted.

II. Consideration by the Second Committee of the Draft Convention on the Liability of Operators of Transport Terminals in International Trade (A/CONF.152/C.2/L.2 and Add.1-3)

Articles 17 and 18 (A/CONF.152/C.2/L.2)

4. The section of the draft report concerning articles 17 and 18 was adopted.

Articles 19 and 21 (A/CONF.152/C.2/L.2/Add.1)

5. Mr. ASTAPENKO (Byelorussian Soviet Socialist Republic) said that, although he agreed with the section of the draft report dealing with article 21, the amendments to that article raised an editorial question. Since the Japanese amendment to article 21 (1) now established a clear link with article 19, the provision in article 21 (2) concerning notification of declarations was largely superfluous, since it was almost identical to paragraph 2 of article 19 (2). He accordingly proposed that paragraph 2 of article 21 should be deleted and, for reasons of consistency, that the words "in writing" should be inserted after the word "notified" in article 19 (2).

6. The CHAIRMAN said that the Committee's proposals on all articles would be referred to the Drafting Committee. She took it that the Committee agreed to refer the proposal by the representative of the Byelorussian SSR to the Drafting Committee.

7. It was so decided.

8. The section of the draft report concerning articles 19 and 21 was adopted.

Articles 22 to 25 (A/CONF.152/C.2/L.2/Add.2)

9. The section of the draft report concerning articles 22 to 25 was adopted.

Final, formal clauses of the Convention (A/CONF.152/C.2/L.2/Add.3)

10. The section of the draft report concerning the final, formal clauses of the Convention was adopted.

11. The report of the Committee was adopted, subject to consideration of the report of the Drafting Committee to the Committee.

The meeting rose at 10.25 a.m.

4th meeting

Monday, 15 April 1991, at 11.45 a.m.

Chairman: Ms. J. VILUS (Yugoslavia)

A/CONF.152/C.2/SR.4

CONSIDERATION OF THE REPORT OF THE DRAFTING COMMITTEE TO THE COMMITTEE (agenda item 4) (concluded) (A/CONF.152/C.2/L.9)

1. Mr. RAO (India), speaking as the Chairman of the Drafting Committee, introduced the report of the Drafting Committee to the Second Committee (A/CONF.152/C.2/L.9) and suggested that the Secretary of the Drafting Committee should be requested to indicate the changes it had made in the text of the articles approved by the Second Committee.

2. Mr. BERGSTEN (Executive Secretary), speaking as the Secretary of the Drafting Committee, said that it had filled in the two blank spaces in paragraph 1 of article 18 by inserting the full title of the Conference and the words "30 April 1992". After some discussion, generated by a suggestion made in the Second Committee by the Byelorussian delegation (A/CONF.152/C.2/SR.3), the Drafting Committee had decided to delete the words "are to be notified to the depositary and" from article 19 (2). No change had been made in the text of article 19 (3) referred to the Drafting Committee by the Second Committee in the light of the First Committee's decision on article 2.

3. In article 20, which had previously been article 21, the Drafting Committee had, at the request of the Second Committee, replaced the words "under this Convention" in paragraphs 1 and 4 by the words "under article 19". Likewise at the suggestion of the Second Committee, it had reversed the order of articles 20 and 21 and in article 25 had inserted a cross-reference to paragraph 8 of article 24. The date would be inserted in the penultimate clause of the Convention after the signing ceremony.

4. Replying to Mr. TUVAYANOND (Thailand), Mr. BERGSTEN (Executive Secretary) explained that the date of 30 April 1992 had been inserted in article 18 (1) following the agreement reached in the Second Committee that the Convention should remain open for signature for approximately one year after the concluding meeting of the Conference.

5. Articles 17 to 25 were approved.

CONSIDERATION OF THE REPORT OF THE COMMITTEE TO THE PLENARY CONFERENCE (agenda item 5) (concluded) (A/CONF.152/C.2/L.2 and Add.1-3)

6. Mr. SAHAYDACHNY (Secretary of the Committee) said that the Committee had adopted sections I and II of its report at the previous meeting. He invited it to add the following text to the report:

"III. Consideration of the report of the Drafting Committee to the Committee

At its fourth meeting, held on 15 April 1991, the Second Committee received the report of the Drafting Committee to the Second Committee containing the texts of articles 17 to 25, as approved by the Drafting Committee (A/CONF.152/C.2/L.9). The Second Committee referred those articles to the Plenary."

7. Section III of the Committee's report was adopted.

8. Mr. ZHANG Kening (China) said that his delegation had been surprised to find that the Chinese version of document/A/CONF.152/C.2/L.9 reproduced the texts of articles 17 to 25 as they appeared in document/A/CONF.152/5.

9. Mr. BERGSTEN (Executive Secretary) said that all necessary corrections to the various language versions of articles 17 to 25 should be brought to the attention of the Secretariat. They would be incorporated in the document containing the final version of the report of the Second Committee to the plenary Conference.

COMPLETION OF THE COMMITTEE'S WORK

10. The CHAIRMAN announced that the Committee had completed its work.

The meeting rose at 12.15 p.m.