

(ii) REPORT OF THE STANDING
SUB-COMMITTEE ON THE LAW OF
INTERNATIONAL RIVERS
Presented at the Fourteenth Session

PART-I

General

The Standing Sub-Committee on the Law of International Rivers, which was constituted at the thirteenth session held in Lagos in January 1972, met at the present fourteenth session in New Delhi with the following delegates of the member countries of the Sub-Committee :

<i>Egypt</i>	represented by	Mr. Mohamed M. Hassan
<i>Ghana</i>	represented by	Mr. G. Nikoi
<i>India</i>	represented by	Mr. S. N. Gupta Mr. V. N. Nagaraja Mr. S. C. Jain
<i>Iran</i>	represented by	Mr M. A. Kardan
<i>Iraq</i>	represented by	Mr. Sabah Al-Rawi
<i>Japan</i>	represented by	Mr. E. Furukawa
<i>Nigeria</i>	represented by	Hon. Mr. A. A. Adediran Mr. J. D. Ogundere
<i>Nepal</i>	represented by	Hon. C. R. S. Malla and Mr. K. N. Upadhya

The Secretariat was represented by Mr. K. Ichihashi, Deputy Secretary-General, and Dr. Aziza Fahmi.

The Standing Sub-Committee held six meetings with Mr. Furukawa of Japan as chairman and Mr. Mohamed Hassan of Egypt as rapporteur.

At the beginning of its work, the Sub-Committee agreed that the draft propositions prepared by the special rapporteur, Prof. Shihata, should be the basis of the discussions and agreed

to hear the comments by Dr. Aziza Fahmi on the draft propositions.

2. The rapporteur introduced the draft propositions prepared by Prof. Shihata, and Dr. Aziza Fahmi submitted a document entitled "Commentary on the Draft Propositions" which has been distributed among the members of the Sub-Committee.

PART II

Background of the Subject and Recommendations

The subject, "Law of International Rivers" had been referred to this Committee for consideration under Article 3 (b) of its Statutes by the Governments of Iraq and Pakistan. The sponsors of the subject appeared to be primarily interested in two questions, namely (a) definition of the term "international rivers" and (b) rules relating to utilisation of waters of international rivers by the States concerned for agricultural, industrial and other purposes apart from navigation, particularly in connection with the rights of lower riparians.

The centre of the problem, therefore, was how far the rules developed and practised by European nations which were compiled in the Helsinki Rules 1966, the most outstanding achievement on this subject in recent decades, would be applicable to the problems which arise in the Asian-African region having regard to the different geophysical characteristics of the rivers and the needs of the people for varying uses of the waters.

The Committee had first considered this subject at the ninth session held in New Delhi in December 1967, and then subsequently at the tenth session in Karachi in January 1969, at the eleventh session in Accra in January 1970, at the twelfth session in Colombo in January 1971, and at the thirteenth session in Lagos in January 1972.

It was decided at the Colombo session to request the then rapporteur to formulate a set of draft propositions amalgamating the two draft proposals submitted by Iraq and Pakistan, on one hand, and by India, on the other. The draft propositions thus

prepared were carefully and extensively considered at the Sub-Committee meetings at Colombo at the regular session in January 1971 and at the inter-sessional meeting in September in the same year. At Lagos session, after further examination of the formulation of the first rapporteur, it was decided to request the new rapporteur to prepare a revised set of propositions with suitable commentary.

At the meetings of the present session, the Sub-Committee considered the new formulation prepared by Professor Shihata of Arab Republic of Egypt and completed consideration of all the 10 propositions of the said formulation.

In all four sessions stated above, the Sub-Committee had the opportunity of hearing the various views from member governments on certain problems relating to the equitable utilization of waters of an international river which had particular importance to the Asian and African countries.

Since the problems were so complex and involved a wide range of significance, the Sub-Committee was still unable to reach an agreement on a set of propositions on this subject. However, the Sub-Committee had been able to analyse the problems critically and extensively and thereby could identify several areas which may deserve a further study by the Committee at some opportune time in future. It may be specifically mentioned here that while it is regretted that Pakistan is not represented at the present session, major points raised by the Pakistan Delegation at the earlier sessions are more or less incorporated in the Part III of the present report.

The Sub-Committee wish, therefore, to report to the plenary meeting that it has almost exhausted its discussions on the subject referred by the two sponsoring countries, viz. Iraq and Pakistan.

Finally, the Sub-Committee recommends to the plenary session to consider the present report of the Sub-Committee at an opportune time in a future session.

PART-III

Summary of Discussions

PROPOSITION-I

Text of the rapporteur's formulation

"The general rules set forth in these propositions are applicable to the use of waters of an international drainage basin except as may be provided otherwise by convention, agreement or binding custom among the basin States."

Summary of Discussions

1. One delegate stated that there were certain difficulties, e. g. delimitation of water-shed limits in open lands would have to be taken into consideration.

It was also pointed out by some delegates whether to accept the international drainage basin concept in toto or try to adapt the concept to the factors which characterise rivers in Africa and Asia.

According to another delegate these difficulties were of technical rather than of legal nature and therefore the international basin approach was adequate to meet various situations.

2. A proposal was submitted by one delegate to substitute "binding custom" by "established custom" and no agreement was reached.

PROPOSITION-II

Text of the rapporteur's formulation

"1. An international drainage basin is geographic area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus.

2. A "basin State" is a State the territory of which includes a portion of an international drainage basin."

Summary of Discussions

1. According to one delegate, the knowledge in most Asian and African countries in regard to underground waters was not sufficient and, therefore, be left out of consideration. According to another delegate, underground water was an essential part of the water resources system of drainage basin and in the context of the overall development of these resources, it cannot be left out of consideration without detriment to development.

2. One delegate proposed the adoption of the traditional definition of "international river" as proposed in the Iraq-Pakistan draft to overcome certain difficulties as pointed out by Dr. Aziza Fahmi and some other delegates were of the opinion that the problems involved should be studied carefully before deciding on the final approach to be adopted. Another delegate stressed the validity of the drainage basin approach and saw no advantage in detracting from it. Hence he did not consider it necessary to define "an international river."

PROPOSITION-III

Text of the rapporteur's formulation

"1. Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

2. What is a reasonable and equitable share is to be determined by the interested basin States by considering all the relevant factors in each particular case.

3. Relevant factors which are to be considered include in particular :

- (a) the economic and social need of each basin State and the comparative costs of alternative means of satisfying such needs.
- (b) the degree to which the needs of a basin State may be satisfied without causing substantial injury to a co-basin State.

- (c) the past and existing utilization of the waters.
- (d) the population dependent on the waters of the basin in each basin State.
- (e) the availability of other water resources.
- (f) the avoidance of unnecessary waste in the utilization of waters of the basin.
- (g) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses.
- (h) the geography of the basin.
- (i) the hydrology of the basin.
- (j) climate affecting the basin."

Summary of Discussions

1. The following amendment proposed by one delegate entailed an extensive discussion. That is to say, it was proposed to add to paragraph 1. a phrase "giving priority to land within the watershed limit."

2. It was also proposed by another delegate to add after "basin State" of paragraph 3 (a) "with due regard to the development interest of the less developed basin State."

3. The proposal made by the same delegate to add to sub-paragraph 3 (j) "and in particular the rate of rainfall and wells in the basin" was unanimously accepted.

4. Another delegate proposed to substitute "other water resources" in sub-paragraph 3 (e) by "other alternative resources" because certain benefits derivable from water, e. g. communication, power etc. could be derived by utilization of other resources, e. g. oil, gas, etc.

5. Still another delegate suggested that the sub-paragraph 3 (e) of the rapporteur's draft may be read as follows:

- "(e) The availability of other water resources within that portion of the international drainage basin that lies in each co-basin State."

6. It was proposed by one delegate to renumerate the factors considered in paragraph 3 as follows :

- Sub-paragraph (c) becomes (a),
- Sub-paragraph (a) becomes (b), and
- Sub-paragraph (b) becomes (c).

PROPOSITION-IV

Text of the rapporteur's formulation

"1. Every basin State shall act in good faith in the exercise of its rights on the waters of an international drainage basin in accordance with the principles governing good neighbourly relations.

2. A basin State may not therefore undertake works or utilisation of the waters of an international drainage basin which would cause substantial damage to another basin State unless such works or utilisations are approved by the States likely to be adversely affected by them or are otherwise authorised by a decision of a competent international court or arbitral commission."

Summary of Discussions

1. One delegate stated that paragraph 2 of the proposition is not acceptable to its delegation and that he proposed to replace the same by the following amendment :

"Consistent with the principles of sovereign equality of all States, every basin State should have due regard to the rights of co-basin States in the exercise of its right to use the waters of an international drainage basin."

2. Another delegate objected to the said proposition, and suggested that the word "shall" in paragraph 1 should be replaced by the word "must" so that it gives the firm confirmation of an obligation. He supported the suggestion made by Dr. Aziza Fahmi that Proposition IV should just state the rules and the procedure to be followed in the settlement of disputes should be subject to special propositions.

No agreement was reached on this question.

PROPOSITION-V

Text of the rapporteur's formulation

"In determining preferences among competing uses of different co-basin States of the waters of an international drainage basin, special weight should be given to uses which are the basis of life, such as the consumptive uses."

Summary of Discussions

1. One delegate objected to the wording of Proposition V in its present form and suggested a proposal along the lines of Article VI of Helsinki Rules giving no preference to competing uses.

2. One delegate suggested the deletion of the phrase "the consumptive uses" at the end of the proposition to avoid the ambiguity in the interpretation of the uses which the phrase might imply. Another delegate agreed to the deletion and proposed adding "are essential to sustain life" after the word "which."

3. No agreement was reached on this proposition.

PROPOSITION-VI

Text of the rapporteur's formulation

"A basin State may not be denied the present reasonable use of the waters of an international drainage basin to reserve for a co-basin State a future use of such waters."

Summary of Discussions

1. One delegate proposed to substitute the word "present" in the first sentence by the word "existing."

2. Another delegate proposed to adopt the suggestion made in the report of Dr. Aziza Fahmi, that is to say, to add the words "and equitable" after the word "reasonable."

3. Still another delegate supported the rapporteur's formulation.

PROPOSITION-VII

Text of the rapporteur's formulation

"1. An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing *but more important* incompatible use.

2. (a) A use that is in fact operational is deemed to have been an existing use from the time of the initiation of construction directly related to the use or, where such construction is not required, the undertaking of comparable acts of actual implementation.

(b) Such a use continues to be an existing use until such time as it is discontinued with the intention that it be abandoned.

3. A use will not be deemed an existing use if at the time of becoming operational it is incompatible with an already existing reasonable use."

Summary of Discussions

1. One delegate proposed to the following phrase at the beginning of paragraph 1 of the present proposition, namely, "with the exception of existing uses in arid lands" and to add paragraph 1 (b) dealing with compensation as follows :

"The decision to terminate one use in order to accommodate another use in accordance with the preceding paragraph shall be coupled with the compensation to be paid for losses incurred for terminating the use."

2. Another delegate supported the rapporteur's formulation.

3. No agreement was reached on this proposition.

4. Another delegate suggested an amendment to paragraph 2 (a) and (b) in view of the ambiguous and undefined terms used in both paragraphs. An amendment was proposed to substitute paragraph 2 (a) and (b) by "A use shall be deemed to be an existing use when it is in fact in operation."

There was no agreement on this question.

(Note : Before starting the discussions on the Propositions VII to X, a discussion took place regarding whether the Sub-Committee could proceed in its deliberations with only four members out of ten, and whether a quorum was necessary according to the rules of procedure. It was decided to proceed with the work as the rules of procedure were silent on the quorum question and in view of the precedent at the inter-sessional meetings in Colombo in September 1971).

PROPOSITION-VIII

Text of the rapporteur's formulation

"1. Consistent with the principle of equitable utilization of the waters of an international drainage basin a State must prevent any new form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause substantial damage in the territory of a co-basin State, regardless of whether or not such pollution originates within the territory of the State.

2. Water pollution, as used in this Proposition, refers to any detrimental change resulting from human conduct in the natural composition, content or quality of the waters of an international drainage basin."

Summary of Discussions

1. It was pointed out in the report of Dr. Aziza Fahmi that Proposition VIII, paragraph 1 was drafted in an improper manner because a State cannot be responsible for pollution outside its country where it has no control. It was thus suggested by a delegate to add the following at the end of this paragraph, viz. "if it is caused by the State conduct." After some discussion, it was agreed to adopt that suggestion after substituting "if" by "provided that."

2. One delegate proposed to change the order of the paragraphs, namely, to exchange the places of paragraph 1, and paragraph 2. However, another delegate objected to the change of paragraphs. No agreement was reached on the proposal.

3. Another delegate suggested to add the words "and salinity" between the words "pollution" and "or any increase" and between "such pollution" and "originates".

PROPOSITION-IX

Text of the rapporteur's formulation

"Any act or omission on the part of a basin State in violation of the foregoing rules may give rise to State responsibility under international law. The State responsible shall be required to cease the wrongful conduct and compensate the injured co-basin State for the injury that has been caused to it, unless such injury is confined to a minor inconvenience compatible with good neighbourly relations."

Summary of Discussions

1. A suggestion was made in the report of Dr. Aziza Fahmi to begin the Proposition with reference to the doctrine of good faith.

2. A delegate suggested to replace the first sentence of the proposition by the following sentence :

"Any act or omission on the part of the co-basin State in contradiction of the foregoing Propositions III to VIII shall be a violation of law, a breach of good faith or abuse of right that gives rise to State responsibility."

3. Another delegate proposed the following amendment to the proposition :

"In the case of violation of the foregoing rules, the State responsible shall be required to cease the wrongful conduct and compensate the injured co-basin State for the injury caused to it unless such injury is confined to a minor

inconvenience compatible with the good neighbourly relations."

One delegate objected to this amendment, while another delegate supported the present draft proposition.

4. No agreement was reached on the proposition.

PROPOSITION-X

Text of the rapporteur's formulation

"A State, which proposes a change of the previously existing uses of the waters of an international drainage basin that might seriously affect utilization of the waters by another co-basin State, must first consult with the other interested co-basin States. In case agreement is not reached through such consultation, the States concerned should seek the advice of a technical expert or commission. If this does not lead to agreement, resort should be had to the other peaceful methods provided for in Article 33 of the United Nations Charter and, in particular, to international arbitration and adjudication."

Summary of Discussions

One delegate suggested to replace the rapporteur's formulation and incorporate Articles XXVI to XXXVII of the Helsinki Rules instead. Another delegate remarked that the Helsinki Rules relating to the settlement of disputes would in that case be more voluminous than the substantive propositions and supported the view that no change be made to the present wording of the proposition. One delegate supported this view.

2. Another delegate suggested to take Article XXIX of the Helsinki Rules as paragraph 1 of the present proposition and as for paragraph 2 the rapporteur's formulation should be substituted by the following sentences, viz.

"Disputes between co-basin States shall be settled on the basis of the foregoing proposition and in accordance with Article 33 of the Charter of United Nations."

**VI. THE LAW RELATING TO INTER-
NATIONAL SALE OF GOODS**

(i) INTRODUCTORY NOTE

The subject "The Law relating to International Sale of Goods" was originally included in the programme of work of this Committee under Article 3 (c) of its Statutes at the suggestion of the Government of India. A study concerning the rules of conflict of laws relating to international sales and purchases was prepared by the Secretariat and was placed before the Committee at its fourth session held in Tokyo in 1961. The matter was considered by a sub-Committee at the Tokyo Session which recommended collection of further material. It was not possible to make further progress on this subject for some time in view of the Committee's preoccupation with a number of references by member governments under Article 3 (b) of the Committee's Statutes which needed urgent attention.

The United Nations Commission on International Trade Law at its first session held in New York in 1968 selected for its consideration "International Sale of Goods" as a priority item and the subject was accordingly taken up at its second session held in Geneva during March 1969. In the course of discussions in UNCITRAL the representatives of Ghana and India suggested that the Asian-African Legal Consultative Committee should be requested to revive its consideration of the subject and consequently the subject was taken up as a priority item at the eleventh session of the Committee held in Accra in January 1970.

At the Accra Session, the Committee had before it a brief prepared by the Secretariat dealing with the topics which were generally discussed at the second session of UNCITRAL in March 1969. These topics included : (i) the Law relating to International Sale of Goods in general ; (ii) the two Hague Conventions of 1964 ; (iii) the Hague Convention on the Law applicable to International Sale of Goods of 1955 ; (iv) Standard contracts and general conditions of sale ; (v) Incoterms and other Trade Terms ; and (vi) Time-Limits and Limitation (Prescription) in the field of International Sale of Goods. The

Committee considered the subject in the plenary and after noting the views and comments made by the various Delegations as well as by the Secretary-General of the Hague Conference on Private International Law, the Secretary of UNCITRAL, and the representatives of ECA and the Arab League, the Committee decided to constitute a Sub-Committee composed of the representatives of Ceylon, Ghana, India, Japan, Nigeria, Pakistan and the United Arab Republic for giving detailed consideration to the subject. The Sub-Committee primarily concentrated its attention on two points, namely (i) how to increase the familiarity of the member governments with the work done by UNCITRAL and other organisations; and (ii) make recommendations regarding the manner in which the subject might be discussed in the Committee on a regular basis. The Sub-Committee also discussed the question of conclusion and adoption of standard or model contracts, particularly in relation to commodities of special interest to buyers and sellers in the Asian-African region.

The subject was taken up for further consideration at the twelfth session of the Committee held in Colombo in January 1971 in the light of further work done in UNCITRAL and the replies received from governments and trading organisations in the Asian-African region to a circular letter issued by the Committee's Secretariat inviting their views regarding the desirability of drawing up of model or standard contracts and the commodities in respect of which adoption of such model or standard contracts or general conditions of sale might be helpful. The Committee after some discussion in the plenary decided to refer the subject for detailed consideration to a Sub-Committee whose composition was the same as that appointed at the Accra Session with the addition of Iraq. The meetings of the Sub-Committee were also attended by the Secretary-General of UNIDROIT and the Secretary of UNCITRAL. The questions mainly considered by the Sub-Committee were: (i) adoption of standard or model contracts in relation to specific commodities of special interest to buyers and sellers of Asian-African region; (ii) Articles 1 to 17 of the Hague Convention on Uniform Law on International Sales of 1964 with a view to determine their utility for the countries of the Asian-African

region; and (iii) the Law of Prescription (Limitation) in the field of International Sale of Goods on the basis of the Questionnaire and Preliminary Draft by the Working Group appointed by UNCITRAL.

At the Lagos session, the Standing Sub-Committee took up for discussion the draft standard form of contract for sale of goods prepared by the joint rapporteur after taking into account the various terms and conditions in the model contracts and general conditions of sale in use in various regions of the world. The Assistant Secretary of UNCITRAL and the Secretary-General of UNIDROIT also attended the meetings of the Sub-Committee. After some discussion, the Sub-Committee drew up a report recommending certain amendments to the draft standard form of contract and directed the Secretariat to elicit information from the member countries in relation to the question of arbitration clauses used in the contracts relating to the types of transactions intended to be governed by the proposed standard form of contract in order that the Sub-Committee may make further studies in that regard. During the fourteenth session of the Committee held in New Delhi in January 1973, the subject was further considered by the Standing Sub-Committee.

At the fourteenth session, a letter addressed to the Secretary-General of the Committee from the Legal Counsel of the United Nations informing the Committee of the U. N. General Assembly resolution 2929 (XXVII) to convene a U. N. Conference on "Prescription (Limitation) in the International Sale of Goods" was brought to the notice of the Sub-Committee. The letter also called for comments and proposals from the Committee on the Draft Convention on Prescription and requested that these should reach the U. N. Secretary-General not later than the 30th June 1973. The Sub-Committee, therefore, in its subsequent meetings examined the provisions of the Draft Convention on Prescription. While generally approving the approach of the Draft Convention as a workable compromise, the Sub-Committee suggested a number of points which needed to be considered in relation to Articles 1, 2, 3, 7, 10, 11, 12, 15.

16, 17, 18, 19, 22, 30 and 36 at the U. N. Conference on Prescription.

The Committee's Secretariat is at present engaged in preparing the final drafts of certain model contracts with the view that the same may be placed before a special meeting to be convened with the participation of representatives of trade and other interested organisations engaged in the field.

(ii) COMMENTARY PREPARED BY THE SECRETARIAT OF THE COMMITTEE ON THE DRAFT CONVENTION ON PRESCRIPTION (LIMITATION) IN THE FIELD OF INTERNATIONAL SALE OF GOODS

INTRODUCTORY

The United Nations Commission of International Trade Law (UNCITRAL), at its second session established a Working Group on Time-limits and Limitations (Prescription) and requested it to study the subject of Time-limits and Limitations (Prescription) in the field of the International Sale of Goods. At its third session, the Commission, having considered a report of the Working Group (A/C N. 9/30), requested it to prepare a preliminary draft convention setting forth uniform rules and to submit this draft to the Commission at its fourth session.

In conformity with the foregoing decision, the Working Group submitted to the Commission at its fourth session a report (A/C N. 9/50 and Corr. 1) setting forth the text of a preliminary draft Uniform Law on Prescription (Limitation) in the International Sale of Goods, a commentary on the draft Uniform Law, and the text of a questionnaire addressed to governments and international organizations designed to obtain information and views regarding the length of the limitation or prescription period and other related matters. At that session, the Commission, after having considered various issues arising out of the preliminary draft, invited members of the Commission to submit to the Secretary-General any proposals or observations they might wish to make with respect to the preliminary draft and requested the Secretary-General to analyse the replies received to the questionnaire and to submit the analysis to the members of the Working Group. The Commission further requested the Working Group to prepare a final draft of the Uniform Law on Prescription (Limitation) for submission to the

Commission at its fifth session; in this work, account would be taken of the views expressed during the discussion of the subject at the fourth session, of the analysis by the Secretariat of replies to the questionnaire mentioned above, and of any proposals or observations communicated to the Working Group. Pursuant to this decision, the Working Group held its third session from 30 August to 10 September 1971 and prepared a revised draft Convention on Prescription (Limitation) in the International Sale of Goods.

At the fifth session, the Commission had before it the report of the Working Group on its third session (A/C N. 9/70), to which the text of the draft convention was annexed, and a commentary on the draft Convention which was issued as an addendum (A/C N. 9/70/Add. 1). The Commission also had before it a compilation of the studies and proposals considered by the Working Group (A/C N. 9/70/Add. 2), a note by the Secretariat regarding consideration of the report of the Working Group, and a note by the Secretariat concerning alternative methods for the final adoption of the draft Convention.

The Commission discussed, article by article, the draft Convention submitted by the Working Group and in the course of this discussion, various amendments and proposals were suggested by the members. The Commission adopted some articles without change and requested the Working Group to reconsider other articles in the light of the proposals and amendments that were made. For this purpose, the Working Group held several meetings in the course of the session and submitted a revised text of the draft Convention.

The Commission considered this revised text and approved most articles as revised. The Commission also set up a number of drafting parties to consider further the language of certain articles and adopted these articles as recommended by the drafting parties. The Commission, however, was not able to reach a consensus on certain provisions and, to indicate this fact, placed these provisions within square brackets for final consideration by an international conference of plenipotentiaries.

The Commission considered alternative methods for the final adoption of the draft Convention on Prescription (Limitation) in the International Sale of Goods in the light of the note submitted by the United Nations Secretariat on this subject. A statement was made by the representative of the Secretary-General on the financial implications of alternative procedures of adoption. All representatives who took the floor expressed the opinion that, in view of the highly technical and specialized nature of this draft convention, the Commission should recommend to the General Assembly that an international conference of plenipotentiaries be convened to conclude, on the basis of the draft articles approved by the Commission, a Convention on Prescription (Limitation) in the International Sale of Goods.

The Commission at its 125th meeting on 5th May 1972, adopted unanimously the following decisions :

The United Nations Commission on International Trade Law

1. **Approves** the text of the draft Convention on Prescription (Limitation) in the International Sale of Goods, as set out below in paragraph 21 of the report of the Commission, noting that no consensus was reached with respect to those provisions appearing within square brackets ;
2. **Requests** the Secretary-General :
 - (a) To prepare, together with rapporteur of the Commission, a commentary on the provisions of the draft Convention which would include both an explanation of the provisions approved by the Commission and references to reservations by members of the Commission to such provisions;
 - (b) To circulate the draft Convention, together with the commentary thereon, to governments and to interested international organizations for comments and proposals;

- (c) To prepare an analytical compilation of those comments and proposals and to submit this compilation to governments and to interested organisations;
3. **Recommends** that the General Assembly should convene an international conference of plenipotentiaries to conclude, on the basis of the draft Convention adopted by the Commission, a Convention on Prescription (Limitation) in the International Sale of Goods. (Vide report of the work of the fifth session of UNCITRAL).

In order to enable member governments and other Asian African governments to evaluate the draft Convention and to form their views on it, the Secretariat has prepared a commentary which deals with it article by article. This commentary reproduces first the text of the draft Convention which was first debated at the first session of UNCITRAL, and below it the final text that was adopted after the debates. The commentary seeks to explain and analyse the final text, and in certain cases to indicate areas in which different views might be held.

The ideas which motivated the formulation of this draft Convention may be briefly indicated. The contract of international sale of goods is a most important element in international trade and commerce. The legal system which would govern such a contract, and the rules of limitation applicable to the contract, are discovered by applying the rules of the conflict of laws of the forum where an action on the contract is brought. It is clear that this situation presents a great deal of uncertainty. In the first place, which system of conflict of laws is applied will depend on the forum in which the action is brought. The different systems of conflict of laws differ in their rules regarding the selection of the legal regime to govern limitation. Further, even after a particular municipal legal system has been indicated as governing limitation, the rules of that legal system may not be clear, or may be unfair. Considerable difficulties are, therefore, created for business-men and their legal advisers. The purpose of this draft Convention is to have a law of limitation which

will be both clear and fair to both parties. It has also been the aim to secure as great a uniformity as possible on the ambit of its operation. Although the Convention deals with only a subsidiary aspect of the sales transaction (i.e. limitation), the achievement of uniformity and certainty even in this field is eminently desirable.

PART 1. UNIFORM LAW

Sphere of Application of the Law

Article 1 (A/CN. 9/70, Annex I)

- (1) This Uniform Law shall apply to the limitation of legal proceedings and to the prescription of the rights of the buyer and seller relating to a contract of international sale of goods [or to a guarantee incidental to such a contract]
- (2) This Law shall not affect a rule of the applicable law providing a particular time-limit within which one party is required, as a condition for the acquisition or exercise of this claim, to give notice to the other party or perform any act other than the institution of legal proceedings.
- (3) In this Law ;
 - (a) "buyer" and "seller" means persons who buy or sell goods, and the successors to and assigns of their rights or duties under the contract of sale ;
 - (b) "party" and "parties" means the buyer and seller [and persons who guarantee their performance] ;
 - (c) ["guarantee" means a personal guarantee given to secure the performance by the buyer or seller of an obligation arising from the contract of sale] ;
 - (d) "creditor" means a party seeking to exercise a claim, whether or not such a claim is for a sum of money ;

- (e) "debtor" means a party against whom the creditor seeks to exercise such a claim ;
- (f) "legal proceedings" includes judicial, administrative and arbitral proceedings ;
- (g) "person" includes any corporation, company or other legal entity, whether private or public ;
- (h) "writing" includes telegram and telex.

PART 1 : SUBSTANTIVE PROVISIONS

Sphere of application

Article 1 (Final draft)

1. This Convention shall apply to the limitation of legal proceedings and to the prescription of the rights of the buyer and seller against each other relating to a contract of international sale of goods.
2. This Convention shall not affect a rule of the applicable law providing a particular time-limit within which one party is required, as a condition for the acquisition or exercise of his claim, to give notice to the other party or perform any act other than the institution of legal proceedings.
3. In this Convention :
 - (a) "Buyer" and "seller" or "party" means persons who buy or sell, or agree to buy or sell goods, and the successors to and assigns of their rights or duties under the contract of sale ;
 - (b) "Creditor" means a party who asserts a claim, whether or not such a claim is for a sum of money ;
 - (c) "Debtor" means a party against whom the creditor asserts a claim ;
 - (d) "Breach of contract" means the failure of a party to perform the contract or any performance not in conformity with the contract ;

- (e) "Legal proceedings" includes judicial, administrative and arbitral proceedings ;
- (f) "Person" includes corporation, company, association or entity, whether private or public ;
- (g) "Writing" includes telegram and telex.

Commentary

This article, together with Articles 2 to 6, define the sphere of application of the Convention. This question will be dealt with as a whole after each of these articles has been commented on.

In the course of the debates at the fifth session of UNCITRAL, it was unanimously decided to exclude the application of the Convention to guarantees, as a guarantee constituted an independent contract different in its nature from a sale. This decision, it is submitted, is to be welcomed.

The retention of the two phrases "...*limitation of legal proceedings* and to the *prescription of the rights of the buyer and seller*....." (which might at first sight appear unnecessary) was due to the fact that certain legal systems used the concept of limitation of actions (without affecting the rights which were the subject-matter of the actions) and others the prescription (and extinction) of the rights themselves. The Convention was intended to apply to both cases.

The insertion of the phrase "against each other" has been made to clarify beyond doubt the point that the Convention is only intended to apply to parties in privity of contract. It is not to apply to possible rights of third parties, other than the third parties coming within the definition in 1.3 (a) (A/CN.9/SR.94, p.5).

The intention of the draft appears to be to exclude claims in tort or delict as between buyer and seller relating to the contract (A/CN.9/50, p.7 and A/CN.9/70, p.10) and if this is so, the question as to whether the words 'relating to a contract of sale' should not be amended to make this clearer is worthy of consideration.

The purpose of 1.2 is to preserve time-limits which may have to be observed by the parties under the applicable law. Such time-limits are often specified in contract documents. Thus a buyer dissatisfied with the quality of goods may be required to notify the seller of his dissatisfaction "promptly" or "within a week". The effect of non-observance of these time-limits will be determined by the applicable law.

There has been some modification of the technical definitions contained in 1.3 of the earlier draft, including the insertion of a definition of breach of contract. Questions which may require consideration in this connection are the following :—

- (a) Whether the meaning of 'administrative proceedings' in 1.3 (e) should not be clarified ;
- (b) The definition of 'person' is intended to include any group, whether or not it has legal personality. The application of this idea to common law systems may create some difficulty. Thus a common law partnership would presumably be a person within the meaning of this definition (A/CN.9/SR. 115).

As the article now stands, the Convention applies to all legal proceedings and all rights of the buyer and seller against each other. A difference of view arose in the course of the debates as to whether actions which seek to annul or set aside the contract on the ground that it is void or non-existent should be excluded from the scope of the law. The argument in favour of exclusion appeared to be that such actions, founded on the basis that the contract is invalid, can be classified as distinct from actions which are founded on the basis that the contract is valid, but has been broken. The arguments against exclusion are —

- (a) That there will be uncertainty as to when an action is one for nullity, and when it is not.
- (b) In principle it is desirable that all actions relating to a contract be subject to the same period of limitation.

- (c) A businessman will not expect two periods of limitation to govern the contract, depending on whether the contract is a nullity or not.

A compromise has been reached by providing that an exclusion of actions for nullity can be achieved by reservation (Article 34).

Article 2 (A/C N. 9/70. Annex I)

- (1) Unless otherwise provided herein, this Law shall apply without regard to the rules of private international law.
- (2) [Notwithstanding the provision in paragraph 1 of this article, this Law shall not apply when the parties have expressly chosen the law of a non-contracting State as the applicable law.]

Article 3 (A/C N. 9/70. Annex I)

- (1) For the purpose of this Law a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the seller and buyer have their places of business in different States.
- (2) Where a party to the contract of sale has places of business in more than one State, his place of business for the purposes of paragraph 1 of the article shall be his principal place of business, unless another place of business has a closer relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract.
- (3) Where a party does not have a place of business, reference shall be made to his habitual residence.
- (4) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.