Nevertheless, conflicts problems were irritating and had to be solved in order to further international trade and improve international relations. He remarked that his reasons for attending the Sessions of the Committee were to keep open lines of communication between the two organisations, to gain a fresh insight into problems of common interest, and to be of assistance by showing the specialised methods of thinking developed by his organisation.

In relation to the subject of the International Sale of Goods, his organisation was interested in the two topics of the choice of law and the unification of law. With regard to the first of these topics, his organisation had drafted in 1955 the Convention on the law applicable to international sales of corporeal movables. Under this Convention, the parties were free to choose the applicable law. Failing agreement, the law of the habitual residence of the seller was applicable. In 1964 the Convention on the Uniform Law on International Sales had been signed, which, *inter alia*, attempted to eliminate the need for conflicts rules in international sales. Thereafter, there had been a certain hesitancy among States in acceding to the 1955 Convention. However, the Federal Republic of Germany and the Netherlands in ratifying ULIS, had stated that it would only be applied as between Contracting States. The need for a conflicts rule in other cases had therefore revived. The revision of ULIS by UNCITRAL had also resulted in the need for a conflicts rule in certain cases.

He was therefore of the view that it was important for Asian and African States to pay attention to the 1955 Convention.

The leader of the delegation of *Sri Lanka* observed that the work of the UNCITRAL on International Shipping Law was of considerable importance. The developing countries had now been presented with another opportunity to rectify an imbalance in a field of law which often had a decisive bearing on the economic well-being of the relatively poor countries of the world. He remarked that it was a historical fact that the present shipping law and practices were the creation of the

colonial powers of the 18th, 19th and early 20th centuries. Shipowners had played a vital role in the sustenance of the empires of such countries, and it was therefore not surprising that the present system of law was designed to protect shipowners' interests while neglecting the legitimate interests of shippers and consignees. He further stated that although most of the developing countries had, in a modest way, started their own shipping business, this was no justification for perpetuating a law heavily weighted in favour of shipowners. He stated that so far as his country was concerned, it was primarily a ship-user in respect of both essential exports and imports. The Five Year Plan of his Government therefore specifically provided for the development of a national shipping fleet.

In the highly competitive world of trade, it was essential that both the financial interests of shippers and also the national interests behind them should be protected from shipowners who, between acceptance of the goods and their delivery, bore a responsibility to which hitherto a commensurate liability had not been attached. It was the view of his delegation that either the proposed new Convention or an amendment to the present one should cast upon the shipowner liability for loss caused to the shipper by delay resulting from an intentional or negligent act or omission on the part of the former, his servants and agents.

Another area in which change was desirable was that of the law relating the issue of a bill of lading. The unlimited power of freedom of contract presently existing made it possible to contract out of such an obligation. Shipowners, being in a powerful bargaining position, were able to do this, and it had already resulted in the creation of shipping practices by which shipowners undertook to carry goods on informal agreements, thus greatly increasing the vulnerability of the shipper to staggering losses, the effects of which would be felt at a national level. He therefore, felt that every assistance should be given by the developing nations to the work of UNCITRAL on international shipping legislation so that the present imbalance would be speedily remedied.

The delegate of *Japan* stated that he would first like to

thank the representative of UNCITRAL Professor Kazuaki Sono, for the lucid statement introducing the work of UNCITRAL, with special reference to the proceedings at its 6th Session relating to International Commercial Arbitration and International Shipping Legislation. His statement had given a comprehensive picture of the recent activities of the Commission and its Working Groups on all subjects. He had also listened with great interest to the clear statement made by Mr. Van Hoograten, the representative of the Hague Conference on Private International Law. He observed that since UNCITRAL was established six years ago, it had made considerable progress in the unification of international trade law. He believed that the Commission had already become one of the most productive bodies in this field, and it was also making a useful contribution to the dissemination of information on this subject. He took this opportunity of expressing the appreciation of his delegation of the work done by UNCITRAL.

He also wished to take this opportunity of saying a few words on the draft Convention on Prescription (Limitations) in the International Sale of Goods. This draft was the first concrete achievement of UNCITRAL in its first attempt to formulate a uniform law. His delegation was aware that it was not an easy task to bridge the differences existing between the prescription of rights in the civil law system and the limitation of actions in the common law system. He expressed the earnest hope that the Conference of Plenipotentiaries to be held in New York would be successful and constitute a landmark in the field of the unification of trade law.

The Working Groups of the Commission were now considering a Uniform Law on the International Sale of Goods, International Legislation on Shipping with particular reference to Bills of Lading, and a Uniform Law on Negotiable Instruments. His delegation wished to refrain from offering any substantive comments on these subjects at this stage, since the various Working Groups had not completed the tasks entrusted to them. He only wished to say, in this regard, that careful consideration should be given to customs and practices already prevailing in international business.

Resuming the discussion at the Sixth Plenary Meeting held on Monday, the 14th January, 1974, the delegate of *Nigeria* stated that it was natural that today the problems of the Law of the Sea were occupying the attention of everybody. Nevertheless, he wished to emphasize that Nigeria attached the greatest importance to the work of the United Nations Commission on International Trade Law. While the progressive development and codification of International Law were matters of yesterday and today, the progressive development and codification of International Trade Law were matters of today and tomorrow. To the developing world, trade was of the greatest importance, for improved trade brought about development and a better balance of payments position. Although questions of international law were important, the developing world was more beset by international trade problems. Matters such as the impact of multinational corporations on the economy. and matters relating to invisibles such as shipping and insurance, all affected the welfare and happiness of the people. In regard to the specific areas of work being presently covered by UNCITRAL, he observed that the revision of the Uniform Law on International Sale of Goods was of great importance, as all countries were buyers and sellers of goods. He was hopeful that the work would be brought before a Conference of Plenipotentiaries. The work of International Shipping Legislation concerning the revision of the Brussels Convention of 1924 was also of great importance. That Convention titled the balance in favour of shipowners and it was now necessary to redress the balance. The work of an International Payments was also of the greatest significance to the developing countries. The attempt in that field was to unify the law of the common law and civil law countries on the law of cheques and other bankers drafts. He, therefore, urged the Committee in the years to come to pay more attention to the questions of international trade so that the developing world may better its position and contribute to the progress and happiness of its people.

The Delegate of *Nepal* commented on the work of UNCITRAL towards development of international trade law in

general and in the field of international sales of goods in particular. He expressed particular satisfaction concerning the progress made by UNCITRAL on subjects like Prescription in the Law of International Sales, Uniform Rules on International Sales, Model Contract Provisions and International Payments.

Speaking on the subject of Bills of Lading, the delegate recognised that developing countries were mostly cargo-owners and that most of their exports were either agricultural products and other heavy or unfinished goods. He also expressed his concern over the injustices done to the developing countries under the Hague Rules. He strongly felt that any future convention or international agreement in this field should be able to rectify those injustices and remove uncertainties and ambiguities of the Hague Rules concerning liability of the shipowners in regard to loss of or damage to cargo taking into consideration the minimising of insurance costs to cargo-owners so that the interests of the developing countries could best be served.

As regard International Commercial Arbitration, the delegate did not have any objection to the creation of an 'Arbitration Institution' under the auspices of the respective commercial organisations. In his view, apart from the general questions involved in international commercial arbitration – who might be parties in the disputes subject to arbitration, form of the arbitration agreement, its content, the jurisdiction of the arbitral tribunal, the applicable rules of procedures, time limits, and the rendering, content, recognition and enforcement of the award, any future convention on that subject should properly safeguard the interests of developing countries in terms of the cost factor and foreign currency problems that would be involved in the practical implementation of any arbitration agreement.

(iii) REPORT OF THE SUB-COMMITTEE ON TRADE LAW MATTERS

The Sub-Committee on International Shipping Legislation (Bills of Lading) and International Commercial Arbitration had five meetings, three of which were devoted to discussion on International Shipping Legislation, and two to International Commercial Arbitration.

The following Delegates participated in the discussions.

Delegates

Arab Republic of Egypt :

Hon'ble Mohamoud Abdel Aziz El Ghamry (Chairman)
Mr. Mohamed Moustapha Hassan

India :

Mr. K.K. Chopra

Indonesia :

Mr. Abdul Kobir Sastradipura

Iraq :

Mr. Amer Araim
Mr. Sabah Al-Rawi

Japan :

Mr. Michitoshi Takahashi
Mr. Akira Takakuwa

Pakistan :

Mr. A.G. Chaudhary

Sierra Leone :

Mr. P.P.C. Boston

Sri Lanka :

Mr. P.H. Kurukulasuriya (Rapporteur)

Tanzania :

Mr. E.E. Mtango
Mr. S.A. Mbenna

The Sub-Committee Meetings were also attended by the following Observers from the UNCITRAL Secretariat and the Hague Conference on Private International Law.

UNCITRAL : Prof. K. Sono

Hague Conference on Private International Law — Mr. M. Van Hoogstraten.

INTERNATIONAL SHIPPING LEGISLATION

(Bills of Lading)

1. A Sub-Committee consisting of nine (9) members, namely, Arab Republic of Egypt, Iraq, India, Indonesia, Japan, Pakistan, Sierra Leone, Sri Lanka and Tanzania was set up at the first Plenary Meeting to consider the above-mentioned subjects now under review by the U.N. Commission on International Trade Law.

2. The leader of the delegation of the Arab Republic of Egypt, the Honourable Mohamoud Abdel Aziz El Ghamry was appointed Chairman, and Mr. P.H. Kurukulasuriya of the delegation of Sri Lanka was appointed Rapporteur for this Sub-Committee.

3. The Sub-Committee, at its first meeting held on 7th January, 1974, having examined in some detail the scope of the subjects before it, decided to confine its programme of work to the following specific topics :

(a) Liability of the carrier for delay.

(b) The scope of the application of the Brussels Convention (the International Convention for the unification of certain rules of law relating to Bills of Lading, signed at Brussels on 26 August, 1924).

Two specific problems were to be discussed :

(i) the question of the geographical applicability of the Convention as set out in Article 10 thereof and Article 5 of the Brussels Protocol of 1968 (Protocol to amend the International Convention for the unification of certain rules relating to Bills of Lading)

(ii) the question of the applicability of the Convention to ocean carriage under informal documents that evidence the contract of carriage but may not be regarded as documents of title, and to oral contracts of carriage.

(c) The appropriateness of the information required by Article 3(3) of the Brussels Convention to ocean carriage under informal documents, and whether the Convention should specify certain information that must be included in the Bill of Lading if it is to be considered negotiable.

(d) Validity and effect of letters of guarantee given to secure a false clean Bill of Lading.

(e) Legal effect of the Bill of Lading in protecting good faith purchasers of Bills of Lading, and whether provisions additional to those contained in Article 3(4) of the Brussels Convention and Article 1(1) of the Protocol are desirable.

4. The Sub-Committee also decided that its report be submitted to the Working Group of UNCITRAL dealing with the subject of Bills of Lading scheduled to commence sittings in February 1974.

5. At the first meeting of the Committee, the scope of the subject of International Commereial Arbitration was also discussed on the basis of a comprehensive brief prepared by the Secretariat of A.A.L.C.C. The Committee having examined in general the problems involved in International Commercial Arbitration decided to confine its deliberations to the following subjects :

(1) Institutional Arbitration and Ad Hoc Arbitration

(2) Constituting the arbitral tribunal

(3) Venue of the Arbitration

(4) The applicable law to determine the rights and obligations of the parties under the contract which is the subject matter of arbitration.

(5) Procedure in arbitration

(6) Arbitral awards

(7) Enforcement of foreign arbitral awards.

6. The Committee discussed the question whether it was advisable to draft a new convention of International Shipping Law with special reference to Bills of Lading, or whether it was sufficient to amend the present convention by a protocol embodying the necessary changes. Two delegates expressed the view that a new convention should be drafted to replace the present one, but in view of the fact that this involved discussion on the nature and scope of the amendments to the entirety of the present law, the Sub-Committee decided that it would be inadvisable to take a decision on the subject at the moment.

7. *Liability of the carrier for delay*

The Sub-Committee was of the view that an adequate and clear provision should be made in the new law governing Bills of Lading with regard to the liability of the carrier for delay. The Sub-Committee also appreciated the fact that delay

is a standard by-product in the field of shipping and that it is almost impossible for shipowners to regularly keep to strict schedules. The Sub-Committee was also of the view that there were certain circumstances which might cause delay in the performance of the contract which should be regarded as excuses. After an extensive exchange of views, the Sub-Committee came to the following conclusions :

(1) That it was essential that a specific and clear provision should be included in the convention with regard to the liability of the carrier for delay.

(2) That it was not advisable to list the circumstances that cause an excusable delay.

(3) That the excuses for delay should be set out in the convention in general terms, and

(4) That the liability of the carrier for delay should not be on the basis of strict liability but on the basis of fault.

While one delegate was of the view that there should be a definition of what constitutes delay, others were of the view that such a definiton was impracticable and unnecessary.

The Sub-Committee also decided that the following proposals should be placed before the UNCITRAL Working Group as reflecting the views of the Sub-Committee.

(1) The carrier shall be liable for all loss or damage caused by delay whether the delay consists of the late arrival of the vessel for the purpose of performing the contract of carriage, or late performance of the contract of carriage.

(2) The carrier shall be so liable to any lawful holder or transferee of a Bill of Lading or other similar document of title, or to anyone succeeding to the rights of such a person, and to all persons to whom

loss or damage could reasonably be foreseen at the time the delay occurred.

(3) (a) The carrier shall not be liable where he proves that the delay resulted from measures to save life or from reasonable measures to save property at sea. (Provided that where such measures to save life or property at sea result in financial gain to the carrier, the carrier shall pay to any person or persons who would otherwise be entitled to claim compensation from the carrier for loss or damage caused by such delay a sum not exceeding one-half of the financial gain so accruing and in any event not exceeding the loss or damage actually suffered by such person).

(b) The carrier shall not be liable where he proves that he, his servants and agents, took all measures that could reasonably be required to avoid the delay and its consequences.

(c) The carrier shall not be liable for any loss or damage which could not reasonably be foreseen at the time the delay occurred as likely to result from the delay.

(4) Where fault or negligence on the part of the carrier, his servants or agents, concurs with another cause to produce delay resulting in any loss or damage, the carrier shall be liable only for that portion of the loss or damage attributable to such fault or negligence, provided that the carrier bears the burden of proving the amount of loss or damage not attributable thereto.

(5) The burden of proof shall be on the claimant to establish :

(a) His status to maintain the action,

(b) Delay in terms of the contract of carriage, and

(c) The monetary value of the loss or damage.

8. *Scope of the Convention in regard to its geographical applicability*

It was pointed out that Article 10 of the Convention as amended by Article 5 of the Brussels Protocol of 1968 does not make the convention applicable to a Bill of Lading where the carriage is to a port in a Contracting State unless either sub-paragraphs (a) or (c) thereof apply.

The Sub-Committee decided that it was desirable that provision should be made in the proposed legislation to ensure the application of the convention to contracts of carriage covered by a Bill of Lading where the carriage is to a Contracting State.

9. *The applicability of the convention to ocean carriage under informal documents that evidence contracts of carriage but may not be regarded as documents of title*

It was pointed out that this problem appeared to arise in view of the shipping practice mainly prevalent in some Scandinavian countries of entering into contracts of ocean carriage under informal documents where no Bill of Lading is issued.

The Sub-Committee with the exception of one delegate agreed that provisions must be made to ensure that carriers do not enter into contracts of carriage which are not covered by a Bill of Lading or in other words, that the convention should ensure that a Bill of Lading covered every contract of ocean carriage. In this respect, the Sub-Committee with the exception of one delegate was of the view that the existing legislation in this connection was insufficient. One delegate, however, also adopted the position that it was not desirable to bring within the scope of the application of the convention contracts of carriage not covered by Bills of Lading and that the existing provisions in this regard were sufficient.

He supported his view with the following reasons :

(a) That maritime transport was itself slow moving and the cargo bulky, and hence delay in the issue of formal documents such as Bills of Lading was inherent.