border Insolvency and BOT Projects, the Commission identified the precise scope of the future work to be undertaken. The relevant details about the progress made on these topics are set out hereunder:

(I) DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

Background

The letters of credit were originally intended to be used in connection with the documentary sale of goods, but they are now being used for a number of other purposes, such as the works contracts, provision of services, or any other transaction where the act of performance for which payment is due may be established by documents such as a certificate of acceptance or completion or any other certificate, preferably by an independent party. These are commonly known as stand-by letters of credit.

While the traditional letter of credit provides the seller with a secure mechanism for payment by the buyer, the stand-by letter of credit is a default instrument in that it covers the risk of non-performance or defective performance by a contractor, supplier or other obligor. Guarantees issued by banks or other financial institutions serve the same function as stand-by letters of credit, but their distinguishing feature is the independence of the guarantor's undertaking from the underlying relationship between the principal and beneficiary.

Stand-by letters of credit and guarantees, whilst functionally similar, differ as to their legal treatment for the prime reason that the stand-by letter of credit is, after all, a letter of credit, and therefore, laws and regulations governing letters of credit would generally be applicable to stand-by letters of credit which might not be appropriate for the latter in view of its different purpose. As for guarantees, the legal framework is distinct from that governing stand-by letters of credit as it is characterized by a varied development of national laws, in particular case law, towards recognizing the independent legal nature of the guarantee. Thus, there exists considerable disparity and uncertainty in respect of the legal rules governing the two kinds of instruments. It has, therefore, been considered desirable to impart a greater degree of certainty and uniformity in this area.

The Commission, at its twenty-first session (1988) considered the report of theU.N. Secretary-General on this topic.[1] It agreed with the conclusion of that report that a greater degree of certainty and uniformity was desirable and approved a suggestion made in that report that future work be envisioned

1. Doc. No. A/CN.9/301.

in two stages, the first relating to contractual rules or model terms and the second pertaining to statutory law.

With regard to the first stage, the Commission welcomed the initiative taken by the International Chamber of Commerce (ICC) in preparing Uniform Rules on Guarantees and felt that comments and possible recommendations by the Commission could help to enhance the worldwide acceptability of such rules. The twelfth session of the Working Group on International Contract Practices held in Vienna (November-December 1988) was devoted to that purpose. That Working Group also recommended that work be initiated in the Commission on the preparation of a uniform law on independent guarantees and stand-by letters of credit, whether in the form of a model law or of a convention. That recommendation was accepted by the Commission at its twenty-second session (1989).[2] The Working Group devoted its thirteenth to twenty-third sessions (1990-95) to the preparation of a uniform law.[3] The work was carried out on the basis of the working papers prepared by the secretariat on the possible issues to be included in the uniform law.[4] The draft articles of the uniform law, which the Working Group decided should as a working assumption be in the form of a draft Convention, were submitted by the secretariat.[5] The Working Group also had before it a proposal by the U.S.A. relating to rules for stand-by letters of credit. The text of the draft Convention as presented to the Commission by the Working Group was contained in the annex to document No. A/CN.9/408. After examining the Draft Convention submitted by the Working Group and incorporating amendments therein, the Commission formally adopted the Draft Convention. It then transmitted the text to the General Assembly along with a request to establish an International Convention on Independent Guarantees and Stand-by Letters of Credit by means of a resolution and open it for signature. The General Assembly at its fiftieth Session has adopted and opened for signature or accession the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit.

An Overview of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit

The *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* consists of 29 articles arranged under seven chapters.Chapter I on *Scope of the Application* has Articles 1 to 4; Chapter

2. Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), para 8.
3. The reports of these sessions are contained in Doc. 9/330, 342, 345, 358, 361, 372, 374, 388, 391, 405 and 408.
4. Doc. Nos. A/CN.9/WG.II/WP.63, WP.70 and WP.71.
5. Doc. No. A/CN.9/WG.II/WP.67, WP.73 and Add. 1, WP.76 and Add. 1, WP.80 and WP.83.

II on *Interpretation* consists of Articles 5 and 6; Chapter III entitled *Form and Content of Undertaking* has Articles 7 to 12; Chapter IV on *Rights, Obligations and Defences* is made up of Articles 13 to 19; Chapter V on *Provisional Court Measures* has a single provision, namely Article 20; Chapter VI on *Conflict of Laws* consists of Articles 21 and 22; and the final Chapter VII sets forth the final Clauses in Articles 23 to 29.

Article 1 on *Scope of Application* delineates the scope of application of the Convention. The Convention applies to an undertaking, i.e. an independent guarantee or a stand-by letter of credit if the guarantor/issuer has his place of business in a Contracting State or if the rules of private international law led to the application of the law of a Contracting State. Parties have, however, been given the fullest freedom to opt out of the Convention as a whole. Paragraph (2) is intended to recognize a right of the parties to a commercial letter of credit to opt into the Convention. The intent of paragraph (3) is that the provisions of Articles 21 and 22, which lay down rules for resolving conflict of laws, apply in any situation in which a choice would have to be made between the laws of different States in order to determine the applicable to a guarantee or stand-by letter of credit, whether or not in the end it is determined that the Convention will apply. This provision is intended to provide a binding rule of private international law to be used in determining the applicable law and its focus, thus, is not limited to the provision in paragraph (1) (b).

Article 2 on *Undertaking* defines the term 'undertaking' as an indepedent commitment, known in international practice as an independent guarantee or as a stand-by letter of credit given by a bank or other institution or persons (guarantor/issuer) to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by supporting documents, indicating that payment is due because of a default in the performance of an obligation...". It is clear that the Convention is intended to cover only independent guarantees and stand-by letters of credit and is not applicable to commercial letters of credit and other instruments of an independent and promissory character. Such undertakings must provide for demands for payment in documentary form. Thus, undertakings providing for oral demands are outside the scope of application of the Convention.

Article 3 on *Independence of Undertaking* qualifies an undertaking as independent if it is not dependent upon the existence or validity of the underlying transaction or subject to any term or condition not appearing in the undertaking. This provision is aimed at establishing those instruments that are within the scope of the Convention and to differentiate such undertakings from accessory instruments which directly dependent on the

existence and validity of the underlying transaction or upon any other undertaking to which confirmations or counter-guarantees relate.

Article 4 on *Internationality of Undertaking* lays down the test for detrmining the internationality of an undertaking on the basis of information contained on the face of the instrument. It states that an undertaking will be classified as international if the place of business as mentioned in the undertaking of any two of the following parties are in different States, i.e. guarantor/issuer, beneficiary, principal/applicant, instructing party and confirmer. If a party indicated more than one place of business, the relevant place of business will be the one which has the closest connection with the undertaking. If an undertaking did not indicate the place of business but specified his habitual residence, the habitual residence would be considered relevant for determining the internationality of the undertaking.

Article 5 on *Principles of Interpretation* lays down the principles according to which the provisions of the Convention are to be interpreted. These principles include: (i) international character of the Convention; (ii) the need to promote uniformity in the application of the Convention; and (iii) observance of good faith in the international practice of independent guarantees and stand-by letters of credit. This provision is akin to the corresponding provisions on Interpretation in the other Conventions prepared by UNCITRAL.

Article 6 on *Definition* enumerates the terms used in the Convention which in the context of the Convention have specific meanings. These terms include 'undertaking', 'guarantor/issuer', 'counter-guarantee', 'counter-guarantor', 'confirmation', 'confirmer' and 'document'.

Article 7 on *Issuance, form and Irrevocability of Undertaking* addresses the issuance, form and irrevocability of an undertaking. Paragraph (1) defines issuance as occurring when and where the undertaking leaves the sphere of control of the guarantor/issuer. It is intended to set the time of issuance as a definite point in time since from that time onwards the guarantor/issuer will be bound by the Convention. Paragraph (2) establishes the rule that an undertaking can be issued in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally acceptable means or by a procedure agreed upon by the guarantor/issuer and the beneficiary. The Convention thus rules out oral undertakings. Paragraph (3) entitles the beneficiary to demand payment from the time of the issuance of an undertaking, albeit in accordance with its terms and conditions, unless a different time is indicated in the undertaking. Paragraph (4) makes an undertaking irrevocable upon issuance unless it stipulates that it is revocable.

Article 8 on *Amendment* lays down the rules and procedures for amending an undertaking. Paragraph (1) establishes the rule that no such amendment is permissible unless it is in the form stipulated in the undertaking and in the absence of such stipulation, according to the formalistic requirement prescribed by Article 7 (2). It will be recalled that Article 7 (2) prescribes the form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally acceptable means or by a procedure agreed upon by the guarantor/issuer and the beneficiary. Paragraph (2) embodies the concept of the pre-authorization of amendments by the beneficiary unless otherwise, agreed. In such cases, the amendment becomes effective upon issuance. Under paragraph (3), unless otherwise agreed, amendments that were pre-authorized take effect upon acceptance by the beneficiary. Paragraph (4) clarifies that such amendments have no effect on the other parties unless they consent to those amendments.

Article 9 on *Transfer of Beneficiary's Right* to demand payment deals with the transfer of the beneficiary's right to demand payment under an undertaking. Under paragraph (1), the beneficiary can effect such transfer only (i) if authorized in the undertaking, and (ii) only to the extent and in the manner so authorized. This is because in the case of transfer of an undertaking, there is the issue not only of the basic authority to transfer, but also the question of what percentage of the undertaking is subject to transfer and questions of procedure, such as whether the transfer should involve the issuance of a second instrument containing certain modifications. Paragraph (2) is addressed to the case where the instrument is designated as transferable but does not specify whether or not the consent of the guarantor/issuer or another authorized person is required for actual transfer. In this case also, the actual transfer can take place only to the extent and in the manner expressly agreed by the guarantor/issuer or another authorized person.

Article 10 on *Assignment of Record* deals with the beneficiary's right to assign proceeds. Paragraph (1) constitutes a general recognition of the beneficiary's right to assign proceeds, whether or not the assignment is irrevocable. In actual practice, revocable assignments of proceeds are of limited practical value. Paragraph (2) obliges the beneficiary to give notice of assignment to the guarantor/issuer, and not the assignee. This marks a departure from the general law of assignment in various legal systems in which it is the assignee who is required to give notice of the assignment to the debtor. The legal effect of such notice is that the guarantor/issuer would be disharged upon making payment to the assignee.

Paragraph (1) of Article 11 on *Cessation of Right to Demand Payment* sets out the conditions in which the right of the beneficiary to demand

payment will come to an end. These conditions are: (a) receipt-by the guarantor/issuer of a statement from the beneficiary about his release from liability; (b) agreement between the beneficiary and guarantor/issuer on the termination of the undertaking; (c) payment of the amount available under the undertaking unless the undertaking provides for its automatic renewal, or for an automatic increase in the amount available or for continuation of the undertaking otherwise; and (d) expiry of the validity period of the undertaking (in accordance with Article 12). Paragraph (2) permits the parties to agree that only the return of the documents embodying the undertaking or a procedure functionally equivalent to the return of the document in case of the issuance of the undertaking in a non-paper form would trigger cessation of the right of the beneficiary to demand payment. This can be done either independently or in conjunction with the events mentioned in paragraph (1) (a) or 1 (b). However, retention of the documents would not preserve any right of the beneficiary after the occurrence of the events mentioned in paragraph (1) (c) or (d).

Article 12 on *Expiry* concerns the expiry of the validity period of the undertaking. It provides that the validity period of an undertaking comes to an end: (i) at the expiry date or the last day of a fixed period of time stipulated in the undertaking; (ii) if the expiry depends on the occurrence of an act or event not within the guarantor/issuer's sphere of operations, when the guarantor/issuer is advised that the act or event has occurred; and (iii) in any event, when six years have elapsed from the date of issuance of the undertaking.

Article 13 on *Determination of Rights and Obligations* deals with the rights and obligations of the guarantor/issuer and the beneficiary. Under paragraph (1), the extent of these rights and obligations are to be determined by the terms and conditions set forth in the undertaking itself including any rules, general conditions or usages specified therein and by the provisions of the Convention. The expression "by the provisions of this Convention" is intended to indicate that these rights and obligations would be determined, apart from the terms and conditions of the undertaking, by the mandatory provisions of the Convention and by all non-mandatory provisions of the Convention which are not excluded or modified by the parties. Paragraph (2) provides that in interpreting the terms and conditions of the undertaking and in settling questions not addressed by such terms and conditions or by the provisions of the Convention, recourse can be had to the generally accepted international rules and usages in the international practice of guarantees and stand-by letters of credit. This raises the question whether usages expressly excluded by the parties could be invoked by a court or arbitral tribunal? It would seem that the provision provides a balanced

compromise. Any express stipulation by the parties would ordinarily not be ignored by a court or arbitral tribunal. However, a court or arbitral tribunal is not precluded from having recourse to the usages in order to resolve a fundamental issue not provided for in the undertaking.

Article 14 on *Standard of Conduct and Liability of Guarantor/Issuer* sets a standard for the conduct of the guarantor/issuer and makes him liable for his failure or negligence to conform to that standard. Paragraph (1) obliges the guarantor/issuer to act in good faith and to exercise reasonable care having regard to generally accepted standards of international practice in this context in discharging his obligations arising out of the undertaking or out of the provisions of the Convention. Paragraph (2) forbids exemption of the guarantor/issuer from liability due to his failure to act in good faith or for any grossly negligent conduct. This provision is not aimed at providing the guarantor/issuer with exemption from liability for his failure to act in good faith or for his negligence, but is aimed at providing a limit to the extent to which parties could contract out of liability for such failure or negligence. In actual practice, in certain commercial situations, parties freely agree to a lower standard of care in the examination of demands for payment. This provision is thus intended to take account of such practices.

Article 15 on *Demand* sets out the conditions and modalities for submitting a demand for payment by the beneficiary. Paragraph (1) requires the demand for payment to comply with the formalistic requirement stipulated by Article 7(2) and to conform with the terms and conditions set out in the undertaking itself. Paragraph (2) authorizes the parties to depart from the general rule that any of the documents required to be submitted in order to obtain payment should be presented to the guarantor/issuer at the place where the undertaking was issued by allowing the parties to stipulate in the undertaking another solution on the issue of time and for example, agree that mere dispatch, rather than receipt of documents needed to take place prior to the expiry of the validity period of the undertaking. Paragraph (3) establishes an implied certification by the beneficiary making a demand for payment (either simple demand or demand accompanied by documents) that the demand is not fraudulent or abusive in accordance with the provisions of Article 19(1)(a), (b) and (c).

Paragraph (1) of Article 16 on *Examination of Demand and Accompanying Documents* obliges the guarantor/issuer to examine the demand for payment and the accompanying documents in accordance with the standard of conduct referred to in Article 14(1). Paragraph (2) frames the rule that unless otherwise stipulated in the undertaking or otherwise agreed elsewhere, the guarantor/issuer should examine the documents within a reasonable time with the seven-day period established as the outer limit.

The seven-day period is to be counted from the day after presentation of the demand. Should the guarantor/issuer after due examination of the demand for payment decide not to pay, he is required to notify the reason therefor to the beneficiary preferably by tele-transmission and if that is not feasible, by any other expeditious means, unless otherwise agreed by the guarantor/issuer and the beneficiary.

The main import of paragraph 1 of Article 17 on *Payment* is that upon presentation of a conforming demand in accordance with Article 15 (implied certification of good faith), payment must be made by the guarantor/issuer promptly to the beneficiary or on a deferred basis if so specified in the Undertaking. Paragraph (2) clarifies that a payment made in contravention of the provisions of Article 15 would not prejudice the rights of the principal/applicant.

Article 18 on *Set-off* permits the guarantor/issuer a right of set-off while making payment to the beneficiary, unless otherwise stipulated in the undertaking or otherwise elsewhere agreed by the guarantor/issuer and the beneficiary. As to the types of claims which would be exempt from set-off, Article 18 exempts not just those claims arising from the underlying transaction, but also any other claims that the principal/applicant might assign to the guarantor/issuer.

While Article 17 of the Convention obliges the guarantor/issuer to make prompt or deferred payment to the beneficiary upon presentation of a conforming demand, Article 19 on *Exception to Payment Obligation* authorizes him to refuse payment in the case of a manifestly and clearly improper demand. Article 19 is a key provision in the Convention as it is intended to harmonize the law in the area of fraud *vis-a-vis* independent guarantees and stand-by letters of credit. Article 19 enshrines a right mix of the different approaches countenanced in the Commission for the formulation of this provision. These approaches were whether this provision should be framed in terms of a duty of the guarantor/issuer in the case of a manifestly and clearly improper demand or whether the guarantor/issuer should merely have a right to refuse payment or whether to leave intact the discretion of the guarantor/issuer in such cases. The article, finally agreed, reflects the approach based on the right of the guarantor/issuer to withhold payment. However, this has been structured in such a way as to make it amply clear that this is a right as against the beneficiary and a duty as against the principal/applicant. Since vesting a right in the guarantor/issuer to refuse payment would have constituted an obstacle in some jurisdictions to the issuance of provisional court measures, the article overcomes this problem by conferring upon the principal/applicant the right to seek provisional court measures in accordance with Article 20.

Paragraph (1) of Article 19 defines an improper demand. Under this provision, a demand is improper when it is manifest and clear that (i) a document presented in connection with the demand is not genuine or has been falsified; (ii) payment is not due on the basis asserted in the demand and the supporting documents; and (iii) judging by the type and purpose of the undertaking, the demand has no conceivable basis. Paragraph (2) then sets forth the situations in which a demand would have no conceivable basis, namely (i) the contingency or risk which the undertaking was to cover has not materialized; (ii) the underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal; (iii) the underlying obligation has been fulfilled to the satisfaction of the beneficiary; (iv) the fulfillment of the underlying obligation has been prevented by wilful conduct of the beneficiary; and (v) in the case of a call under a counter-guarantee, there has been complicity between the beneficiary making the call and the guarantor/issuer. Since as against the principal/applicant, the guarantor/issuer is to be considered to have a duty not to pay against an improper demand and thus not to prejudice the right of the principal/applicant to pursue court measures to challenge or block the action of the guarantor/issuer, paragraph (3) is intended to safeguard that right of the principal/applicant.

Article 20 on *Provisional Court Measures* is a corollary of Article 19. It is intended to establish the right of access to the court by the principal/applicant to prevent the beneficiary from receiving payment in the cases specified in Article 19(1)(a), (b) and (c). The right of access provided to the principal/applicant has, however, been restricted to the cases stipulated in Article 19(1)(a), (b) and (c) so as to avoid undue interference of courts in payments under independent guarantees and stand-by letters of credit.

Articles 21 and 22 on *Choice and Determination of Applicable Law* are intended to provide binding rules of private international law to be used in determining the applicable law. These apply in any situation in which a choice would have to be made between the laws of different States in order to determine the law applicable to an independent guarantee or stand-by letter of credit, whether or not in the end it is determined that the Convention will apply.

Finally, Articles 23 to 29 set out the *Final Clauses*. Amongst the Final Clauses, Articles 27 and 28 are noteworthy in that while the former forbids making of any reservations to the Convention, the latter stipulates the requirement of just five ratifications/accessions for the entry into force of the Convention.

(2) DRAFT MODEL LAW ON LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF COMMUNICATION

Under the topic of Electronic Data Interchange (EDI), the Commission had before it at the Twenty-eighth Session (1995) the text of a draft Model Law on Legal Aspects of EDI and Related Means of Communication, consisting of 14 draft articles,[6] submitted by its Working Group on EDI as also a draft Guide to Enactment of the Model Law prepared by the Secretariat with a view to providing guidance to legislatures that might consider enacting the Model Law.[7] The draft Model Law is intended to apply to data created, stored or exchanged in the context of commercial activities. The Commission at that session adopted draft articles 1 and 3 to 11 of the draft Model Law on EDI. These provisions are to be regarded as final subject to any amendment that may become necessary as a consequence of the decisions taken by the Commission at its next session in 1996 when it will take up for consideration the remaining draft articles of the Model Law, namely draft articles 2 and 12 to 14. As to the future work in the field of EDI, it has been decided to take up work on negotiability and transferability of EDI transport documents, with particular emphasis on EDI maritime transport documents after the Commission has completed its work on the Draft Model Law on EDI.

An overview of the draft articles adopted by the Commission

The draft articles of the Model Law on EDI finalized by the Commission are Articles 1 and 3 to 11.

Article 1 on *Scope of Application* limits the scope of the Model Law to data created, stored or exchanged in the sphere of commercial transactions. The Model Law is, however, not intended to preclude States from extending the scope of the Model Law to cover uses of EDI and related means of communication outside the commercial area.

Article 3 on *Interpretation* lays down the principles according to which the provisions of the Model Law are to be interpreted.

Article 4 entitled *Non-discrimination of data record* enshrines the principle that data records should not be discriminated *vis-a-vis* written texts.

Article 5 on *Writing* is addressed to adapting the legal requirement of 'writing' to data message. It states that a data message satisfies the

6. Doc. No. A/CN/406.
7. Doc. No. A/CN.9/407.

legal requirement of 'writing' if the information contained therein is accessible so as to be usable for subsequent reference. The term 'rule of law' used in this article is intended to be confined to rules of statutes and case law and is not to be extended to requirements resulting from trade usages and practices. Although this rule is mandatory it permits enacting States to exclude certain situations from the scope of this mandatory rule provided those situations are enumerated under paragraph (2).

Article 6 on *Signature* lays down the criteria for meeting the legal requirement of 'signature' in the case of a data message. It states that this requirement would be met if a method is used to identify the originator of the data message and that method is reliable and appropriate for the purpose for which the data message was generated or communicated. Paragraph (2) of this article enables enacting States to exclude the application of this rule in certain situations which should be listed thereunder.

Article 7 on *Original* is intended to deal with two distinct situations. The first situation is in which a rule of law requires information to be retained in its original form. In this situation, there will be no need for machine-readable information to be displayed. The second situation would be wherein a rule of law requires information to be 'presented' in its original form, for example, in the context of judicial proceedings. In that situation, the information should be capable of being displayed, for example, to a judge.

Article 8 on *Admissibility and Evidential Weight of Data Messages* incorporates the principle that data messages should not be discriminated in the context of evidential requirements. Thus, information presented in the form of data messages should be admitted as evidence and given due weight.

Article 9 on *Retention of Data Records* lays down the conditions for adapting the rule relating to retention of documents or records to the retention of data messages. These conditions include (i) the data message should be accessible for subsequent reference; (ii) the data message must be maintained in the format in which it was generated, transmitted or received or in such format which can be demonstrated to represent the message generated, transmitted or received; and (iii) the data message identifies its origin, the data and time of its transmission or receipt. The obligation to retain data messages, however, does not extend to retaining all of the transmittal information associated with a data message.

Paragraph 1 of Article 10 on *Party Autonomy* enshrines the principle of party autonomy in relation to Chapter III of the Model Law entitled *Communication of Data Messages*. It allows contractual derogations from

the provisions of the Model Law set out in Chapter III. Since this could be misinterpreted as restricting the freedom of contract where it might be recognized by applicable rules of national law, paragraph (2) clarifies that parties are free to modify any rule of law contained in Chapter II if it is permitted by applicable rules of law.

Article 11 on *Attribution of Data Messages* sets out a set of complex but useful provisions. Paragraph (1) states that the originator will be bound by a data message if it sent that message effectively. Paragraph (2) further provides that he would also be deemed to be bound by a data message if it was communicated by a person authorized to act on his behalf. Paragraph (3) deals with three kinds of situations in which the addressee can rely on a data message as being that of the originator: firstly, situations in which the addressee properly applied an authentication procedure previously agreed by the originator; secondly, sitautions in which the addressee properly applied a procedure which was reasonable under the circumstances; and thirdly, situations in which the data message resulted from the actions of a person who by virtue of his relationship with the originator had access to the originator's authentication procedures. However, under paragraph (4), the originator would be released from the binding effect of the data message after the time the notice was received by the addressee to the effect that the data message was not that of the originator or when the addressee knew or should have known had he exercised reasonable care or used any agreed procedure that the data message was not that of the originator. Under paragraph (5), the addressee is entitled to rely on the data message up to the point of time it learnt that the message was not that of the originator. However, the addressee is not so entitled when he knew or should have known by exercising reasonable care or using any agreed procedure that there were errors in the transmission of the data message. Paragraph (6) entitles the addressee to regard each data message as a separate message and to act on that assumption unless he knew or should have known by exercising reasonable care or using any agreed procedure that the repetition was a duplication. This provision is yet to be settled by the Commission *vis-a-vis* the question whether the assumption on the part of the addressee should be rebuttable or irrebuttable.

(3) DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS

Under the topic of International Commercial Arbitration, the Commission had examined the first draft entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings"[8] at its twenty-seventh session in 1994 and had requested the Secretariat to revise it in the light of comments

8. Doc. No. A/CN.9/396/Add.1.

and suggestions made at that session. The proposed guidelines were motivated by the consideration that in appropriate circumstances, a preparatory conference might be a useful exercise and that internationally harmonized guidelines would help practitioners in deciding whether to hold a preparatory conference or not, and if one was to be held, to help them prepare for it and carry it out. At its Twenty-eighth Session (1995), the Commission had before it a revised version prepared by the Secretariat entitled "Draft Notes on Organizing Arbitral proceedings".[9] The Draft Notes consist of an Introduction which outlines the purpose and origin of the Notes and a section entitled "Procedural matters for Possible Consideration" containing notes on a checklist of matters to be borne in mind while organizing arbitral proceedings. This section sets out notes on such topics as (i) set of arbitration of rules; (ii) language of the proceedings; (iii) place of arbitration; (iv) administrative services; (v) deposit of costs; (vi) confidentiality; (vii) routing of writings among parties and the arbitral tribunal; (viii) telefax and other means of sending writings; (i) timing of written submissions; (x) practical details concerning written submissions and evidence (e.g. number of copies, numbering of items of evidence, reference to documents, numbering of paragraphs); (xi) defining points at issue; (xii) possible settlement negotiations and their effect on scheduling; (xiii) documentary evidence; (xiv) physical evidence other than documents; (xv) witnesses; (xvi) experts and expert witnesses; (xvii) hearings; (xviii) multi-party arbitrations; and (xix) possible requirements concerning filing or delivery of the award. The Commission reviewed the substance of the Draft Notes and requested the Secretariat to prepare a revised draft taking into account the comments and suggestions made during the session for final approval of the Commission at its twenty-ninth session in 1996.

(4) ASSIGNMENT IN RECEIVABLES FINANCING

On this topic, the Commission at its Twenty-eighth Session (1995) had before it a report prepared by the Secretariat on the possible scope of future work in that area.[10] It also contained preliminary drafts of uniform rules. The conclusion of the Report was: "It would be both desirable and feasible for the Commission to prepare a set of uniform rules the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments (in which the assignor, the assignee and the debtor would not be in the same country) and effects of such assignments on the debtor and other third parties. Wide support was expressed in the Commission for undertaking work in this area as it was felt that this could

9. Doc. No.A/CN.9/410.
10. A/CN.9/412.

facilitate international trade as assignment of receivables was one of the most important transactions in the financing of international trade. It was, therefore, decided to entrust the work of preparing draft uniform law on assignment to a working group.

(5) CROSS-BORDER INSOLVENCY

On this topic, the Commission has initiated the task of developing a model legislative framework for judicial cooperation and for access and recognition in cross-border insolvencies and to entrust that work to a working group. The proposed legislative framework is intended to remove or minimize the obstacles that stand in the way of judicial cooperation and access and recognition in cases of cross-border insolvency. These mainly arise because of the diversity of approaches in different legal system and conflicting jurisdictions. Since the incidence of cross-border insolvency is likely to increase appreciably on account of the recent trend towards integration of national economies with the world economy, the Commission's initiative in the area of cross-border insolvency appears to be in the right direction.

(6) BUILD-OPERATE-TRANSFER (BOT) PROJECTS

On this topic, the Commission at its Twenty-eighth Session (1995) had before it a note prepared by the Secretariat on the possible future work to be undertaken in the Commission.[11] The note identified three areas for future work by the Commission, namely (i) preparation of guidelines to assist States in establishing a legal framework conducive to the implementation of BOT projects; (ii) preparation of guidelines on procurement for BOT projects which could possibly include preparation of model procurement regulations or of a model bid solicitation document for BOT projects; and (iii) preparation of a study on problems encountered in the area of contracting since in a BOT project contracts have to be negotiated simultaneously with a multiplicity of parties and all these contracts, many of which might be inter-related, have to be fitted into a composite contractual package to ensure the successful implementation of the BOT project. The Commission endorsing the Secretariat's recommendations requested it to prepare a report on the aforementioned three issues for submission at its next session. It was also emphasized that the work of the Commission should not duplicate the work of UNIDO on the preparation of "Guidelines for the Development, Negotiation and Contracting of BOT Projects" which was at an advanced stage. It should be noted that while the UNIDO's Guidelines are geared towards describing the main policy concerns that States should address when deciding whether or how to

11. Doc. No. A/CN.9/414.

implement BOT projects, the Commission's work in this area would be devoted to addressing a number of practical obstacles of a legal nature which make it difficult to implement such projects.

II. United Nations Conference on Trade & Development (UNCTAD)

Since the establishement of UNCTAD in 1964, a number of multilateral legal instruments have been negotiated and adopted under its auspices: the General and Special Principles to govern international trade relations and trade policies conducive to development in 1964; the Generalized System of Preferences (GSP) in 1971; the Convention on a Code of Conduct for Liner Conferences in 1974; the Charter of Economic Rights and Duties of States, proclaimed in 1974 by the General Assembly in resolution 3281 (XXIX), the Agreement establishing the Common Fund for Commodities in 1980; the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in 1980; the United Nations Convention on International Multimodal Transport of Goods in 1980; the United Nations Convention on Conditions for Registration of Ships in 1986; the United Nations Convention on Maritime Liens and Mortgages in 1993; and several international commodity agreements.

This note summarizes UNCTAD's current legislative activities concerning commodities, technology, restrictive business practices, economic co-operation among developing countries (ECDC) and maritime and multimodal transport.

1. COMMODITIES

Within the United Nations system, UNCTAD is the principal organization responsible for the negotiation of international agreements on trade in commodities. Since 1965 conferences have been convened under the auspices of UNCTAD for the negotiation or renegotiation of international commodity agreements on cocoa, natural rubber, jute, tropical timber, olive oil, wheat, sugar and tin.

Conference resolution 93(IV) established a framework for international action to improve international trade in 18 commodities of export interest to developing countries,known as the Integrated Programme for Commodities (IPC). The IPC called for the establishment of a Common Fund and negotiation and renegotiation of international commodity arrangements.

The Common Fund for Commodities

The principal multilateral legal instrument in the context of the IPC is the Agreement establishing the Common Fund for Commodities (TD/IPC/CF/CONF/25). This Agreement, which came into force on 19 June 1989, has established a new multilateral financial institution of a universal character aimed at facilitating the conclusion and functioning of ICAs, particularly concerning commodities of special interest to developing countries. The Common Fund's functions include the financing, through its first account of commodity stocks and, through its second account, of commodity development measures.

Adoption of New or Renegotiation of Existing ICAs

Cocoa : The International Cocoa Agreement 1986 was due to expire on 30 September 1987 but was extended by a decision of the International Cocoa Council for a further period of three years. The UN Cocoa Conference 1992 met in five parts: first from 21 April to 1 May; the second from 6 to 24 July; and the third from 2 to 13 November; the fourth from 22 February to 5 March 1993 and the fifth, in July 1993. The last part of the Conference was able to establish the text of the International Cocoa Agreement 1993 (TD/COCOA.8/17/Rev. 1). The Agreement came into force on 22 February 1994. It will remain effective for a period of five years from the date of its entry into force unless the International Cocoa Council decides to extend or terminate it. The Council has been authorized to extend the Agreement for two periods not exceeding two years each.

Although the principal aim of the 1993 Agreement like that of its predecessor, is to maintain the price of cocoa beans between an agreed set of prices, it has the following distinctive features as compared with the previous agreements;

(i) the incorporation of discretionary intervention prices;

(ii) the abandonment of the maximum and minimum prices;

(iii) withholding scheme to supplement the buffer stock which remains, however, the main supply regulatory mechanism to achieve the principal aim of the Agreement;

(iv) rules and procedures for the revision of price levels at an annual review;

(v) the deletion of all references to borrowing and the denomination of the price levels in SDRs.

Jute : The 1982 Agreement was renegotiated at the UN Conference on Jute and Jute Products held under the auspices of UNCTAD from 30 October to 3 November 1989 and culminated in the International Agreement on Jute and Jute Products 1989. The 1989 Agreement entered into force on 12 April 1991 and will remain effective for a period of five years from the date of its entry into force unless extended or terminated by the

International Jute Organisation (IJO) in accordance with its provisions. The Council has been empowered to extend the agreement for not more than two periods of two years each.

The main features of the Agreement are much the same as those of the 1982 Agreement. It maintains the same basic aims and provides for the same means to achieve them. The objectives of the 1982 Agreement have, however, been spelt out in greater detail in the new Agreement. The most important of these objectives are: to enhance the competitiveness of jute and jute products; to maintain and enlarge existing markets as well as to develop new markets; to develop new end-uses of jute including new jute products; and to promote the expansion and diversification of international trade in jute and jute products. One new objective is to give environmental aspects due consideration in the activities of the IJO, particularly by creating awareness of the beneficial effects of the use of jute as a natural product.

Olive Oil : The United Nations Conference to negotiate a successor agreement to the International Agreement on Olive Oil and Table Oils 1986 met in Geneva from 8 to 12 March 1993 and adopted "Protocol of 1993 extending the International Agreement on Oil and Table Oils, 1986, with amendments" (TD/OLIVE OIL 9/6). The Protocol came into force on 26 January 1994. The 1986 Agreement contains general provisions with respect to international cooperation and concerted action for the integrated development of the world economy for olive products and is aimed at trade expansion and standardization of olive products, modernization of olive cultivation and oil extraction, improvement of olive products and by-products industry with regard to the environment.

Tropical Timber : The International Tropical Council decided to extend the International Tropical Agreement 1983 for a further period of two years ending on 31 March 1992. The United Nations Conference for the Negotiation of a Successor Agreement to the 1983 Agreement met in Geneva in four parts: the first from 13 to 16 April; the second from 21 to 25 June; the third from 4 to 15 October and the fourth one from 10 to 26 January 1994. On 26 January 1994, the Conference adopted the final text of the International Tropical Agreement 1994 (TD/TIMBER.2/16). The Agreement has not entered into force as yet. The Secretary-General of the United Nations is holding consultations with the parties concerned.

Natural Rubber : The International Natural Rubber Agreement 1987 entered into force on 3 April 1989 and was to expire on 28 December 1993 unless extended by a decision of the International Natural Rubber Council. The 1989 Agreement is to be replaced by the International Natural

Rubber Agreement 1995 (TD/RUBBER.3/11) which is still to enter into force.

Sugar : The International Sugar Agreement 1992 entered into force on 20 January 1993 (TD/SUGAR/12.6). The main thrust of this Agreement is on export quotas and national stocks in order to stabilize prices.

Coffee : The International Coffee Agreement 1983, with its economic provisions suspended since July 1989, had been extended to 30 September 1993. In April 1992, the International Coffee Council had established a Negotiation Group for the negotiation of a new, market-oriented International Coffee Agreement on the basis of a universal quota supported by an effective system of controls. The Negotiating Group was able to conclude the International Coffee Agreement 1994 in London on 30 March 1994 (EB 3467/94) which entered into force on 1 October 1994.

Copper : The Terms of Reference of the International Study Group on Copper became effective as from 23 January 1992 (TD/COPPER/15). The inaugural meeting of the Group was convened in Geneva from 22 to 26 June 1992 and it, *inter alia*, amended paragraphs 13 and 14 of the Terms of Reference. Paragraph 13 authorized the Group to be designated as an International Commodity Body under Article 7(9) of the Common Fund Agreement, for the purpose of sponsoring projects on Copper to be financed by the Common Fund through its Second Account. Paragraph 14 bestowed on the Group on international legal personality.

Tin : The Terms of Reference of the International Tin Study Group (TD/TIN.7/15) negotiated under UNCTAD auspices in April 1989 have yet to enter with force as the requirement of an unspecified number of States accounting for at least 70% of trade in tin has not been fulfilled.

Others : It should be pointed out that in respect of agricultural products, there are Intergovernmental Groups in the FAO on bananas, citrus fruits, fisheries, forestry, grains, hard fibers, kenat and allied fibers, meat, oil seeds, oils and fats, rice, tea and wine and in GATT (now WTO) on dairy products and meat. These intergovernmental group meet at regular intervals to review the market situation and prospects of the commodities in question.

2. TRANSFER OF TECHNOLOGY

International Code of Conduct on Transfer of Technology

The UN General Assembly by resolution 32/188, had convened the UN Conference on an International Code of Conduct on Transfer of Technology to negotiate and adopt such a code. The Conference held six sessions between October 1978 and May 1986, but was unable to complete

its work due to disagreement on Chapter 4 on restrictive practices and Chapter 9 on applicable law and settlement of disputes of the draft Code (TD/CODE.TOT/47). Since then consultations are being carried out by the Secretary-General of the United Nations. At UNCTAD-VIII (1992), the Conference noted the lack of agreement in recent consultations on this subject and recognized "that the conditions do not currently exist to reach full agreement on all outstanding issues in the Draft Code of Conduct." The General Assembly, in its resolution 48/167 of 21 December 1993, endorsed the above finding of UNCTAD-VIII and invited "the Secretary-General of UNCTAD, based on the relevant provisions of the Cartagena Commitment and taking into account the findings of the *Ad Hoc* Working Group on the Inter-relationship between Investment and Technology Transfer, to report to the General Assembly at its fiftieth session on the state of the discussion". The Secretary-General of UNCTAD in its report submitted to the fiftieth session of the General Assembly (TD/CODE.TOT/60) has advised the General Assembly to formally suspend the negotiations on the draft code of conduct.

3. RESTRICTIVE BUSINESS PRACTICES

Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (RBPs).

The United Nations Conference on Restrictive Business Practices approved in April 1980 a Set of Multilaterally Agreed Equitable Principles and Rules for the Control of RBPs (TD/B/RBP/CONF.10/Rev.1) which the General Assembly adopted by resolution 35/63 in December 1980. The Principles and Rules established, for the first time, international means for the control of RBPs, including those of TNCs, adversely affecting international trade, in particular the trade and economic development of developing countries.

Subsequently, the Trade & Development established an Intergovernmental Group of Experts to perform the task of monitoring, implementation and review of the Principles and Rules and to convene periodically Review Conferences for the improvement and further development of Principles and Rules. The first Review Conference was held in Geneva from 4 to 15 November 1985; the second one from 26 November to 7 December 1990, and the third one on 13 November 1995. The Third United Nations Review Conference reviewed 15 years of the application and implementation of the Set (TD/RBP/CONF.4/5) and considered RBPs that have an effect in more than one country, in particular developing and other countries (TD/RBP/CONF.4/6), the role of competition policy in economic reforms in

developing and other countries (TD/RBP/CONF.4/2) and the scope, coverage and enforcement of competition laws and policies and analysis of the provisions of the Uruguay Round Agreement relevant to competition policy, including their implications for developing and other countries (TD/RBP/CONF.4/8).

Model Law on Restrictive Business Practices

The International Group of Experts on RBPs had asked the UNCTAD Secretariat to prepare the draft of a Model Law on RBPs in accordance with the provisions of the Set of Principles and Rules so as to assist countries or regional groupings not having legislation on RBPs to devise such legislation to strengthen and improve controls over RBPs. The Secretariat had accordingly prepared a text entitled "Draft Possible Elements for Articles of a Model Law or Laws" alongwith commentaries (TD/B/RBP/Rev.3). The Group of Experts, at its thirteenth session held from 24 to 28 October 1994, considered this text and revised the commentaries. It asked the Secretariat to compile drafting suggestions to the revised draft commentaries and submit the compilation to its fourteenth session with a view to further revising the commentaries.

At its fourteenth session held from 6 to 10 March 1995, the Group of Experts took note of the compilation of the commentaries prepared by the Secretariat (TD/B/RBP/Misc.16) and decided to further revise the commentaries in the light of the comments to be received from State Members before 15 May 1995. The Secretariat document No. TD/B/RBP/Rev. 4 accordingly sets forth the revised commentaries taking into account the comments submitted by the Governments and recent trends in competition legislation worldwide.

4. ECONOMIC COOPERATION FOR DEVELOPMENT

Generalized System of Trade Preferences (GSTP)

The GSTP was adopted by the Negotiating Committee on GSTP at its Ministerial-level meeting hosted by Yugoslavia in Belgrade in 1987. It came into force on 19 April 1989. It is aimed at liberalizing trade among developing countries through exchange of trade concessions which would need to be associated with the development of effective clearing and payments arrangements among the developing countries; the strengthening of economic integration and cooperation groupings; and the adoption of direct trade measures, particularly through cooperation between enterprises at sectoral levels among the developing countries.