

Article 10 specifically provides that the Convention has no retroactive effect, although paragraph (3) makes it clear that the Convention does not in any way legitimize any illegal transaction which may have taken place before its entry into force. Articles 11 to 21 of the Convention contain the final provisions customarily to be found in private law Conventions.

3. International Interests in Mobile Equipment:

Unidroit's efforts towards development of international uniform rules in this field is designed to address the legal problems arising out of the everyday movement of high value mobile equipment across international frontiers. Pursuant to the decision of the Governing Council at its 67th session (1988) in response to a proposal by the Canadian Government, initial feasible studies were carried out between 1989 to 1992. The Governing Council in 1992 established a study group for the preparation of uniform rules. This Study Group, chaired by Mr. Roy Goode, held its first session in March 1993, and made a preliminary examination of the issues involved. The Governing Council at its 72nd Session (1993) decided that this work should for the time being be carried forward within a sub-committee of the study group essentially responsible for the preparation of a first draft. Consequently the Sub-Committee of the Study Group (hereinafter "the subcommittee") has over the past two years met three times to prepare a set of draft articles of the proposed Convention. This first draft was completed by the Drafting Group of the Sub-Committee on 5 December 1995 subject to some terminological revision completed on 4 March 1996.

The areas encompassed by the first draft were the sphere of application of the proposed Convention, the setting up of an international registry and the conditions that should govern the recognition by the courts of Contracting States of international interests in mobile equipment created in accordance with the proposed Convention. A separate chapter is to be prepared containing special rules for aircraft industries. These rules are to be drafted along the lines of the recommendations submitted by the Aviation Working Group. New chapters on the effects of an international interest as between the parties, setting forth certain basic *in rem* remedies and the effects of an international interest as against third parties, detailing an embryonic priorities structure have also been included. A number

of provisions were placed in square brackets reflecting the need for the Study Group to take a decision one way or the other, in particular as regards the manner in which the parties were to be able to determine the application of the *inter partes* remedies provisions of the planned Convention and as to whether it was necessary to maintain a distinction between serial number registration and debtor name registration for the limited purpose of the international interest's validity against the debtor's trustee in bankruptcy and unsecured creditors.

The draft was examined by the Study Group at the second session of that body held in Rome from 12 to 16 April 1996. In the light of the deliberations at that session, the Drafting Group will revise and complete the first draft with a view to forwarding it to the Study Group², scheduled for December 1996.

4. Franchising

The subject has been on the agenda of the Institute since the 65th session (1986) of the Governing Council. At its 72nd session in June 1993, the Governing Council decided to set up a Study Group on Franchising to examine the different aspects of franchising and in particular disclosure of information between the parties before and after a franchise contract has been concluded and the effect of a master franchise agreement on sub-franchise agreements.

At its first session, held in Rome from 16 to 18 May 1994, the study group considered both international and domestic franchising. In relation to international franchising, the group focused its attention on master franchise agreements. It examined in particular the nature of the relationship between such agreements and sub-franchise agreements, the applicable law and jurisdiction, the settlement of disputes and problems associated with the tripartite nature of the relationship between franchisor, sub-franchisor and sub-franchisees, especially in connection with termination and disclosure.

² The session of the Study Group was held in December 1996. The outcome of the deliberations thereat, were not available with the Secretariat.

As regards domestic franchising the study group concentrated on the question of disclosure, examining the experience of countries which have, or which have attempted, some form of regulation in this area, the role of franchising associations and the importance of codes of ethics adopted by these associations.

The study group reached the conclusion that none of these areas would lend itself to being dealt with by means of an international convention. However, there emerged a general consensus on the desirability of preparing a legal guide to international franchising, and in particular to master franchise agreements which are most commonly used in international franchising. The recommendations of the study group was endorsed by the Governing Council at its 74th session (March/April 1995), on the understanding that work on a legal guide would not preclude further work on the subject.

At its second session held from 29 to 31 January 1996, the study group examined the first draft of the Guide and made such substantial changes both to the actual content of the draft and to the arrangement of the material between the various chapters that extensive rewriting has become necessary. Taking note of these developments at its 75th session in June 1996, the Governing Council decided that it was premature to enter upon any detailed consideration of the draft Guide at this stage and, that it would proceed to such an examination once complete versions were available in both English and French.

In this context, it may be recalled that the Secretariat of AALCC had collaborated with the India International Law Foundation (IILF) in organising a two-day seminar on "Franchising as a Tool for Development and New Trends in International Commercial Contracts" in New Delhi, in March 1996 which was attended by the representatives of member States of AALCC. The seminar supported by WIPO, UNDP and Unidroit, was marked by valuable exchange of information and comprehensive deliberations over the relevant issues.

5. Inspection agency contracts:

In Pursuance of a decision of the Governing Council at its 72nd session in June 1993, the Secretariat of Unidroit had circulated a study on inspection agency contracts in the international sale of goods. A paper analysing the comments and reactions received was drawn up by the Secretariat for submission to the 73rd session of the Governing Council. After noting the limited response to the Secretariat inquiry, and recognising the sensitive nature of some of the economic and political issues that had been raised, the Council requested the Secretariat to engage in a further round of consultations with the interested circles to enable it to decide on the prospects of any useful working being carried out in connection with this topic. At its 74th session the Council was informed that the Secretariat inquiry had indicated no greater degree of enthusiasm for the subject than had the first and in these circumstances it decided that the matter should in principle be deleted from the Work Programme of the Institute for the triennial period 1996-1998.

6. Civil liability connected with the carrying out of dangerous activities:

This topic was included in the programme of work of Unidroit following upon a reference from the Government of India in the wake of leakage of methyl-iso cyanite gas from a multi-national power plant at Bhopal and the consequent disaster that claimed the life of thousands and leaving others permanently incapacitated. The Governing Council at its 73rd session (1994) asked the Secretariat to prepare a study designed to identify issues that might serve as a basis for possible measures designed to ensure compensation for personal injury to the victims of industrial accidents. At its 74th session the Governing Council decided to retain the subject on the Unidroit Work Programme for the 1996-1998 triennial period. In so doing it renewed the mandate it had conferred on the Secretariat at its 73rd session, namely the study was to be conducted within the following parameters (i) It should be confined to the question of liability for personal injury; (ii) It should cover neither nuclear accidents nor accidents occurring in the transport of goods and (iii) Any action that might be authorized in the light of such study would be undertaken on a step-by-step basis. Given the pressure on its own human and financial

resources, the Secretariat is presently engaged in exploring the possibility of obtaining special external financing for the carrying out of such a study,

7. Legal issues connected with software:

A study by the Secretariat had suggested Unidroit initiative in the area of specific commissioning of software programmes and the rights to use of the programme by the Party commissioning the programme and the party developing it. Agreements concluded with a view to the preparation of such programmes are usually tailor-made from one agreement to another and their terms differ according to the experiences of the parties and their respective bargaining power. It was proposed by the Secretariat that Unidroit might usefully consider the drawing up of guidelines regarding the negotiation of such agreements, their purpose being to make the parties more aware of the differing legal consequences flowing from their choice of contractual provisions.

The Governing Council at its 72nd session in June 1993 took note of the Secretariat study but in view of the doubts expressed by certain members as to the usefulness of carrying out work on the subject at the present, it was decided that further study should only be undertaken as and when the resources of the Institute would permit. At its 73rd session in 1994, the Governing Council noting the lack of any significant progress in relation to this item decided to suspend any further study of the subject.

On the occasion of its 74th session (March/April 1995), the Governing Council decided to retain the item on the Work Programme for the 1996-1998 triennial period under a slightly different title, namely "Legal issues associated with computer software". Although the subject was placed only on the reserve list, the Council considered that technological advances in this field are such that legal problems have already been encountered at national level and that some of those problems might usefully be addressed by Unidroit at some time in the future.

II. World Trade Organization (WTO): An Overview

Background

The Uruguay Round of Multilateral Trade Negotiations, launched in 1986, concluded on 15 April 1994, in Marrakesh (Morocco) with the signing of the Final Act embodying the results of that Round and opening for signature the Agreement establishing the World Trade Organization (WTO) to which all substantive agreements and understandings were annexed, as well as the Ministerial Declarations and Decisions adopted at Marrakesh and the Understanding on Commitments on Financial Services to form an integral part thereof. It was also agreed that the WTO Agreement must be accepted as a package deal without any exception.

Of the 125 countries which formally participated in the Uruguay Round, 111 signed the Final Act and 104 signed the WTO Agreement, in many cases with the stipulation that their acceptance was subject to ratification.¹ Seven countries, Australia, Botswana, Burundi, India, Japan, Republic of Korea and USA, were unable to sign the WTO Agreement because of domestic legislative impediments.²

The most significant feature of the Final Act was that it represented a single undertaking integrating all the key agreements under one umbrella, i.e. tariffs and now also service commitments as well as substantive trade rules are part of a single package. This was reinforced by the organizational and institutional framework which the WTO Agreement and the WTO, as the international economic organization, provide.

¹ *International Legal Materials* Vol. XXXIII, No. 5 (September, 1994) p. 1132. The AALCC Member States signatory to the WTO Agreement include: Bahrain, Bangladesh, China, Cyprus, Egypt, Ghana, Indonesia, Kenya, Kuwait, Malaysia, Mauritius, Myanmar, Nigeria, Pakistan, Philippines, Qatar, Singapore, Sri Lanka, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates.

² *Ibid.*

Agreement Establishing the WTO

The Agreement is of a purely procedural and institutional character. It consists of a Preamble, sixteen Articles and four Annexes. The Agreement does not incorporate any substantive multilateral rules and disciplines, (concerning, for example, most-favoured-nation (MFN) treatment, non-discrimination, national treatment etc.): The Preamble, a redraft of the GATT 1947 preamble, is the only place where substantive matters are touched upon. Apart from referring to the "optimal use of the world's resources in accordance with the objective of sustainable development", the Preamble recognizes the "need for positive efforts designed to 'ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'". It, in general terms, seeks to develop "an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, (GATT) the results of post trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations"

Multilateral Trade Agreements (MTAs) (the Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights) form Annexes IA, IB and IC respectively of the WTO Agreement. Annex 2 covers the Understanding on Rules and Procedures Governing the Settlement of Disputes, while Annex 3 contains the text of the Trade Policy Review Mechanism (TPRM). Plurilateral Trade Agreements (PTAs) are to be found in Annex 4. The Agreements in Annexes 1, 2 and 3 are binding on all members of the WTO, and, in fact, their acceptance, along with specific schedules of concessions on goods and services, is a strict condition for membership of the WTO. Annex 4 agreements create rights and obligations only for members that have accepted them.

The WTO Agreement thus establishes the WTO to provide a common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the above-mentioned annexes. The functions of the

WTO are: (1) facilitation of the implementation, administration and operation of the annexed agreements; (2) provision of a forum for negotiations among its members concerning their multilateral trade relations in matters dealt with under the annexed agreements, and of a forum for further negotiations among its members concerning their multilateral trade relations, as well as a framework for the implementation of the results of such negotiations; (3) administration of the Dispute Settlement Body; (4) administration of the Trade Policy Review Mechanism.

The WTO organizational structure is open to all its members. It provides for membership of original and acceding members including procedures for admittance of further members. Under the Agreement, the Contracting Parties to GATT 1947 as of the date of entry into force of the WTO Agreement, and the European Community, which have accepted the WTO Agreement and the MTAs and which have submitted their schedules of concessions on goods (annexed to GATT 1994)³ and services (annexed to GATS)⁴ are eligible to become original members of the WTO. There is, however, an exemption from this basic requirement for the least developed countries (LDCs) which are only required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capacities (Article XI of WTO Agreement). cooperation, as appropriate, with IMF and the World Bank, and its affiliated agencies with a view to achieving greater coherence in global economic policy-making.

The WTO Agreement invests the organization with a proper organizational structure which includes plenary and executive organs, subsidiary committees and a properly regulated Secretariat under the charge of a Director-General. It consists of a Ministerial Conference meeting at least once in two years, and a General Council meeting as appropriate. The General Council has also been mandated to carry out the functions of the Dispute Settlement Body and the Trade Policy Review

³ GATT - 1994 forms Annex I A to the WTO Agreement.

⁴ GATS, i.e. General Agreement on Trade in Services forms Annex I B to the

Mechanism. Other bodies include a Council for Trade in Goods, a Council for Trade in Services and a Council for TRIPS. The Ministerial Conference has been authorized to establish a Committee on Trade and Development, a Committee on Budget, Finance and Administration and a Committee on Balance of Payments Restrictions. These Councils are to function under their respective procedural rules, albeit subject to their approval by the General Council. The Councils have been empowered to establish subsidiary bodies. The Council for Trade in Goods will oversee the functioning of MTAs as set out in Annex IA to the WTO Agreement, while the Council for Trade in Services will oversee the functioning of the GATS as set out in Annex IB of the WTO Agreement. The Council for TRIPs will oversee the functioning of the Agreement on TRIPS, including Trade in Counterfeit Goods, included in Annex 1 C to the WTO Agreement.

The budget and finances of the WTO are now formally regulated and so too are matters like voting. However, many features of the old GATT have been retained, for instance, the preferred mechanism for decision making is still consensus and this carries over the practice adopted by GATT Contracting Parties over the course of almost fifty years. Voting is to be used for more formal measures like amendments to the WTO Agreement and the MTAS. In this respect, different procedures have been established depending on the issue involved. In general, decisions of the Ministerial Conference and the General Council that require a vote will be taken by a majority of votes cast. The Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of the WTO Agreement and the MTAS. In the case of an interpretation of an MTA in Annex 1, the above organs shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of the Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the members.

As for waiver of an obligation imposed on a member by the WTO Agreement or any of the MTAS, which is considered by Article IX:3 as "exceptional circumstances", a majority of three-fourths of members vote is in general required, but in the case of a waiver concerning the WTO Agreement, it can be done only by the Ministerial Conference on the basis of consensus or a decision by a three-fourths

majority once a given period of time for consideration has elapsed (90 days) without reaching the required consensus. A request for a waiver under the MTAs will be initially submitted to the respective Councils for their consideration over not more than 90 days, after which the relevant Council will report to the Ministerial Conference. A decision granting a waiver by the respective organs (Ministerial Conference) must highlight the exceptional circumstances, the terms and conditions of the waiver, and the date of its termination. Any waiver granted for more than one year must be reviewed annually by the Ministerial Conference which, on the basis of its findings, may extend, modify or terminate the waiver. Decisions on interpretations and waivers under the PTAs will be governed by the provisions of those agreements.

Other decision-making procedures include: (a) the WTO financial regulations and annual budget estimates will be adopted by the General Council by a two-thirds majority, comprising more than half of the WTO members; (b) decisions by the General Council acting as the Dispute Settlement Body will be taken only on the basis of consensus as foreseen in Article 2.4 of the Dispute Settlement Understanding; and (c) decisions on accessions to the WTO will be approved by the Ministerial Conference by a two-thirds majority of the WTO members.

Amendments to the provisions of the WTO Agreement (except Articles IX and X) and to the provisions of the MTAs in Annex IA (except Articles I and II of GATT 1994) and Annex 1 C (except Article II:1 of GATS), and of the Agreement on TRIPs (except Article 4), that are of a nature that would alter the rights and obligations of the members, will take effect for the members that have accepted them upon acceptance by two-thirds of the members and thereafter for each member upon acceptance by it. The Ministerial Conference may also decide by a three-fourths majority of the members that any amendment made effective under this general rule is of such a nature that any member which has not accepted it within a period specified by the Ministerial Conference in each case will be free to withdraw from the WTO or to remain a member with the consent of the Ministerial Conference. The same procedures will apply with respect to amendments to Parts I, II (except Article II:1), and III of the GATS and the respective annexes.

As for amendments to the WTO Agreement, and other MTAs in Annex IA and the Agreement on TRIPS, that are of a nature not requiring alteration of the rights and obligations of the members, the Ministerial Conference should first decide by a three-fourths majority whether the amendment is of such a nature. If it is, it will take effect for all members upon acceptance by two-thirds of the members.

Special procedures established to deal with amendments to the specific provisions of the WTO Agreement and the MTAs include:

- * Amendments which require acceptance by all members involve (1) articles in the WTO Agreement dealing with decision-making and amendments; (2) Articles I and II of GATT 1994 (MFN treatment); (3) Article II:1 of GATS (MFN treatment,) and (4) Article 4 of the TRIPs Agreement (MFN treatment);
- * Amendments to Parts IV, V and VI of GATS and the respective annexes will take effect for all members upon acceptance by two-thirds of the members;
- * Amendments to the TRIPs Agreement meeting the requirements of its Article 71 (2) may be adopted by the Ministerial Conference without further formal acceptance procedures. This provision relates to amendments "merely serving the purpose of adjusting to higher levels of protection of intellectual property achieved, and in force, in other multilateral agreements and accepted under those agreements by all WTO members".

The WTO Agreement contains specific procedures in dealing with amendments concerning its Annex 2 (Dispute Settlement) and Annex 3 (TPRM). Decisions to approve amendments to Annex 2 will be made by consensus. They will take effect for all members upon approval by the Ministerial Conference, as will decisions to approve amendments to Annex 3.

As for Plurilateral Trade Agreements (PTAs) in Annex 4, it is stipulated (a) that the Ministerial Conference, at the request of the members

parties to a trade agreement, may decide exclusively by consensus to add a PTA to Annex 4 or to delete a PTA from the same Annex; (b) that amendments to PTAs will be governed by their provisions.

The Agreement confers on the WTO a legal personality and obliges its Members to accord such legal capacity to it as may be necessary for the exercise of its functions. Another general obligation imposed upon each of the members is to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements" (Article XVI (4)). The Agreement also stipulates that in the event of a conflict between its provisions and those of any of the MTAs annexed to it, the provisions of the WTO Agreement will prevail.

The Agreement, together with the MTAs annexed to it, will remain open for acceptance for a period of two years following the date of the Agreement's entry into force, which is 1st January 1995. An acceptance after that date will be effective as from the 30th day following the deposit of the instrument of acceptance. A member which accepts the Agreement after its entry into force is required to implement those concessions and obligations in the MTAs that contain time periods starting with the entry into force of the WTO Agreement as if it had accepted the Agreement on the date of its entry into force. Withdrawal from the WTO Agreement applies also to the MTAs and takes effect after the expiration of six months from the date of receipt of the notification of withdrawal by the Director-General of the WTO, included in Annex 1 C to the WTO Agreement.

Annexes to the WTO Agreement

The WTO Agreement has four annexes Annex 1 sets out, three main agreements; the General Agreement on Tariffs and Trade 1994, the General Agreement on Trade in Services, and the Agreement on Trade-Related Aspects of Intellectual Property Rights. Annex 2 sets out the Understandings on the Rules and Procedures governing the Settlement of Disputes; Annex 3 includes the Trade Policy Review Mechanism (TPRM); and Annex 4 sets out the Plurilateral Trade Agreements (PTAs).