INTERNATIONAL TRADE LAW

I. PROGRESS REPORT CONCERNING THE LEGISLATIVE ACTIVITIES OF THE UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW

REPORT ON THE WORK DONE BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) AT ITS THIRTY-SECOND SESSION

(i) Introduction

The Thirty-second session of UNCITRAL was held in Vienna from 17 May to 4 June 1999. The Commission had on its agenda, *inter alia*, the following four substantive topics for consideration:

(i) Privately financed infrastructure projects;

(ii) Electronic Commerce;

(iii) Receivables financing: Assignment of Receivables; and

(iv) Monitoring implementation of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

On the topic 'Privately financed infrastructure projects' the Commission had at its 29th Session in 1996 decided to prepare a legislative guide on build-operate-transfer contracts (BOT) and related topics of projects. Accordingly, the UNCITRAL Secretariat was directed to review issues suitable for being dealt with in a legislative guide and to prepare draft materials for consideration by the Commission. In accordance with the line-of-work that was subsequently approved by the Commission at its 30th Session (1997), the Secretariat at the 31st session presented the drafts of the introductory chapter and four other chapters (Chapters I, II, III and IV). At the current session, the Commission had before it the revised draft text of earlier chapters (Chapter I to IV) and initial drafts of the remaining chapters (Chapters V to VIII).

On the subject of 'Electronic Commerce', it may be recalled that the Commission, at its 30th Session (1997), entrusted the Working Group on Electronic Commerce with the preparation of uniform rules on the legal issues of digital signatures and certification authorities. While taking note of the manifest difficulties faced by the Working Group in reaching a common understanding of the new legal issues associated with the use of digital and other electronic signatures, the Commission at its 31st session in 1998 expressed the view that the progress realised so far indicated that the draft Uniform Rules on Electronic Signatures were progressively being shaped into a workable structure. At the current session, the Commission had before it the report of the Working Group on the work of its thirty-third and thirty-fourth sessions. The Commission while noting the significant progress achieved at these session, also felt that the Working Group has been faced with difficulties in the building of a consensus as to the legislative policy on which the uniform rules should be based. Note was also taken as to the suggestions with respect to the future work in the field of electronic commerce.

On the subject of 'Assignment in Receivables Financing', the Commission considered the reports of the twenty-ninth and thirtieth session of the Working Group on International Contract Practices. It may be noted that the Working Group had been mandated to prepare uniform law on assignment in receivables financing. The Commission noted that the Working Group had made substantial progress on a number of matters. The Commission identified and deliberated on a number of specific issues that remain to be addressed by the Working Group. More particularly the discussion centered on the scope of the draft Convention and its relationship with the evolving UNIDROIT draft Convention on International Interests in Mobile Equipment. While expressing appreciation for the work accomplished, the Commission requested the Working Group to proceed expeditiously with its work so as to complete it in the year 1999 and to submit the draft Convention for adoption by the Commission at its thirty-third session (2000).

While considering the item 'Monitoring of Implementation of 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards', the Commission reviewed the progress made in monitoring the legislative implementation of the Convention and called upon States Parties to the Convention that had not yet replied to the questionnaire of the Secretariat, to do so. Besides this, the Commission had before it a Secretariat Note on possible future work on international commercial arbitration. Following exchange of views on the matter the Commission outlined a priority list of issues and entrusted further work on these items to a Working Group.

Thirty-ninth Session: Discussion

The Deputy Secretary General (AALCC) **Dr. Ahmed J. Al-Gaa'tri**, introduced the Secretariat report on the subject. As regards the progress made in the work of UNCITRAL at its 32nd session held in May-June 1999, Dr. Gaa'tri highlighted the Commission's deliberations regarding the draft legislative guide on privately financed-infrastructure projects; electronic signatures; assignments in receivables financing; and possible future work in the fields of international commercial arbitration and insolvency law. He also drew attention to the salient features of the International Convention on Arrest of Ships, which was adopted by a Diplomatic Conference of the UN and the IMO in March 1999. Inviting attention to the ongoing tenth session of UNCTAD (UNCTAD-X) at Bangkok (12-19 February 2000), he said that the central theme of the meeting, namely "Developmental Strategies in an increasingly interdependent world: Applying the lessons of the past to make globalization on effective instrument for the development of all countries and all peoples" was reflective of the contemporary reality of international trade. He emphasized that, if the developing countries of Asia and Africa are to derive the promised benefits of the globalization process, the developmental dimensions should be appropriately addressed within the existing trade institutions.

Other aspects dealt in the statement include the activities of UNIDO, UNIDROIT and the Hague Conference on Private International Law. More specifically, on the work of UNIDROIT, he informed on the progress made in the work relating to the draft convention on International Interests in Mobile Equipment. With respect to the activities of the Hague Conference, Dr. Gaa'tri said that the items relating to Hague Convention on Jurisdiction and Recognition of Judgements were at an advanced stage of completion.

Prof. Herbert Kronke, Secretary and Representative of the International Institute for the Unification of Private Law (UNIDROIT) informed that during his term of office the Asian and African regions would be the priority areas of attention. Both the current work as well as the items in preparation for the next triennial work programme of the UNIDROIT, he said, were aimed at meeting the specific needs of many Asian and African nations.

While most of the American and European States were members of UNIDROIT, he deplored the inadequate representation from the Asian-African States. In Africa the countries members of UNIDROIT are Egypt, Tunisia, South Africa and Nigeria. Current membership for Asia includes China, India, Japan, Korea, Pakistan and the Islamic Republic of Iran. In this context, he thanked the Governments of Egypt and South Africa who have been working closely with UNIDROIT towards encouraging more accessions from Asian-African States. He informed that the Kingdom of Morocco and Indonesia were presently considering their accession to UNIDROIT. Calling upon the AALCC Member States to accede to the UNIDROIT he said that it would be helpful to draw upon the expertise available in this region and gain vital insights to the specific needs of these countries in working towards harmonization of international commercial law.

Speaking on UNIDROIT's work relating to Draft Convention on International Security Interests in Mobile Equipment, he said that this instrument was aimed at cutting costs for high-value infrastructure equipment by 15% to 40%. Refuting the popular notion that this instrument is an aircraft finance device, he said the convention would address a whole range of mobile equipment that would move across borders and would have to be financed privately through the capital markets. These include: spacecraft (in particular telecommunications satellites), railway rolling stocks, exploration and oil-rigs, container pools, etc. Commending the active role played by China, Egypt, South Africa, Korea and Japan, he informed that it was likely that a Diplomatic Conference to adopt the Convention would be convened early 2001.

As regards, the topic "UNIDROIT Principles on International Commercial Contracts" he informed the success and popularity of the Principles were evident by the domestic contract law reform undertaken in many countries since 1994 when the Principles were published. He also said that the Arabic version of the Principles have been completed very recently. A UNIDROIT Working Group was now in the process of drafting Part II of the Principles which will add chapters relating to agency, assignment, third parties rights, set-off, limitation of actions and waiver.

As regards the future work of UNIDROIT, he said it was studying ways and means for structuring certain transactions on transnational and connected capital markets and other issues arising from the increased use of newly emerging technologies.

The **Delegate of the Republic of Korea** expressed his appreciation for the Secretariat's brief on this subjects. The process of globalization had, in his view, brought into focus the significance of harmonization of laws relating to international commerce. While many international bodies were currently addressing some of these issues, the delegate pointed out that care should be taken to ensure that multiplicity of forums does not result in duplicating the work. He informed that the Republic of Korea along with UNCITRAL would convene a three-day seminar in October 2000 at Seoul to widely disseminate and increase awareness of the past achievements and the current work of the UNCITRAL.

The **Delegate of Thailand** in his statement said that as a member of the UNCITRAL, Thailand attached importance on the model laws drafted by UNCITRAL and is in the process of adopting such model laws in the national legislation. In this respect, he informed that on the basis of the UNCITRAL Model Law his Government had set up committees to draft laws on electronic commerce, digital signatures, electronic funds transfer, electronic data interchange, computer crimes, and the protection of personal data. The reports of he above said bodies have been submitted to the Cabinet for approval.

On the topic of privately financed - infrastructure projects, Thailand endorsed UNCITRAL's attempt to keep a fair balance between attracting private investment infrastructure projects, on the one hand, and the protection of the interests of the host government as well as those of infrastructure users, on the other hand. His delegation also supported the decision of the Commission to begin further studies on international commercial arbitration and cross-border insolvency.

In this regard, the delegate encouraged the AALCC to organize seminars and or training courses for participants from Member Countries. He urged the Secretariat to explore the possibility of identifying, problems of common concern and practicality, which could be included in the agenda for discussion.

(ii) Resolution on the "Progress Report Concerning the Legislative Activities of the United Nations and other International Organizations Concerned with International Trade Law"

(Adopted on 23.2.2000)

The Asian-African Legal Consultative Committee in its thirty-ninth session.

Having taken note of the Secretariat Report concerning the Legislative Activities of the United Nations and other International Organizations concerned with International Trade Law in Doc. No.AALCC/XXXIX/ CAIRO/2000/S.9

Having heard with appreciation the comprehensive assessment of the Deputy Secretary General;

1. **Expresses** its appreciation for the brief of Documents prepared by the Secretariat on the recent developments in the field of international trade law;

2. **Expresses** its appreciation for the continued cooperation with the various international organizations in the field of international trade law and hopes that this cooperation will be intensified in future;

3. **Welcomes** the substantial progress achieved in the UNCITRAL Working Group on Assignments Receivables Financing and hopes that it would be in a position to adopt the same by the year 2000;

4. **Urges** Member States to consider adopting ratifying or acceding to the instruments prepared by the United Nations Commission on International Trade Law (UNCITRAL).

5. **Directs** the Secretariat, to monitor and report on the outcome of the tenth session of the United Nations Conference on Trade and Development held at Bangkok, Thailand from 12 to 17 February 2000; and

6. **Decides** to place the item "Progress Report Concerning the Legislative Activities of the United Nations and Other International Organizations concerned with International Trade Law" on the agenda of its fortieth session.

(iii) Secretariat Study: Progress Report Concerning the Legislative Activities of the United Nations and Other International Organizations in the Field of International Trade Law

A. United Nations Commission on International Trade Law (UNCITRAL)

Privately-Financed Infrastructure Projects: Preparation of a Draft Legislative Guide

Consideration by the Commission at the Current Session

Pursuant to the recommendations emerging from the Commission's deliberations at the last session, Secretariat had changed the overall structure of the legislative guide, combined some of its chapters, and prepared initial drafts of the remaining chapters. The complete draft of the legislative guide, as presented to the Commission is structured in the following manner:

Introduction and background information on privately financed infrastructure projects.

Chapter I: General Legislative Consideration

Chapter II: Projects Risks and Government Support

Chapter III: Selection of the Concessionaire

Chapter IV: The Project Agreement

Chapter V: Infrastructure development and operation

Chapter VI: End of Project Term, Extension and termination

Chapter VII: Governing Law

Chapter VIII: Settlement of Disputes.

(a) Introduction and Background Information on Privately-Financed Infrastructure Projects

The Secretariat Note1[1] on this chapter deals with the following aspects, viz., purpose and scope of the Guide, terminology of the Guide, forms of private sector participation in infrastructure projects, sources of finance, main parties involved in implementation of infrastructure projects; and infrastructure policy, sector structure and competition. On consideration of the Secretariat Note, the Commission *inter alia* recommended the insertion of a new paragraph for the purpose of clarifying the relationship between the legislative recommendations and the accompanying notes. The proposed paragraph would read as follows:

> "Each chapter of the Guide is divided into Legislative Recommendations ('Recommendations') and Notes on Legislative Recommendations ('Notes').The Recommendations contain a set of recommended legislative principles. The Notes offer an analytical introduction with references to financial, regulatory, legal, policy and other issues raised in the subject area. The Notes provide background information to enhance the understanding of the Recommendations".

1[1] A/CN.9/458/Add.1.

(b) Chapter I: General Legislative Considerations

The successful implementation of privately-financed infrastructure projects requires a legal framework that provides contracting authorities in the host country with the necessary power to award concessions for infrastructure development and operation. The chapter accordingly contains recommendation on legislative measures to delineate the scope of national authority to award concessions; administrative co-ordination for facilitating issuance of licences and permits; and constitution of regulatory bodies to regulate infrastructure services.2[2]

(c) Chapter II: Project Risks and Government Support

The Secretariat note3[3] in its presentation on project risks (Section-B) gives an overview of the main risks encountered in privately financed infrastructure projects and a brief discussion of common contractual solutions for risk allocation, which emphasizes the need for providing the parties with the necessary flexibility for negotiating a balanced allocation of project risks. An enumerative list of categories of project risk, as identified in the Secretariat note are:

(i) Project disruption caused by events outside the control of the parties;

(ii) Project disruption caused by adverse acts of Government ("Political risk");

(iii) Construction and Operation Risks;

(iv) Commercial Risks; and

(v) Exchange rate and other financial risks.

The Commission while considering this chapter was of the view that the above-mentioned risks were ones largely faced by the project company. Therefore it was agreed that reference need to be made to risks specifically faced by the contracting authority, in particular risks related to the transfer of the infrastructure facility to the contracting authority, at the end of the project term.

Section-C of this Chapter deals with "Government support". As used in the Guide, the expression "government support" refers to special measures, which is mostly of a financial or economic nature, that may be taken by the Government to enhance the conditions for the execution of a given project or to assist the project company in meeting some of the project risks, above and beyond the ordinary scope of the contractual authority and the project company to allocate project risks. Some common forms of governmental support measures, as identified by the Secretariat note include:

(a) Public loans and guarantees; (b) Equity participation; (c) Subsidies; (d) Sovereign guarantees; (e) Tax and customs; (f) Protection from competition; and (g) Ancillary revenue sources.

In addition to this, the Commission expressed the view that governmental undertakings aimed at protecting the concessionaire from competition might in some cases be inconsistent with the host country's obligations under international agreements on regional economic integration or trade liberalization. It was felt that such circumstances should be mentioned in the Guide.

(d) Chapter III: Selection of the Concessionaire

This chapter deals with methods and procedures recommended to be used for the award of privately financed infrastructure projects.4[4] In line with the advice of the World Bank and UNIDO, the present Guide opts for the use of 'competitive selections procedures', rather than negotiations with bidders. The selection method herein consists of a two-stage procedure with a pre-selection. It allows some scope for negotiations between the contracting authority and the bidders within clearly defined conditions. The recommendations as proposed by the Secretariat Note states that the contracting authority on the completion of the pre-selection proceedings, should:

2[2] A/CN.9/458/Add.2.

3[3] A/CN.9/458/Add.3.

4[4] A/CN.9/458/Add.4.

(a) invite the pre-selected bidders to submit final proposals;

(b) take recourse to two-stage procedure to request proposals from pre-selected bidders when it is not feasible for the contracting authority to formulate technical specifications or performance indicators and contractual terms in a manner so as to permit final proposals to be formulated.

On the consideration of this chapter within the Commission, opinions were expressed favouring competitive methods for selecting the concessionaire, with appropriate adjustments that took into account the particular needs of privately financed infrastructure projects. It was suggested that the UNCITRAL Model Law on Procurement of Goods, Construction and Services (based on notion of competition in public procurement) presented a suitable basis for devising selection procedures in privately financed infrastructure projects. Besides the Commission reviewed and provided directions for suitable formulations concerning final proposals and negotiations; evaluation criteria; unsolicited proposals; and review procedures.

(e) Chapter IV: The Project Agreement

The "project agreement" between the host government and the concessionaire is the central document in an infrastructure project. The project agreement defines the scope and purpose of the project as well as the rights and obligations of the parties; it provides details on the execution of the project and sets forth the conditions for the operation of the infrastructure or the delivery of the relevant services. The Secretariat Note on this chapter discussed the relation between the project agreement and the host country's legislation on privately financed infrastructure projects and the procedures/formalities for the conclusion and entry into force of the project agreement.5[5]

Though the Commission was of the view that the Notes, appropriately and in a balanced manner, reflected solutions found in different legal systems, however, a view was expressed that the draft chapter appeared to give more emphasis to the need for attracting financing for privately financed infrastructure projects than to the public service nature of most of these projects. The Commission reviewed the legislative recommendations and the accompanying notes and offered comments on matters relating to certain core terms of the project agreement - financial arrangements, project site, easements, security interests, assignment, transferability of shares, etc.

(f) Chapter V: Infrastructure Development and Operation

The conditions under which infrastructure is developed and operated may vary from project to project and therefore, it may not be advisable to regulate the specific aspects of the mutual rights and obligations of the concessionaire and the contracting authority, by means of general legislation. However, as the Secretariat Note on this chapter indicates, in most infrastructure projects there will be issues that require consideration by the legislature. Accordingly, the document prepared by the UNCITRAL Secretariat contains legislative recommendations pertaining to subcontracting; construction projects; infrastructure operation; guarantees of performance; changes in conditions and exemptions; and remedies in event of default.6[6]

On reviewing the proposal legislative recommendations, a view was expressed in the Commission that recommendation 1 and the accompanying notes appeared to advocate the concessionaire's unrestricted freedom to hire subcontractors. Attention was drawn to the practice of some legal systems whereby government contractors were not free to subcontract obligations without the prior approval of the contracting authority. Secondly, reference was made to the restrictions imposed by some regional integration agreements for the award of sub-contracts by concessionaire of public services. Against this backdrop, it was suggested that the recommendations be revised accordingly. Views to set forth the circumstances, under which the concessionaire may be required to

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5[5] A/CN.9/458/Add.5.

6[6] A/CN.9/458/Add.6.

carry out extensions in its service facilities and the method of financing the cost of such extensions, were also expressed.

(g) Chapter VI: End of Project Term, Extension and Termination

Most privately financed infrastructure projects are undertaken for a certain period, at the end of which the concessionaire transfers to the contracting authority responsibility for the operation of the infrastructure facility. This chapter accordingly deals with the following aspects7[7]:

(a) circumstances under which the project agreement may be extended;

(b) circumstances that may authorize the termination of the project agreement prior to the expiry of its term; and

(c) Consequences of the expiry of termination of the project agreement.

The Commission *inter alia* welcomed the possibility of extending the terms of the concession as a suitable mechanism for affording the concessionaire additional time to recover the investment if the concessionaire had incurred loss due to circumstances outside his control. At the same time, attention was drawn to the possibility of such extension being effected for reasons of public interest. Therefore, the Commission generally felt that legislative recommendations 1(a) and (b) should be redrafted so as to refer to the circumstances under which an extension was justifiable, without linking it to the notion of compensation. The Commission noted that the 'standard of compensation' in the event of termination of the project agreement by the contracting authority was a sensitive issue, because it raised consideration similar to those in connection with the standard of compensation due in the event of expropriation or nationalization. It was felt that the language to be used in the guide should take into account various general guiding principles and resolutions adopted by the UN General Assembly, formulated on this matter.

(h) Chapter VII: Governing Law

The stage of development of the relevant laws of the host country, the stability of its legal system and the adequacy of remedies available to private parties are essential elements of the overall legal framework for privately financed infrastructure projects. The legislative recommendations to the chapter deals with the following three aspects8[8]:

(1) **The law governing the project agreement**: The host country may wish to enact provisions that indicate, as appropriate, the statutory regulatory texts that govern the project agreement and those whose application is excluded.

(2) **The law governing contracts entered into by the concessionaire:** The host country may wish to consider adopting legislative provisions recognizing the freedom of the concessionaire and its lenders, insurers and other contracting parties to choose the applicable law to govern their contractual relations.

(3) **Other relevant areas of legislation**: The host country may wish to consider reviewing and, as appropriate, revising rules of law in other areas relevant to privately financed infrastructure project. These include:

- investment promotion and protection
- property law
- rules and procedures on expropriation
- intellectual property law
- security interests

7[7] A/CN.9/458/Add.7.

8[8] A/CN/458/Add.8.

- company law
- accounting practices
- contract law
- rules on government contracts and administrative law
- insolvency law
- tax law
- environmental and consumer protection law
- anti-corruption measures.

In addition, the legislative notes accompanying the recommendations invite attention to certain types of international agreements entered into by the host country, which may have implications for privately financed infrastructure projects. Instances of such international agreements include:

(a) Membership in multilateral financial institutions;

(b) General agreements on facilitation and promotion; and

(c) International agreement on specific industries.

A view was expressed in the Commission that while the legislative Guide was concerned with the law governing the project, the title of the chapter "Governing Law" suggested a discussion limited to choice of law or private international law. Hence alternative titles - "Law governing the risks of the project" and "Legal certainty required by private investment in infrastructure", were proposed for consideration by the Commission.

(i) Chapter VIII: Settlement of Disputes

Disputes that arise under the project agreement frequently present problems that do not arise under other types of contracts. This is due to the complexity of infrastructure projects, the fact that they are to be performed over a long period of time and involve a high level of public interest and the fact that a number of enterprises may participate in the construction and in the operational phases. Hence, disputes arising under the project agreement must be speedily settled in order not to disrupt the construction of the facility or the provision of the relevant services. In the interests of protecting the rights of the concessionaires as well as the consumers, the UNCITRAL Secretariat Note dealt with three categories of disputes9[9]:

(a) Disputes between the contracting authority and the concessionaire;

(b) Settlement of commercial disputes; and

(c) Disputes involving other parties.

The legislative recommendations on this aspect are focussed on: removing unnecessary statutory limitations on the contracting authority's freedom to agree to the most suitable dispute settlement mechanisms; reviewing legislation relating to the scope of sovereign immunity; and making available special simplified and efficient mechanisms for setting disputes between the concessionaire and its consumers, etc.

As a general observation, the Commission was of the view that while basic information about the methods of dispute settlement was useful, the chapter should be more geared to privately financed infrastructure projects and draw on practical experiences in various countries. Statements were made to the effect that the chapter should refer to the phases of privately financed infrastructure project and the different methods of dispute settlement that was suitable for, or were likely to be used in, each phase. Commenting on the legislative recommendation which proposes

9[9] A/CN.9/458/Add.9.

host countries to enable concessionaire to seek review of regulatory decisions, the Commission suggested that the chapter should also address the question of the use of non-judicial grievance settlement mechanisms such as expert panels, advisory bodies or arbitration. Some of the issues that were suggested for further discussion included the following: the relationship between regulatory bodies and arbitral proceedings in the settlement of a dispute and the treatment of information considered confidential during dispute settlement by a public regulatory body.

Electronic Commerce: Draft Uniform Rules on Electronic Signatures

Consideration by the Commission at its Current Session

At the current session, the Commission had before it report of the Working Group on the work of its thirty-third and thirty-fourth sessions.10[10] While it was generally agreed that significant progress had been made in the understanding of the legal issues of electronic signatures, it was also felt that the Working Group had been faced with difficulties in arriving at a consensus as to the legislative policy on which the uniform rules should be based.

A view was expressed in the Commission that the approach currently taken by the Working Group did not sufficiently reflect the business need or flexibility in the use of electronic signatures. It was felt that the uniform rules envisaged currently placed excessive emphasis on digital signature techniques and within the sphere of digital signatures, on a specific application involving third-party certification. Hence, it was suggested that work on electronic signatures by the Working Group should either be limited to the legal issues of cross-border certification or be postponed altogether until market practices were better established. However, the widely prevailing view was that the Working Group should pursue its task on the basis of its original mandate. The imminence of uniform rules on electronic signatures was emphasized in the light of the increased expectations for guidance from UNCITRAL by government and legislative authorities engaged in the process of preparing legislation on electronic signature issues and other closely related matters.

As regards the future work in the field of electronic commerce, various suggestions were made for possible consideration by the Commission and the Working Group. Such proposals *inter alia* include: the preparation of an international convention based on relevant provisions of the Model Law on Electronic Commerce and of the draft uniform rules; electronic transactional and contract law; electronic transfer of rights in tangible goods; standard terms for electronic contracting, rights in electronic data and software; and on line dispute settlement systems. Taking note of the proposals the Commission decided that upon completing its current task of preparation of draft uniform rules on electronic signatures, the Working Group could examine some or all of the above monitored items, with a view to making more specific proposals for future work by the Commission.

Assignment in Receivables Financing Consideration at the Current Session

At its current session the Commission had before it the reports of the Twenty-ninth and thirtieth sessions of the Working Group.11[11] The Commission noted that the Working Group at its thirtieth session had adopted the title, the preamble and draft articles 1 to 24 and thus the whole of the draft convention had been adopted with the exception of the optional substantive law priority rules.

While expressing appreciation for the progress achieved by the Working Group, the Commission noted that a number of specific questions remained to be addressed. Such issues *inter alia, included:*

(a) whether the draft Convention would apply only to assignments in a financing context or to other assignments as well;

(b) whether certain assignments such as those involved in securities and clearing-house transactions should be excluded or simply dealt with differently;

10[10] A/CN.9/454 and 457.

11[11] A/CN.9/455 and 456.

(c) whether location of a corporation should be defined by reference to its place of business, place of incorporation or place of central administration, for purposes of the draft Convention;

(d) whether priority with respect to the 'proceeds of receivables' should be treated in the same way as priority with respect to receivables;

(e) whether private international law rules should be used to fill gaps in the substantive law provisions of the draft Convention to unify the private international law on assignment at large; and

(f) whether the optional substantive law priority rules should be expanded or rather reduced to a couple of principles.

The Commission also considered ways of avoiding any conflict between the draft Convention and the UNIDROIT Draft Convention on International Interests in Mobile Equipment and its protocols on aircraft, space equipment and railway rolling stock. One view was that the assignments of receivables arising from the sale or lease or high-value equipment should be excluded from the draft Conventions, since such receivables were in practice part of equipment financing. A second view was that, rather than excluding such assignments from the scope of the draft Convention in all cases, it might be preferable to give precedence to the UNIDROIT Draft Convention with regard to such assignments only if the UNIDROIT Draft Convention applied in a particular case. A third view was the possibility of excluding certain assignments from the UNIDROIT draft Convention could be considered. The Commission referred these views to the Working Group for consideration.

The Working Group was requested by the Commission to proceed with its work expeditiously so as to enable the draft Convention to be circulated to Governments for comment in good time and for consideration by the Commission for adoption at its thirty-third session (2000). As regards the subsequent procedure for adopting the draft Convention, the Commission noted that it would have to decide at its next session whether it should recommend adoption by the General Assembly or by a diplomatic conference to be convened by the General Assembly for that purpose.

Other Topics

(a) International Commercial Arbitration: Possible Future Work

It may be recalled that the Commission during its thirty-first session, held on 10 June 1998 a special commemorative New York Convention Day in order to celebrate the 40th anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).At that commemorative conference, various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable the Commission to consider the desirability of any future work.

At the current session the Commission had before it a note prepared by the UNCITRAL Secretariat containing issues and problems identified in arbitral practices.12[12] The specific aspects identified by the Secretariat Note include:

(a) Conciliation;

(b) Requirement of written form for arbitration agreement;

(c) Arbitrability;

(d) Sovereign immunity;

(e) Consolidation of cases before arbitral tribunals;

(f) Confidentiality of information in arbitral proceedings;

(g) Raising claims for the purpose of set-off;

12[12] A/CN.9/460.

(h) Decisions by 'truncated' arbitral tribunals;

(i) Liability of arbitrators

(j) Power by the arbitral tribunal to award interest;

(k) Costs of arbitral proceedings;

(l) Enforceability of interim measures of protection; and

(m) Discretion to enforce an award that has been set aside in the State of origin.

The Commission undertook its deliberations with an open mind as to the ultimate form the future work of the Commission might take. It was agreed that any considerations as to the form would at the current time be tentative, leaving firmer decisions to be taken later as the substance of proposed solutions became clear. At its conclusion of its deliberations, the Commission decided to entrust the work to a working group. It was agreed that the priority items for the working group should be:

- conciliation; (item (a) above)
- requirement of written form for the arbitration agreement; (item (b) above)
- enforceability of interim measures of protection; (item (1) above); and
- discretion to enforce an award that had been set aside in the State of Origin (item (m) above).

As regards the other topics mentioned above, which were accorded lower priority, the working group was to decide on the time and manner of dealing with them.

(b) Possible future work on insolvency law

The Commission had before it a proposal by Australia on possible future work in the area of insolvency law. Drawing attention to recent global and regional financial crises and the work undertaken in international fora in response to those crises, the Australian proposal cited these reports demonstrate that strong solvency and debtor-creditor regimes were important means to prevent financial crises and facilitating rapid and orderly workouts from excessive indebtedness. The proposals urged that the Commission consider entrusting a working group with the development of a model law on corporate insolvency regimes. While the Commission recognised the importance of strong insolvency regimes, the prevailing view was that an exploratory session of a working group should be convened to prepare a feasibility proposal for consideration by the Commission at its thirty-third session.

(c) AALCC's Participation at the Session

The AALCC was represented by Dr. Ahmad J. Al Gaa'tri, Deputy Secretary General of AALCC to explore the possibilities of convening a seminar or workshop on global electronic commerce, in co-operation with UNCITRAL and UNCTAD. The Commission while appreciating the statement, welcomed all efforts aimed at strengthening cooperation with the AALCC.

Date and Place of the Thirty-third Session

It was decided that the Commission would hold its thirty-third session in New York from 12 June to 7 July 2000. This duration was considered necessary in view of the expectation that two, or possibly three, draft legal texts would be submitted to the Commission for finalization and adoption.

B. United Nations Conference on Trade and Development (UNCTAD)

Preparation for the Tenth Session (UNCTAD-X): February 2000

The tenth session of the United Nations Conference on Trade and Development (UNCTAD-X) was scheduled to open on 12 February 2000 at Bangkok, Thailand. At the twentieth executive session of the Trade and Development Board of the UNCTAD held on 5 February 1999, the following substantive agenda item was adopted for UNCTAD-X.

Development Strategies in an increasingly interdependent world: Applying the lessons of the past to make globalization an effective instrument for the development of all countries and all people.

The developmental impact of globalization has been mixed: while some developing countries have benefited, others have not. Economic disparities among countries have not been reduced, with the result that a number of developing countries, particularly the LDC's, run the risk of further marginalization. Tensions and imbalances of a systemic nature have also arisen, and given the high degree of interdependence in the world economy, the risk of financial upheavals spreading across other countries and regions has greatly increased. The international community should undertake a rigorous and balanced review of the policy and institutional framework for global trade and finance. In this context, the Conference provides member States with an opportunity to take stock of and review the major international economic initiatives and developments, in particular those that have taken place since UNCTAD IX. UNCTAD should consider the strategies and policies that are most likely to ensure the successful integration of all countries concerned, particularly the developing countries, into the world economy on an equitable basis, and to avoid the risk of further marginalization.13[13]

UNCTAD-X will also have before it the report of the Secretary-General of UNCTAD. This document entitled "Report of the Secretary General of UNCTAD to UNCTAD-X"14[14] seeks to view the process of globalization as one that goes beyond mere unification of markets. Globalization is articulated in terms of cooperation and shared knowledge for security and development. The Report calls for a new international commitment to growth and development and examines the role that the UNCTAD could assume in the evolving world economy.

In accordance with past practice, the Report of UNCTAD-X will be submitted to the UN General Assembly.

An Overview of the Work of the Commissions

It might be recalled that the Ninth session of the United Nations Conference on Trade and Development held at Midrand (South Africa) in 1996, decided to pay more attention in its analytical and deliberative work on the following areas:

- Globalization and development
- International trade in goods and services, and commodity issues
- Investment, enterprise development and technology
- Services infrastructure for development and trade efficiency.

The emphasis of UNCTAD since the Midrand session has mostly focussed on analyzing the impact of the Uruguay Round Agreements on development and working out modalities for enhancing capacities of developing countries for participation in the multilateral trading system. To accomplish this agenda, UNCTAD-IX established the following subsidiary bodies of the Trade and Development Board: (i) the Commission on Trade in Goods and Services, and Commodities; (ii) the Commission on Investment, Technology and Related Financial Issues; and (iii) the Commission on Enterprise, Business Facilitation and Development. These commissions adopt an integrated approach in their respective areas of competence and meet once a year, unless otherwise decided by the Board.

The following part seeks to provide an overview of the activities of the three Commissions.

I. Commission on Trade in Goods and Services, and Commodities

It may be recalled that the third session of the Commission held from 28 September to 2 October 1998, had endorsed the convening of three expert level meeting in the year 1999 on the following topics:

13[13] TD/B/EX(20)/L.1.

14[14] TD/380, 29 July 1999.

(i) Examining trade in agricultural sector, with a view to expanding the agricultural exports of the developing countries, and to assisting them in better understanding the issues at stake in the upcoming agricultural negotiations;

(ii) Scope for Expanding Exports of Developing Countries in Specific Services Sectors through All GATS Modes of Supply, taking into account their interrelationship, the role of information technology and of new business practices;

(iii) The impact of changing supply-and-demand market structure on commodity prices and exports of major interest to developing countries.

Accordingly, the *Expert Meeting on Trade in the Agricultural Sector* was held at Geneva from 26 to 28 April 1999. The Agreed Conclusions of the Expert Meeting recognized that least developed countries (LDCs) lacked the capacity to improve their competitive position and exploit opportunities arising from global agricultural trade. The following issues have been identified as problems facing developing countries, particularly LDCs, and that need to be taken into account in the upcoming agricultural negotiations:

(i) **Market Access:** Need to identify possible tariff reduction formulae to be employed in the next reform process; and discussions which on the future of Special Safeguard (SSG) provision, which has often been applied against exports from developing countries.

(ii) **Domestic Support**: Further discussions required to identify how development aspects of domestic support measures in developing countries could be incorporated in the domestic support countries.

(iii) Export subsidies and support.

(iv) Technical support provided pursuant to the Sanitary and Phyto Sanitary and Phyto Sanitary Agreement (SPS) and Agreement on Technical Barriers to Trade (TBT) needs to be increased.

(v) **Special and Differential Treatment (S&D)**: S&D treatment could focus on specific features of market access, increased productivity, food security, the need to protect small farmers, the special situations of small and vulnerable economies and developing countries with large segments of the population dependent on the agricultural sector for employment.15[15]

The *Expert Meeting on Air Transport Services on "Clarifying Issues to Define the Elements of the Positive Agenda of Developing Countries as Regards both the GATS and Specific Sector Negotiations of Interest to Them"*, was held at Geneva from 21 to 23 June 1999. It may be noted that the current Annex on Air Transport in the General Agreement on Trade in Services (GATS) rules out its application to traffic rights and services related to traffic rights. The Annex however lists three services related to air transport to which the rules of the GATS apply. Yet commitments in these three sectors are limited.

The Expert Meeting in its agreed conclusions16[16] urges GATS signatories to review their commitments and also to consider options for extending the coverage of items similar to those now listed in paragraph 3 of the Annex. The Agreed conclusion examines the ways of extending the coverage; deals with treatment of developing countries; and analyses the application of competition policy and other regulatory issues in this sector. Accordingly, the Expert Meeting recommended that the UNCTAD in collaboration with the International Civil Aviation Organization (ICAO), should work with developing countries on these options and the construction of the positive agenda for further negotiations.

15[15] TD/B/COM.1/23;TD/B/COM.1/EM.8/3.

16[16] TD/B/COM.1/25TD/B/COM.1/EM.9/3.

The *Expert Meeting on the "Impact of Changing Supply-and-Demand Market Structures on Commodity Prices and Exports of Major Interest to Developing Countries"* was held at Geneva from 7 to 9 July 1999. The Agreed Conclusions prescribe a large number of actions and policies to enhance the benefits of commodity production and trade for developing countries.17[17] These conclusions are grouped under three heads:

(a) policies with regard to the general state of the world commodity economy;

(b) policies specific to improving the domestic framework for commodity sector production, processing and trade, specifically in the light of market liberalization; and

(c) policies towards adapting to and realizing opportunities arising from international commodity market conditions.

The conclusions of the three expert group meetings were forwarded to the Commission on Trade in Goods and Services, and Commodities that held its fourth session on 20th September 1999.

II. Commission on Investment, Technology and Related Financial Issues

In pursuance of the decisions of the Commission at its third session held in September 1998 the following expert group meetings were convened:

An *Expert Meeting on "International Investment in the Interest of Promoting Growth and Development"* was held at Geneva from 24 to 26 March 1999. The Expert Meeting reviewed the ways and means, by which existing international investment agreements (IIAs) provide for flexibility for the purpose of promoting growth and development and discussed pertinent experiences, including various concepts applied at different levels of IIAs. The Agreed Conclusions of the Expert Meeting state that the three expert meetings convened by the Commission so far on the development dimensions of IIAs have assisted in clarifying some of the concepts and mechanisms available for IIAs so as to be responsive to development concerns.18[18] The Expert Meeting recommended that the report submitted by the UNCTAD Secretariat19[19] should be revised in the light of the discussions during the Expert Meeting.

An *Expert Meeting on "Foreign Portfolio Investment and Foreign Direct Investment: Characteristics, Similarities, Complementarities and Differences, Policy Implications and Development Impact"* was held at Geneva from 28 to 30 June 1999. The Expert Meeting examined how different types of investment flows could contribute to development and discussed in the regard the relationship between foreign direct investment (FDI) and foreign portfolio investment (FPI) flows. Noting the respective roles of FDI and FPI the Agreed Conclusions20[20] of the Expert Meeting, undertook a comparative examination of both these flows under the following heads: statistical recording, contribution to development, determinants and volatility, policy implications, etc.

The *Intergovernmental Group of Experts on Competition Law and Policy* met at its second session from 7 to 9 June 1999 at Geneva. Keeping in view that the Fourth Review Conference is scheduled to be held in the year 2000, the Group invited the Secretary General of UNCTAD to prepare an assessment of the operation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices ("Set"). The Agreed Conclusions of the Intergovernmental Group recommended that the Fourth Review Conference consider the following issues related to the better implementation of the Set:21[21]

17[17] TD/B/COM.1/26;TD/B/COM.1/EM.10/3.

18[18] TD/B/COM.2/EM.5/L.1.

19[19]International Investment Agreements and Concepts Allowing for Flexibility in the Interests of Promoting Growth and Development. Doc. No. TD/B/COM.2/EM.5/2.

20[20] TD/B/COM.2/EM.6/L.1.

21[21] TD/B/COM.2/19;TD/B/COM.2/CLP/14.

(a) Experience gained so far with the establishment of competition laws and competition authorities and enforcement of the law and competition advocacy in developing countries, countries with economies in transition, and relevant regional organizations;

(b) Organization and powers of competition authorities, including how to determine enforcement priorities;

(c) Treatment of confidential information in competition law and policy;

(d) The role of competition policy in economic development;

(e) Competition policy issues in telecommunications; and

(f) Competition policy and its implications for regulatory and legislative reforms.

Guideline for National Systems for the Qualification of Professional Accountants: It may be recalled that the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting (ISAR) was created by resolution 1982/67 of the Economic and social Council. It is the only intergovernmental working group in the UN system devoted to the international harmonization of national accounting and reporting practices at the corporate level. The ISAR at its sixteenth session in Geneva from 17-19 February 1999 recognized that improved accounting disclosure and auditing depends on the existence of qualified professional accountants and recommended the "Guideline for National Systems for the qualification of Professional Accountants" (hereafter 'Guidelines'). The Guideline is structured in the form of recommendations. It includes22[22]:

- Recommendation on general education;
- Recommendation on professional education other than education for professional knowledge;
- Recommendation on the modern curriculum for education for professional knowledge;
- Recommendations for the assessment of professional competence (examinations);
- Recommendations on practical experience; and
- Recommendations of adherence to a code of professional ethics.

The agreed conclusions of the above-said expert meetings were forwarded for the consideration of the Commission at its fourth Session held on 4-8 October 1999.

III. Commission on Enterprise, Business Facilitation and Development

Pursuant to the decision of the Commission on Enterprise, Business Facilitation and Development at its third session in November 1998, the following two expert group meetings were held in 1999.

An *Expert Meeting on Sustainable Financial and Non-Financial Services for SME Development* was held at Geneva from 2 to 4 June 1999. In the Agreed Conclusions and Recommendations23[23] adopted by the Expert Meeting, the difficulties faced by financial institutions to serve small and medium-sized enterprises (SMEs) because of high risk and high transaction costs was recognised and appropriate recommendations to governments and UNCTAD were suggested. As regards the non-financial services, the Expert Meeting recognized that SMEs are unable to make their full potential contribution because they lack access to markets, finance, and technology and business skills. Against this backdrop, the Expert Meeting recommended "principles of good practice" to be adopted by governments and the international community when promoting the delivery of

22[22] TD/B/COM.2/ISAR/L.2.

23[23] TD/B/COM.3/EM.7/L.1.

business development services for enterpreneurship, productivity improvement, mobilization and efficient use of local savings.

An *Expert Meeting on Capacity-Building in the Area of Electronic Commerce: Legal and Regulatory Dimensions* was held at Geneva from 14 to 16 July 1999. The importance of electronic commerce as a vehicle for promoting the participation of developing countries in global trade and development should be recognised. To do so, the legal issues electronic commerce need to be addressed and monitored on a regular basis. The Agreed Conclusions and Recommendations24[24] as adopted by the Expert Meeting, *inter alia*, urged Governments to:

- examine the existing legal infrastructure to see if paper-based form requirements prevent laws from being applied to electronic transactions and to determine whether such form requirements should be adjusted to make their laws technology-neutral and permit their interpretation and application in an electronic environment;
- to give consideration to using the UNCITRAL Model Law on Electronic Commerce?as a basis for preparing new laws or adjusting current laws.

More significantly, developed country governments were urged to dismantle barriers to global electronic commerce for developing countries by removing restrictions on the export of technology, especially with respect to state-of-the-art encryption systems and products, as well as associated technologies and computer systems.

It was recommended that international organizations should strengthen their assistance to developing countries in the following areas:

- Reviewing and adopting their national laws to accommodate electronic commerce;
- Promoting awareness, education and training; and
- Developing/strengthening electronic commerce infrastructures.

As regards the role of UNCTAD, the Expert Meeting recommended that UNCTAD should seek to assist developing countries in preparing legislation to accommodate electronic commerce. It was suggested that UNCTAD should intensify its training activities in the field of legal aspects of electronic commerce, especially for developing countries and their small and medium-sized enterprises (SMEs). It was proposed that a special segment on legal aspects of electronic commerce could be included in UNCTAD's existing training programmes, such as TRAIN FOR TRADE.

The recommendations of the Expert Meetings were forwarded to the fourth session of the Commission on Enterprise, Business Facilitation and Development held at Geneva from 19 to 23 July 1999.

C. United Nations Industrial Development Organization (UNIDO)

The work programme of UNIDO in the area of international trade law appears to be focused on the preparation of guidelines, manuals and checklists of contractual clauses so as to assist parties from the developing countries in concluding industrial contracts. These may be enumerated as below:

(1) Guidelines on the purchase, maintenance and operation of basic insurance coverage for processing plants in developing countries;

(2) UNIDO Model from of agreement for the licensing of patents and know-how in the petrochemical industry, including annexes, in integrated commentary and alternative texts of some clauses;

(3) Items which could be included in contractual arrangements for the setting up of a turnkey plant for the production of bulk drugs (pharmaceutical chemicals) or intermediaries included in the UNIDO list;

24[24] TD/B/COM.3/E.8/L.1.

(4) UNIDO Model form of licensing and engineering services agreement for the construction of a fertilizer plant;

(5) UNIDO Model form of turnkey lump-sum contract for the construction of a fertilizer plant;

(6) UNIDO Model form of semi-turnkey contract for the construction of a fertilizer plant;

(7) UNIDO Model form of cost-reimbursable contract for the construction of a fertilizer plant;

(8) Guidelines for Infrastructure through Build-Operator-Transfer Projects: The BOT Guidelines prepared by UNIDO cover the entire spectrum of financial and legal issues faced by government authorities and project managers in the development of BOT projects, while offering developing countries the basic orientation needed to design effective BOT strategies. The Guidelines *inter alia*, contain chapters on the following aspects: introduction to the BOT concept; the government's role in providing for successful BOT projects; transfer of technology and capability building; procurement issues and selection of sponsors; financial structuring of BOT projects; and standard forms of agreements relating to construction, operation and maintenance.

(9) The UNIDO Manual on Technology Transfer Negotiations: This Manual is primarily intended to serve the purpose of a teaching tool for technology transfer negotiation courses for enhancing he negotiation skills of the developing countries.

D. International Institute for the Unification of Private Law (UNIDROIT)

The 78th Session of the Governing Council of UNIDROIT met in Rome from 12-16 April 1999. The current work programme (1999-2000) of the UNIDROIT includes: (a) International Interests in Mobile Equipment; (b) UNIDROIT Principles of International Commercial Contracts; (c) Model Law on Franchising; (d) Transnational rules of Civil Procedures; and (e) Uniform rules for transport.

Draft Convention on International Interests in Mobile Equipment

The purpose of the proposed convention is to establish an international legal regime for security and related interests in equipment of a kind normally moving from one State to another in the normal course of business for example aircraft and railway rolling stock, satellites and other space objects. It may be recalled that this project resulted from a proposal made by Mr. T.B. Smith QC, the Canadian Member of the Governing Council of UNIDROIT in 1988. Accordingly, an exploratory working group constituted by UNIDROIT had concluded that the legal uncertainties resulting from the application of the *lex rei_sitae* tended to deter banks and other financial institutions from extending secure financing facilities for high value mobile equipment.

Against this backdrop, a study group was constituted by the Council for the purpose of preparing uniform rules on certain international aspects of security interests in mobile equipment.25[25] At the conclusion of the fourth round, the study group adopted the text of a Preliminary Draft UNIDROIT Convention on International Mobile Equipment. The main features of this draft convention are:

(i) it enumerates a new framework convention/protocol approach to law making wherein States have the required flexibility to join the treaty and abide by its obligations;

(ii) it provides international protection to security interests in high value, uniquely identifiable mobile equipment;

(iii) it provides for a regime by which such interests can be perfected by registration, thereby enabling third parties to discover their existence; and

(iv) lays down rules for the recognition and prioritization of interests, both within and outside the debater's bankruptcy.

25[25]The study group met in four sessions from 1993-1997. Besides a number of specialized working groups on aviation, rail and space industries provided vital input regarding the impact of the work of the study group.

The preliminary draft convention and the draft protocol on matters specific to Aircraft Equipment were considered by the 77th Session of the Governing Council. At the 78th Session of the Council the First Joint Session of the UNIDROIT Committee of Government Experts for the preparation of a draft convention on international interests in mobile equipment and a draft Protocol thereto on Matters Specific to Aircraft Equipment and the sub-committee of the ICAO Legal Committee on the Study of International Interests in Mobile Equipment (aircraft equipment) was held in Rome from 1-12 February 1999. This meeting threw up a number of issues requiring special attention. Chief among these were the insolvency related provisions of the preliminary draft.

At the First Joint Session a major issue was the adequacy of the insolvency related provisions of the draft convention and the draft Protocol thereto on Matters Specific to Aircraft Equipment (hereinafter Aircraft Protocol) in the light of the existing international instruments on insolvency and insolvency assistance and national law rules pertaining to transnational insolvency. The First Session decided to convene an Informal Insolvency Working Group to consider the insolvency provisions of the draft convention and the draft Aircraft Protocol. The Working Group met on 1 and 2 July 1999, but owing to shortage of time could not achieve much. Hence it was decided to carry forward this work done by the Insolvency Working Group to the Second Joint Session.

Similarly, at the First Joint Session a Registration Working Group was set up look into and consider the impact of the recommendations made by the Registration Working Group on the registration provisions of the preliminary draft Aircraft Protocol and to the structural and political aspects of the future International Registry for aircraft equipment.

At the Second Joint Session held in Montreal from 24 August - 3 September 1999, the discussions generally revolved around the structure of the instruments under preparation. While few delegates wanted the draft aircraft Protocol alone to deal with interests in mobile equipments, others had an open mind wherein work should continue on the basis of a multi equipment convention. Moreover, it was agreed that an integrated text of the preliminary draft convention and the draft Aircraft Protocol could be worked upon at the Third Joint Session.

At the Second Joint Session much progress was made by the Insolvency Working Group. The Working Group concentrated essentially on Articles XI and XII of the preliminary draft Aircraft Protocol. This included two options being given to the States: (a) Follow a 'hard approach', where a set period is provided for the giving of possession of the aircraft object to the obligee, should all defaults by the obligor not be cured at the end of such period; and (b) follow a 'softer approach' which involved providing judicial control and discretion in the obligee's realization of his security in the aircraft object.

The Second Joint Session also dwelt on the issue of jurisdiction related provisions of the preliminary draft conventions and draft Protocol, in light of the comments made by the Hague Conference on Private International Law. The Conference it must be remembered is preparing a Draft Universal Convention on Jurisdiction and the Recognition and Enforcement of Judgements. A Jurisdiction Working Group was set up to further look into the matter.

The Drafting Committee considered the recommendations of the Insolvency, Jurisdiction and Registration Working Groups and was able to complete a second reading of the preliminary draft convention and the draft aircraft protocol. Owing to the volume of work little substantial progress was made at the second joint session. To enable speedy completion of its work the session appointed an *amicus curiae* ad hoc group to complete unfinished work to enable the circulation of revised texts of the preliminary draft convention and draft aircraft protocol by end of 1999.

Also completed along with the draft aircraft protocol were the preliminary draft Protocol to the draft Convention on Matters Specific to Railway Rolling Stock. However, the preliminary Space Protocol to the preliminary draft Convention on Matters Specific to Space Property still continues. As regards the draft Rail Protocol the UNIDROIT Secretariat has been authorized by its Governing Council at its 78th Session to convene a Steering and Revisions Committee to consider the compatibility of the draft Rail Protocol to the draft Rail Convention and complete the same before the 79th Session to be held in 2000.

UNIDROIT Principles of International Commercial Contracts

The UNIDROIT Principles of International Commercial Contracts were published in 1994 and a number of countries, it may be stated, adopted and incorporated these principles in their national arbitration, meditation or conciliation laws. The Governing Council appreciative of the good response, in 1997 constituted a working group for their preparation in the form of a second edition, wherein subjects not covered in the first edition, could be considered. The Working Group that met in 1998 decided that the following subjects be dealt with on a priority basis: agency, limitation of actions, assignment of contractual rights and duties, contracts for the benefit of a third party, set off and waivers. A number of Rapporteurs on these subjects were appointed. The second session of the Working Group was held in Bozen, Italy from 22-26 February 1999.

At its 78th Session the Governing Council approved the addition, as a footnote to paragraph 2 of the Preamble of the Principles of the following text of a model clause to assist parties in incorporating the UNIDROIT Principles into their contracts:

"Parties working to provide that their agreement be governed by the Principles might use the following words, adding any desired exceptions or modifications:

"This contract shall be governed by the principles (1994) [excerpts to Articles?]"

Parties wishing to provide in addition for the application of the law of a particular jurisdiction might use the following words.

"This contract shall be governed by the UNIDROIT Principles (1994) except as to Articles?], supplemented when necessary by the law of [jurisdiction X]".

"However if such a clause is used along with an arbitration clause, the parties should take care to ensure that the two clauses are not incompatible".

As regards these principles on international commercial contracts, it has come to the notice of UNIDROIT that the new Panama Law on Arbitration (Decree NO. 5 of 8 July 1999) has in a unique way incorporated the UNIDROIT Principles. Articles 26 and 27 of the Panamian Law expressly mention UNIDROIT Principles and a lay, which may be chosen by the Parties and is to be taken into consideration by the arbitral tribunal, even in domestic arbitration cases, which is a novelty.

Other Topics under Consideration

Model Law on Franchising

The work on franchising was completed in 1998 with the publication of the *Guide to International Master Franchise Agreements*. The next stage will be the preparation of a model law on franchising to serve as a basis for the drafting of domestic legislation in this field. It may be recalled that the Governing Council had decided at the 1988 Session, to endorse the Secretariat's proposal that the Franchising Study Group commence work on a draft model law on franchising. A drafting Committee of the Study Group on Franchising held its first meeting in January 1999 to prepare the first draft. The Study Group in a Plenary will discuss this draft in December 1999.

Transnational Rules of Civil Procedure

The decision to include this item on the Work Programme of the UNIDROIT was taken pursuant to a proposal by the American Law Institute (ALI) to prepare uniform rules of procedure (including, if appropriate, provisional measures) applicable to transnational disputes once the question of jurisdiction has been settled, but before the question of recognition and enforcement of the judgement arises. Thereupon, the Governing Council decided to appoint an independent expert to prepare a flexibility study on the basis of which a decision would be taken as to the work to be carried out.

Model Law on Leasing

The Governing Council decided to include on its Work Programme the preparation of a model law on leasing, drawing on the expertise already gained by the UNIDROIT when it drew up the Convention on International Leasing in 1988. This effort, the Council felt, would greatly help the countries undergoing economic transition to formulate a coherent response, as a reform to their domestic laws is underway, which is sponsored by regional and universal development banks. It may

also be added that preliminary research carried out by the Secretariat of the UNIDROIT, had shown that external sources of funding could be located, to help finance the preparation of such a model law.

Uniform Rules Applicable to Transport

The Governing Council decided to include the preparation of uniform rules for transport in the work programme to provide assistance and cooperation to all those wishing to renew their transport laws. It was also felt that subject to availability of funds and the cooperation of other international organizations, this could be taken up.

E. Hague Conference on Private International Law

The work programme for the period 1996-2000 of the Hague Conference includes matters relating to: (i) Future Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters; (ii) The operation of the Hague Convention relating to Maintenance Obligations and of the New York Convention of 20 June 1956 on the Recovery Abroad of maintenance.

Mr. Mohammed Reza Dabiri, Deputy Secretary General, AALCC attended meeting of the Special Commission on the Question of International Jurisdiction and Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters, held in the Hague from 16-18 June 1999. The Special Commission has been entrusted the task of preparing a preliminary draft convention on the subject, which is to be submitted to the nineteenth Diplomatic Conference to be convened in 2000. The proposed convention would apply to matters relating to international litigation i.e. in cases where the parties are all subjects of private law or are acting for private entities, which in turn, would mean that this would exclude all cases between a State or a state entity or any other entity acting on behalf of a State in public service.

Furthermore, it may be recalled that on the basis of a preliminary document prepared by the Secretariat in 1997, delegates had reached a consensus on the objectives of the proposed convention. Views were expressed that the proposed convention must be simple, effective and pragmatically drafted by public. They had also felt that the convention must incorporate elements of majority of legal systems and not duplicate the work on the subject pursued by other international organizations. Matters relating to jurisdiction were also discussed.

The agenda for the fourth meeting of the Special Commission included a discussion a Working Document 144. The discussions on the proposed convention covered issues relating to (a) substantive scope (Article 1); (b) defendant's forum (Article 3) which includes individuals, companies, legal entities; (c) choice of court (Article 4); (d) appearance of defendant (Article 5); (e) contracts in general or jurisdiction (Article 6); (f) contracts with consumer (Article 7); (g) labour contracts (Article 8) (h) branches (Article 9); (i) Torts or jurisdiction (Article 10); (j) provisional or protective measures (Article 14); (k) trusts (Article 12); (l) claims and counter claims (Article 17); (m) *lis pendens* (Articles 23); (n) forum non-convenient (Article 24); (o) rules of jurisdiction and recognition (Articles 25-27); (p) judicial cooperation (Article 35); and (q) dispute settlement (Article 34). Detailed discussions on these topics resulted in a second reading of the draft text. It is hoped that the Special Commission would be able to complete its work and prepare a final text before the nineteenth session of the Conference in 2000, where the proposed convention would be adopted at a Diplomatic Conference.

26[1] A/CN.9/458/Add.1.

27[2] A/CN.9/458/Add.2.

28[3] A/CN.9/458/Add.3.

29[4] A/CN.9/458/Add.4.

30[5] A/CN.9/458/Add.5.

31[6] A/CN.9/458/Add.6.

32[7] A/CN.9/458/Add.7.

33[8] A/CN/458/Add.8.

34[9] A/CN.9/458/Add.9.

35[10] A/CN.9/454 and 457.

36[11] A/CN.9/455 and 456.

37[12] A/CN.9/460.

38[13] TD/B/EX(20)/L.1.

39[14] TD/380, 29 July 1999.

40[15] TD/B/COM.1/23;TD/B/COM.1/EM.8/3.

41[16] TD/B/COM.1/25TD/B/COM.1/EM.9/3.

42[17] TD/B/COM.1/26;TD/B/COM.1/EM.10/3.

43[18] TD/B/COM.2/EM.5/L.1.

44[19]International Investment Agreements and Concepts Allowing for Flexibility in the Interests of Promoting Growth and Development. Doc. No. TD/B/COM.2/EM.5/2.

45[20] TD/B/COM.2/EM.6/L.1.

46[21] TD/B/COM.2/19;TD/B/COM.2/CLP/14.

47[22] TD/B/COM.2/ISAR/L.2.

48[23] TD/B/COM.3/EM.7/L.1.

49[24] TD/B/COM.3/E.8/L.1.

50[25]The study group met in four sessions from 1993-1997. Besides a number of specialized working groups on aviation, rail and space industries provided vital input regarding the impact of the work of the study group.