It is true that this article has been drafted according to article 1 of the UNCITRAL Arbitration Rules which also lacks precision in this respect. But the shortcomings of the original rules should not be magnified by using them as a basis for the Rules.

In our opinion, it would be preferable if the application of the Rules was restricted to disputes arising from (i) contractual relationship only, whether the contract is written or oral; (ii) relationship with elements of foreignness only, i.e. from international contracts; and (iii) relationship of a commercial nature which means from commercial contracts of whatever type.

Articles 2–12

No comments.

Article 13

In the footnote to paragraph 2 of this article it is recommended that the settlement agreement contain a clause that any dispute arising out of, or relating to, the interpretation and performance of the settlement agreement shall be submitted to arbitration.

Naturally, the parties to any type of contract may agree to submit it to arbitration solely for the sake of interpretation. Hence, this possibility could be applicable also to the settlement agreement. Nevertheless, we would prefer to have the footnote deleted because an agreement on the successful completion of conciliation proceedings should not be made subject to arbitration even in respect of interpretation of its clauses. If the conciliation did result in the settlement of the dispute, then a new dispute could not arise because no interpretation problem should be possible. By the nature of things, settlement achieved in the course of conciliation excludes any further disputes. If, however, a dispute still arises, this would mean that no real settlement was reached. In such a case, the conciliation proceedings should be reinstituted or a recourse to litigation or arbitration should be made on the understanding, however, that the subject of the reinstituted conciliation or judicial or arbitral proceedings would not be "the interpretation and performance of the settlement agreement" but the *original dispute* for which the parties had agreed to seek an amicable settlement and for which they had instituted conciliation by application of the Rules.

Articles 14–15

No comments.

Article 16

We suggest that a second sentence be added to the text of this article to read: "Before initiating arbitral or judicial proceedings, such a party must first issue written declaration provided in article 15 (*d*)."

Articles 17–18

No comments.

Article 19

We propose that the qualification "Unless the parties have agreed otherwise" be deleted so that the sentence begins instead as follows: "A conciliation may . . .".

We do not think that the reasons advanced in paragraph 86 of the Commentary (A/CN.9/180)* could justify the performance of arbitral or other functions listed in article 19 by a conciliator. It seems highly debatable whether the conciliator's familiarity with the dispute could be regarded as an asset in subsequent arbitral proceedings.

Article 20

No comment.

Model conciliation clause—Variant A

This variant is quite acceptable.

Model conciliation clause—Variant B

This clause is onerous to the party initiating conciliation and therefore seems not to be in conformity with the spirit of the Rules.

ECUADOR (Addendum I)

1. The Government of Ecuador considers that the revised draft of the Conciliation Rules is an improved text embodying important principles and meaningful elements.

2. *Article 1.* In accordance with paragraph 23 of the commentary in document A/CN.9/180, reference should be made in the preamble of the Rules to "international commercial disputes", since that would indicate the principal field of application of these Rules.

3. *Article 2.* In view of the observations made in paragraph 31 of the above-mentioned commentary, there should be inserted in paragraph (4) of this article, before the last sentence and after the word "conciliate;", the following words: "the inviting party may indicate that decision already in the invitation". The paragraph would then continue with the sentence beginning: "If he so elects . . .".

4. *Article 3.* In view of the arguments indicated in paragraph 33 of the commentary, the word "normally" should be inserted in article 3, so that this provision would read: "There shall normally be one conciliator unless the parties have agreed that there shall be two or three conciliators."

5. *Article 4.* With reference to paragraph 40 of the commentary, the following sentence should be added at the end of article 4 (1) (*c*): "The parties may consult with the party-appointed conciliators concerning the appointment of the presiding conciliator."

6. *Article 5.* In view of what is stated in paragraph 47 of the commentary, the word "brief" in paragraph (1) of this article should be replaced by "succinct" since this would beter reflect the principle that the written statement by the parties should not be an actual pleading, an extensive statement, but a neat and concise document.

7. *Article 13.* In view of the footnote to paragraph (2) of this article, it would be desirable to add at the end of that paragraph, after the words "the settlement

* Reproduced as B, above.

agreement", the following sentence: "The settlement agreement may contain a clause that any dispute arising out of or relating to the interpretation and performance of the settlement agreement shall be submitted to arbitration."

8. *Article 14.* There is a reference in this article to the fact that, where the obligation of the conciliator and the parties to keep confidential all matters relating to the conciliation proceedings is concerned, some different provision may be made by law. This must, of course, refer to national law, which governs the conciliation process if this question should arise. However, it can also happen that national law is silent on the subject. Although we should prefer the deletion of the words "or required by law", the reference could be made clearer, if it is considered necessary to retain it, by using the following wording: ". . . or required by the law applicable to the conciliation . . .".

9. *Article 16.* There is a typing error in the fourth line of the Spanish text of this article, where the words *"arbitral o conciliatorio"* should read *"arbitral o judicial"*. In any event, we agree with the exception made in the last part of this provision, although we should prefer the word *"proteger"* instead of *"conservar"*.

10. *Article 19.* In view of the observations made in paragraph 84 of the commentary, the Spanish text of this provision should be clarified by inserting the word *"abogado"* after *"representante"*, so that the passage in question would read: *". . . ni como representante, abogado o consejero de una parte . . .".* The point is that the term *"representante"* may mean the attorney for the case but not the lawyer *(abogado)* pleading it, while a *consejero* may not always be the pleader or *abogado* but an expert who advises the *representante* or the pleader.

ARGENTINA (Addendum 2)

1. The fundamental purpose of the revised draft UNCITRAL Conciliation Rules is to ensure the full autonomy of the parties in conciliation proceedings. This principle, which was upheld by Argentina at the twelfth session, with the support of Austria, France and Singapore among other countries, is now more fully respected at the commencement, in the course of, and at the termination of proceedings.

2. The principle is reflected, for example, in the flexibility of the time-limit referred to in article 2, paragraph (4), which states that the party initiating conciliation may elect to treat the expiry of the time-limit as a rejection of the invitation to conciliate.

Thus the possibility of conciliation remains despite the expiry of the time-limit.

3. It is suggested that, in article 7, paragraph (2), the words "arising from the contract" should be added after the words "the rights and obligations of the parties". This wording indicates that the first consideration would be the terms established by the parties at the time of entering into the contract. This would ensure that solutions could be envisaged without the necessity of subordinating the issue to any national law which might be applicable.

4. The criterion that the settlement should be considered final and binding (art. 13, para. (3)) is also acceptable. This is a general principle which is universally accepted in national legislations (cf. art. 850 of the Argentine Civil Code, under which settlement has the same effects as a judgement that has acquired the authority of *res judicata*). On the other hand, whether the performance of the agreement may be enforced under the procedure for the implementation of judgements is an issue that should be determined in the light of national legislation. It should be made clear, however, that the settlement may be challenged on grounds of nullity. This is a fundamental principle to be taken into consideration vis-à-vis the final and binding nature of the settlement, since the right to challenge on the ground that consent has been vitiated cannot be waived unless it is a case of relative nullity, which can be remedied.

5. Since the conciliation proceedings must be based on the full autonomy of the parties, it should be borne in mind that although it is normally appropriate for the parties to refrain from initiating any arbitral or judicial proceedings during the conciliation, recourse to such proceedings should not in itself be regarded as an obstacle to the conciliation proceedings even when the arbitral or judicial proceedings have been initiated for reasons other than the specific purpose of preserving rights, as stipulated in the exception clause in article 16. Recourse to conciliation should be possible in other circumstances as well. It is therefore suggested that there should be an express provision which would clearly envisage the possibility of recourse to conciliation during arbitral or judicial proceedings. Thus the parties would be able to pursue two parallel proceedings: arbitral or judicial proceedings, on the one hand, and conciliation proceedings, on the other. These parallel proceedings could be pursued when arbitral or judicial proceedings are temporarily suspended. Yet such suspension cannot be a prerequisite for initiating the conciliation proceedings if the parties are to be allowed full freedom in the settlement of disputes. The parties themselves can best judge whether parallel proceedings are compatible.

6. It is suggested that a special provision should be included which would envisage the possibility of the parties determining the law applicable to various questions which might give rise to disputes and which it would be inappropriate to regulate by means of specific provisions in the Conciliation Rules. The choice of the law applicable to the settlement (art. 13) is extremely important, as is agreement on the law applicable to the rendering of an accounting of the deposits received, referred to in article 18, paragraph (4).

7. As a model conciliation clause, variant A is more in keeping with the idea that conciliation proceedings may be initiated at any time, there being no requirement that the initiating party should send an invitation to the other party before resorting to arbitral or judicial proceedings.

Variant B could be interpreted as binding on the party which wishes to have recourse to an arbitrator or a judge.

Nevertheless, both clauses are based on prior and legitimate agreement between the parties and are valid possibilities within the context of the idea of autonomy of will.