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REPORT OF THE WORKING GROUP ON INTERNATIONAL NEGOTIABLE INSTRUMENTS on the work of its twelfth session

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INTRODUCTION

1. At its eleventh session the United Nations Commission on International Trade Law adopted the proposal of the delegation of France that the Commission "should study ways of establishing a system for determining a universal unit of constant value which would serve as a point of reference in international /transport and liability/ conventions for expressing amounts in monetary terms."1/

2. The proposal was examined by the UNICTRAL Study Group on International Payments at its meetings in 1978, 1979 and 1980. The Study Group was of the view that the most desirable approach was to combine the use of the Special Drawing Right (SDR) with a suitable index which would preserve over time the purchasing power of the monetary values set forth in the international conventions in question.

3. At its fourteenth session the Commission considered a report of the Secretary-General on the subject, (A/CN.9/200) which reflected the views of the Study Group. The report contained an annex prepared by the staff of the International Monetary Fund at the request of the UNCITRAL Secretariat which discussed issues relating to the choice of an appropriate index to be used in connexion with the SDR. It was there suggested that for most purposes a consumer price index would be suitable, but that other indexes could be used if desired. After discussion, the Commission decided to refer the matter to the Working Group on International Negotiable Instruments. 2/

4. The Working Group was requested to consider various possibilities in regard to the formulation of a unit of account of constant value and to prepare a text, if possible. 3/

5. The Working Group is currently composed of the following eight States members of the Commission: Chile, Egypt, France, India, Nigeria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America.

6. The Working Group held its twelfth session at Vienna from 4 to 12 January 1982. All members of the Working Group were represented except Nigeria.

7. The session was attended by observers from the following States members of the Commission: Australia, Austria, Cuba, Czechoslovakia, Germany, Federal Republic of, Japan, Kenya and Spain.

8. The session was also attended by observers from the following States not members of the Commission: Argentina, Bolivia, Brazil, China, Ecuador, Greece, Holy See, Luxembourg, Netherlands, Portugal, Republic of Korea, Romania, Switzerland, Thailand, Tunisia, Turkey, Uruguay and Venezuela.

1/ A/CN.9/156; Report of the United Nations Commission on International Trade Law on the Work of its eleventh session, Official Records of the General Assembly, Thirty-third session, Supplement No. 17 (A/33/17), para. 67.

2/ Report of the United Nations Commission on International Trade Law on the Work of its fourteenth session, Official Records of the General Assembly, Thirty-sixth session, Supplement No. 17 (A/36/17), para. 32.

3/ Ibid.

9. The session was also attended by observers from the following international organizations:

(a) Specialized agency

International Monetary Fund

(b) Inter-governmental organizations

Bank for International Settlements
Office Central des Transports Internationaux par Chemins de Fer

(c) Non-governmental organizations

International Law Association
Union Internationale des Chemins de Fer
Union Internationale des Transports Routiers

10. The Working Group elected the following officers:

Chairman: M. Joë Galby (France)
Rapporteur: Mrs. Malena Saavedra (Chile)

11. The following documents were placed before the Working Group:

(a) Provisional agenda (A/CN.9/WG.IV/WP.26)

(b) Report of the Secretary-General entitled "Universal Unit of Account for International Conventions" (A/CN.9/200)

(c) Report of the Secretary-General entitled "Unit of Account of Constant Value" (A/CN.9/WG.IV/WP.27).

12. The Working Group adopted the following agenda:

(a) Election of officers

(b) Adoption of the agenda

(c) Universal unit of account of constant value for use in international conventions

(d) Other business

(e) Adoption of the report.

DELIBERATIONS AND DECISIONS

General discussion

13. The Working Group was in agreement that the problems caused by the effects of inflation on the limits of liability in transport and liability conventions were serious. It was noted that a limit of liability which remained fixed over a long period of time often became seriously eroded. The most striking example of the problem was the limit of liability for loss of life in the Warsaw Convention, but the problem was a general one which applied in greater or lesser degree to all such provisions.

14. It was noted that as a result of the erosion of the real value of the maximum compensation which could be recovered under the various limit of liability provisions, the courts in some countries had sought means of avoiding these provisions so that larger damages could be awarded. The result was that the uniformity of application of the conventions was compromised. Moreover, the uncertainty as to the maximum amount of damages which the courts might award had led insurance companies to charge premiums commensurate with the increased risk, thereby effectively nullifying one of the main purposes of the provisions.

15. It was also noted that there was the danger that some States might choose not to be a party to a convention rather than be bound by a limit of liability which had become too low through the effect of inflation. The problem existed both for conventions which were in force, but which some States might denounce, as well as for conventions which had not yet come in force. It was noted that the problems might be particularly serious in respect of those conventions not yet in force. As the passage of time made the limit of liability provision increasingly inadequate, the likelihood of the convention receiving sufficient ratifications to come into force was reduced. It was also noted that the revision procedure in a convention did not come into force until the convention itself came into force thereby making it particularly difficult to adjust the limit of liability to the new situation.

16. The Working Group considered the possibility of creating a new unit of account which would be determined and would evolve by reference to the value of a number of goods and services characteristic of international trade. It was suggested that such a unit of account would have a constant value as to those goods and services, thereby reducing or eliminating the consequences of inflation on the limit of liability. Under another view it was thought that there would be difficulties in determining the content of the basket of goods and services and the relative weights to be given the various items which could make the adoption of such a new unit of account undesirable.

17. There was general agreement in the Working Group that in the current monetary environment the universal character of the unit of account might better be attained by using the SDR rather than other units of account in all conventions containing limitation of liability provisions. 4/

18. The Working Group considered possible approaches to deal with the effects of inflation on limits of liability expressed in SDR's.

19. Under one view the best means of increasing a limit of liability which has been eroded by inflation is by a revision conference. Under this view the need to revise the limit of liability is influenced by several factors, of which the general rate of inflation is only one. In addition, it would be necessary to consider the change in value of the particular goods or services for which claims would be made under the convention in question. Furthermore, changes in the types of merchandise carried by various forms of transportation influenced the amount of the claims, and therefore of the appropriate limits of liability. Under this view only a revision conference could take all of these factors into consideration.

4/ For further discussion and the recommendation of the Working Group, see paras. 91 to 97, below.

20. Under another view, which agreed in principle with the considerations expressed, such a more comprehensive approach was outside the framework of the agenda but was within the competence of the conventions themselves.

21. It was suggested that the Working Group consider means of facilitating the commencement of the revision process and of the entry into force of the new limit of liability. Under one view a new limit of liability adopted by a qualified majority of two-thirds, three-fourths, or even higher should come into force automatically for all Contracting States after a certain period of time without the need for ratification or further acceptance by the individual Contracting States. Only by this means could there be assurance that the new limit of liability would come into force before it in turn had been eroded by inflation. Furthermore, it was important that only one limit of liability be in force for any one convention at a given time. Under this view those States which could not accept the new limit of liability could denounce the convention.

22. It was noted that the new Convention Relative aux Transports Internationaux Ferroviaires (COTIF), adopted in Berne on 9 May 1980, had a procedure similar to that suggested.

23. Under another view any revision conference, no matter how much it might be facilitated, would necessarily be expensive and problematical as to result. Under this view some form of automatic revision process based on indexation should be sought.

24. The question arose as to whether there should exist only one index to be applied in liability conventions generally, or whether different indexes should be tailored to the different risks and types of damage in particular conventions. According to one view, there should exist only one index, since it would be impractical to have separate indexes for different conventions. A contrary view maintained that separate indexes should be created for limits of liability in conventions dealing with different risks. In this connexion the liability limits in conventions dealing with maritime pollution were specifically mentioned.

25. One opinion suggested that a consumer price index might be appropriate for use in connexion with liability limits in transportation conventions. It was stated to be technically possible to base an index upon the consumer price indexes in the five countries whose currencies comprise the SDR "basket" of currencies. The view was expressed that consumer price indexes had the advantage of being subject to constant scrutiny by the governments which issued them, that they were regularly up-dated, and that published index figures were not later changed.

26. A question arose as to whether an index to be linked with a unit of account could be based upon a basket of primary commodities. It was pointed out that due to the recent wide fluctuations in the prices of primary commodities such an index would be quite unstable. However, it was possible that for a particular convention dealing with particular primary commodities, an index could be based upon a basket of those commodities.

27. It was pointed out that the purpose of a limit of liability provision was to cut down on extreme damage awards; its purpose was not to reduce such awards generally. Limits were supposed to be high enough to compensate for damages

incurred by most claimants. The problem was that with inflation, these limits had been reduced in value, effectively denying many claimants full compensation. Adjusting liability limits according to an index would not increase damage awards generally; it would only adjust the upper limits of such awards. Nor would the use of an index change the way in which damages were calculated.

28. Moreover, it was suggested that the absolute amount of the increase in liability limits was not of critical importance. It was more important for those limits to be stable and certain so that carriers could know the upper limit of their liability against which they must insure. Indexation, therefore, should not produce rapidly fluctuating liability limits; the amounts of the limits should be fixed for a certain period of time. It was suggested that if the limits were unstable or ambiguous, shippers would have to over-insure, and the cost of their higher insurance premiums would ultimately be borne by their customers.

29. Various periods of time during which liability limits should be stable were mentioned, the shortest being one year.

30. It was also suggested that a possible method to provide stability in liability limits over a period of time would be for the limit to be adjusted at fixed intervals, but that the adjustment would be made only if a minimum percentage change in the relevant index had occurred. It was noted that this approach was embodied in the sample price index clause in document A/CN.9/WG.IV/WP.27, annex III.

31. It was pointed out to the Working Group that the use of any indexing system would require an institution to prepare and maintain the index. If required, such an index could be calculated by the IMF as well as by other competent international organizations. It was suggested that, if requested, the IMF might in principle be prepared to calculate such an index.

32. It was noted that any solution to the problems under consideration which might be proposed by the Working Group would, if adopted by the Commission, serve only as a recommendation available for use by organizations drafting or revising conventions containing limitation of liability provisions. These organizations would not be bound to apply such a recommendation. However, the recommendation could be expected to be influential in the drafting or revision of a convention by other organizations, since it would have emanated from the core legal body of the United Nations in the field of international trade law.

33. It was generally agreed that the Working Group should explore all realistic solutions to the problems under consideration, including indexing, revision processes, and some combination of these approaches, such as using an index to "trigger" a review process.

34. It was suggested that the Working Group might recommend two alternative solutions, since these alternatives could be considered for use by organizations and applied as required by the particular circumstances of the conventions being drafted or revised.

Revision by use of an index

35. The Working Group decided to consider the sample price index clause contained in A/CN.9/WG.IV/WP.27, annex III as a basis for its discussion of revision of liability limits by use of an index. That sample clause is as follows:

"1. The amounts set forth in article /_ _/ shall be adjusted effective on the first day of July of each year, commencing on the first day of July /19 _/, by an amount corresponding to the increase or decrease in the /Consumer Price Index in Special Drawing Rights as published by the International Monetary Fund/ for the month ending on the last day of the previous December over the same period one year earlier.

"2. The provision in paragraph 1, however, shall not be invoked if the ratio of increase or decrease in the /Consumer Price Index in Special Drawing Rights/ over the preceding year does not exceed /_15_/ per cent. Where no adjustment was made in the previous year because the ratio was less then /_15_/ per cent the comparison shall be made with /19 _/ or with the last year on the basis of which an adjustment was made, whichever is later.

"3. By the first day of April of each year the /depositary/ shall notify each Contracting Party and each State which has signed this /Protocol-Convention/ of the amounts to be in force as of the first day of July following, rounded to the nearest number of Special Drawing Rights and monetary units and, after the entry into force of this /Protocol-Convention/, the /depositary/ shall at the same time transmit to the Secretariat of the United Nations a notice of the amounts to be in force as from the first day of July following for registration and publication under Article 102 of the Charter of the United Nations. *

"* It would also be necessary to provide in the final clauses that when the Convention enters into force and the depositary transmits a certified copy of the Convention to the Secretariat of the United Nations for registration and publication under Article 102 of the Charter, he also indicates the amounts then in force under the various articles."

36. One view considered that the sample provision was in the nature of an automatic adjustment mechanism, and was therefore not a good basis for discussion. According to this view, it should be left for determination in each convention as to the method of dealing with a given increase in inflation, whether these methods involved automatic adjustment, a review conference or some other method.

37. Other views considered that the sample provision presented a reasonable approach for an indexation mechanism, if such a mechanism were to be proposed by the Working Group. It was pointed out that the sample provision avoided a freely fluctuating index, and therefore provided a measure of stability.

38. With respect to the words "Consumer Price Index in Special Drawing Rights" contained within brackets in paragraphs 1 and 2 of the sample provision, it was stated that consumer price indexes are usually expressed in percentages or points, rather than in monetary units. It was explained that the idea intended to be conveyed by this language was that the index would measure the loss of purchasing power of the SDR. It would be based on the consumer price indexes of the five countries whose currencies comprise the SDR "basket" of currencies, these national indexes being weighted in accordance with the weights given their respective currencies in the SDR basket.

39. It was suggested that the point of reference for the index should be the time when the limits of liability were negotiated, and not when the convention entered into force. In this way the index could take account of the effects of inflation which occurred during the period before the convention came into force, a period which was often from five to ten years.

40. The question was raised as to how the index provision could be in effect prior to the time the entire protocol or convention came into effect. It was suggested that this might be primarily a question of drafting.

41. One view recommended that the minimum increase in inflation which should occur before liability limits could be adjusted should be left for determination in each convention. The 15 per cent suggested in the sample provision should therefore be deleted.

42. It was suggested that in any case this percentage was too low, since some States had inflation rates of more than 15 per cent. According to this opinion, from the point of view of private law, an adjustment of liability limits every year, or even every two years, was too frequent. It was suggested that, in fixing the limit of liability in a convention, a certain degree of inflation should be anticipated. If this were done, it would be possible to require a greater amount of inflation before the limit of liability would be adjusted. It would also be possible to lengthen the interval mentioned in paragraph 2 of the sample provision to two or three years.

43. The suggestion was also made that the time of the first adjustment should be left for determination in each convention, and should not be generalized as it was in paragraph 1 of the sample provision.

44. The suggestion was made that automatic adjustment of the limit of liability by an index should take place only up to a certain amount. If the increase were higher, the adjustment should be made by a revision conference.

45. According to another view, if an unusually high rate of inflation existed, the index provision would correctly increase the limits of liability by a large amount.

46. It was also suggested that a State which had become a party to a convention containing an index provision would have accepted the principle of indexation and its consequences. If it could not accept the adjustment effected by such a provision, its only alternative should be to denounce the convention.

47. A proposal was made that the limit of liability should be raised only if the rate of inflation as shown by the Index persisted over a period of time. It was suggested that this might be accomplished by requiring that the requisite increase of the index have persisted for each of the last four months of the year over the last four months of the previous relevant year. It was suggested however that it would be better if the figures to be compared were the index for the entire year compared to the index for the previous relevant year.

48. It was suggested that it may be important for some States in deciding whether to ratify a convention or protocol containing such a provision to know what limits of liability would be in effect when the instrument came into force. Therefore, the depositary should perhaps be required to inform States, upon request, what the adjusted amounts would then be. On the other hand it was suggested that the depositary would probably be prepared to do this on an informal basis.

49. The Working Group was of the view that it was preferable to delete any reference to a particular price index and to insert in the brackets in paragraphs 1 and 2 of the sample provision the words "a specific price index which might be considered appropriate for a particular convention".

50. Under one view the word "shall" in the first sentence of paragraph 2 should be replaced by "may". Under this view it should be possible to increase the limits even if the requisite percentage was not met, especially if it was evident that the rate of inflation was increasing.

51. Under another view such a proposal raised questions as to who would exercise the discretion envisaged.

52. It was noted that the reference to rounding the calculation to the nearest whole number did not belong in paragraph 3 but in paragraph 1. It was suggested that after the words "shall be adjusted by an amount" in the first and second sentences of paragraph 1 could be added the words "rounded to the nearest whole number". This change had the added advantage of deleting any reference to Special Drawing Rights and monetary units from the text. This was particularly useful in the light of the decision of the Working Group to recommend to the Commission that in the future all limit of liability provisions be expressed only in units of account equal to the Special Drawing Right and not in monetary units, as is the current practice. 5/

53. The Working Group requested that a revised version of the sample price index provision be prepared in the light of the discussion. The revised provision is as follows:

"SAMPLE PRICE INDEX PROVISION

"1. The amounts set forth in article /_ _/ shall be linked to /a specific price index which might be considered appropriate for a particular convention/. On coming into force of this /Protocol-Convention/, the amounts set forth in article /_ _/ shall be adjusted by an amount, rounded to the nearest whole number, corresponding in percentage to the increase or decrease in the index for the year ending on the last day of December prior to which this /Protocol-Convention/ came into force over its level for the year ending on the last day of December /of the year in which the Protocol or Convention was opened for signature/. Thereafter, they shall be adjusted on the first day of July of each year by an amount, rounded to the nearest whole number, corresponding in percentage to the increase or decrease in the level in the index for the year ending on the last day of the previous December over its level for the prior year.

"2. The amounts set forth in article /_ _/ shall not, however, be increased or decreased if the ratio of increase or decrease in the index does not exceed /_ _/ per cent. Where no adjustment was made in the previous year because the ratio was less than /_ _/ per cent, the comparison shall be made with the level for the last year on the basis of which an adjustment was made.

5/ See paras. 91 to 97, below.

"3. By the first day of April of each year the Depositary shall notify each Contracting Party and each State which has signed this /Protocol-Convention/, of the amounts to be in force as of the first day of July following and, after the entry into force of this /Protocol-Convention/, the Depositary shall at the same time transmit to the Secretariat of the United Nations a notice of the amounts to be in force as from the first day of July following for registration and publication under Article 102 of the Charter of the United Nations.*

"* It would also be necessary to provide in the final clauses that when the Convention enters into force and the Depositary transmits a certified copy of the Convention to the Secretariat of the United Nations for registration and publication under Article 102 of the Charter, he also indicates the amounts then in force under the various articles."

54. The Working Group decided to adopt this text and to recommend it to the Commission as one alternative means of revising limits of liability in conventions.

Revision by a committee

55. The Working Group considered an expedited revision process as a second alternative method of adjusting limits of liability for inflation or deflation.

56. Several different procedures to initiate the revision process were suggested. A meeting of the Contracting States could be convened if there had been a change in a specified price index of a certain percentage. A second possibility was that the meeting could be convened at regular intervals. A third possibility was that the meeting could be convened upon the request of a stipulated number or percentage of the States parties to the convention.

57. One view suggested that these possibilities could be combined. After the lapse of a certain period of time, or upon the request of one-fourth of the States parties to the convention, the depositary could be required to inquire of all States parties as to whether they deemed it necessary to revise the limits of liability. If the depositary received an affirmative response from more than one-half of the States parties, he would be required to convene a revision conference. It was suggested that inquiry of States parties as to whether they desired a revision conference would avoid the convening of a conference which was unnecessary.

58. Another view suggested that in some instances a revision committee might be preferable to a revision conference. The revision committee could be a representative body made up of a certain number of States parties to the convention which would be able to act more expeditiously and with less formality than a full revision conference composed of all States parties to the convention. It was noted that particularly with respect to conventions to which a large number of States were parties, the convening of a full revision conference would be a substantial undertaking. It was thought not to be feasible to convene such a conference every time liability limits were to be reviewed. Moreover, although

the purpose of such a conference would be to revise the limits of liability, it would be difficult to restrict the conference to that issue and to avoid attempts to revise other aspects of the convention.

59. According to yet another view, under a committee procedure every Contracting State should have the opportunity to participate in the meeting in view of the future binding effect of an amendment on all Contracting States.

60. According to one view, the effects of inflation upon liability limits should be dealt with uniformly among all conventions with limitation of liability provisions, and that this uniformity would be difficult to promote if different conventions employed different revision processes. However, a contrary view suggested that it was not necessary for all conventions to react in the same way to a given increase in inflation. Each convention was subject to its own specific circumstances, and it should be able to respond to an increase in inflation in accordance with these circumstances.

61. The Working Group was of the view that any revision should be implemented rapidly, otherwise the new limits could be overtaken by inflation or deflation by the time they entered into force. In this context the Working Group discussed whether revisions adopted by a revision conference or a revision committee should be made binding on all States parties without requiring ratification by them. In this regard, it was pointed out that ratification procedures typically took 5 to 10 years to complete, which made it important to avoid the necessity of ratification.

62. There was general agreement on the principle that States parties to a convention not wishing to accept revised liability limits adopted by a revision conference or a revision committee should be compelled either to accept the new limit or to withdraw from the convention. They should not be permitted to retain the old limits. It was suggested that this rigid approach was necessary to avoid multiple limits of liability within the same convention regime. It was suggested that if a particular revision were adopted by the required majority of States parties, it would be unwise to compromise the principle of uniformity by permitting several liability limits to exist simply for the sake of keeping within the convention regime the small percentage of States parties which chose not to accept the revision.

63. It was suggested that making a revision binding upon all States parties which had not denounced the convention had the additional advantage of easing the role of domestic courts, which would not have to determine whether a particular State party had accepted the revised limits of liability.

64. As one possible approach to these issues, it was suggested that a revision of liability limits accepted by a stipulated majority of States parties could be made binding upon all States parties to the convention after the lapse of a certain period of time, which might be one year. Within a given amount of time prior to the expiration of this period, States parties which could not accept the revised limits could denounce the convention.

65. The Working Group recognized that a procedure whereby an increase or decrease in the limits of liability adopted by a revision conference or revision committee (that) would come into force for all States at the same time could cause difficulties of a procedural nature for some States. Those States for which treaties are not self-executing might have to implement the increase or

decrease in the limit of liability by legislation. If that were the case, a certain period of time would be required. It was also recognized that unexpected events could delay the implementation procedure beyond the normal period of time. It was stated that the envisaged procedure should not, if possible, lead a State to be in breach of its international obligations.

66. The Working Group requested the Secretariat to prepare a draft text in the light of the discussions, in consultation with interested delegations. The draft text submitted in response to this request is as follows:

"SAMPLE AMENDMENT PROCEDURE FOR LIMIT OF LIABILITY

"1. The Depositary shall convene a meeting of a Committee composed of a representative from each Contracting State within the first year after the present /Protocol-Convention/ comes into force to consider amending the amounts in article / /. Thereafter, the Depositary shall convene the Committee

(a) when a request has been made by at least / / Contracting States, or

(b) when there has been a change in the /Consumer Price Index published by the International Monetary Fund/ of at least / / per cent, provided that at least five years have passed since the Committee last met.

"2. Amendments shall be adopted by the Committee by a / / majority of its members present and voting.*

"3. Any amendment adopted in accordance with paragraph 2 of this article shall be notified by the Depositary to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of / / months after it has been notified, unless within that period not less than /one-third/ of the Contracting States have communicated to the Depositary that they were unable to accept the amendment. An amendment deemed to have been accepted in accordance with this paragraph shall enter into force for all Contracting States / / months after its acceptance.

"4. A Contracting State which has not accepted an amendment shall nevertheless be bound by it, unless such State denounces the present Convention in accordance with article / / before the amendment has entered into force.

"* The Conference of Plenipotentiaries may wish to insert a list of criteria to be taken into account by the Committee."

67. A question arose concerning the number of States whose objection to an amendment could prevent it from coming into force. According to one view, a minority of States should not be permitted to prevent it from coming into force. It was suggested that the interest of States were sufficiently safeguarded by their being able to present their views at the meeting of the committee to

revise the liability limits. If they are unable to accept the revised liability limits they should withdraw from the convention.

68. Under one view a quorum requirement should be established for the meeting of the revision committee to ensure that a small number of States at such a meeting would not produce a revision of the liability limits which would bind other States parties.

69. Under another view a quorum requirement was not advisable, especially for those conventions to which a large number of States were parties. Many States which did not hold strong views on the question to be submitted to the meeting might not attend, even though they would not be opposed to an increase in the limit of liability.

70. It was suggested that providing a minority of States the means to prevent an amendment from coming into force served as a safeguard for the convention. If a significant minority could block the amendment, they would not be compelled to withdraw from the Convention.

71. A question was raised as to whether States voting in favour of an amendment at a meeting of a revision committee should later be able to object to its coming into force. Concern was expressed that States might have become accustomed to traditional procedures, according to which their votes in favour of an instrument were not necessarily binding.

72. According to one view, States voting in favour of an amendment should not be able to object to its coming into force. Another view suggested, however, that particularly if a decision adopting an amendment were taken by a qualified majority, States parties, including those voting in favour, should be able to reflect upon this decision. It was pointed out that the delegate of a State might vote in favour of an amendment as a result of a misunderstanding, perhaps produced by communication difficulties with his home government.

73. There was general agreement in the Working Group that States voting in favour of an amendment should be able to object to its coming into force.

74. The Working Group agreed to delete from sub-paragraph (b) of paragraph 1 of the sample procedure the requirement that a meeting be convened upon a given change in the consumer price index. The meeting should be convened on the request of a given number of Contracting States or when a specific time had passed since the committee last met.

75. According to one view, five-year intervals between meetings of the committee were too long. During these intervals the purchasing power of liability limits could erode by as much as 50 per cent. According to another view, five years was adequate, since if States desired a meeting to amend limits sooner, they could request it pursuant to sub-paragraph (a).

76. It was generally agreed that five-year intervals were sufficient.

77. In connexion with paragraph 4 of the sample procedure, it was pointed out that the amended liability limits would not be effective as to States which denounced the convention. A denunciation might not become effective until after the amended liability limits had come into force; in such a case the denouncing State would remain subject to the old limits until the denunciation took effect.

78. According to one view, because it was undesirable for two limits of liability to exist under a convention, the denunciation of a State party should take effect upon the coming into force of the amendment.

79. According to another view, the existence of two limits in the same convention for a short period of time was not an insurmountable problem. The unamended limits of liability should apply to a State until its denunciation becomes effective.

80. It was pointed out that if a denunciation became effective at the time the amended limits came into force, in many cases the normal denunciation period would be shortened. This could create problems in conventions in which the parties needed time to adjust to the new situation which would exist as a result of the withdrawal of the denouncing party.

81. One solution was to delay the coming into effect of the amended limits until the denunciation of a withdrawing party had become effective. This solution was not generally accepted.

82. Another possible way to deal with this problem and to avoid two limits of liability in the same convention, was to extend the time period for the amended limits to come into effect, and to have a denunciation become effective upon the coming into effect of the amended limits.

83. The Working Group requested that a new draft text be prepared in the light of the discussions. The new draft text is as follows:

"SAMPLE AMENDMENT PROCEDURE FOR LIMIT OF LIABILITY

"1. The Depositary shall convene a meeting of a Committee composed of a representative from each Contracting State to consider amending the amounts in article /_ _/

(a) upon the request of at least /_ _/ Contracting States, or

(b) when five years have passed since the Committee last met.

"2. If the present /Protocol-Convention/ comes into force more than five years after it was opened for signature, the Depositary shall convene a meeting of the Committee within the first year after it comes into force.

"3. Amendments shall be adopted by the Committee by a /_ _/ majority of its members present and voting.*

"4. Any amendment adopted in accordance with paragraph 3 of this article shall be notified by the Depositary to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of /6/ months after it has been notified, unless within that period not less than /one-third/ of the Contracting States have communicated to the Depositary that they were unable to accept the amendment. An amendment deemed to have been accepted in accordance with this paragraph shall enter into force for all Contracting States /12/ months after its acceptance.

"5. A Contracting State which has not accepted an amendment shall nevertheless be bound by it, unless such State denounces the present Convention at least one month before the amendment has entered into force. Such denunciation shall take effect when the amendment enters into force.

"6. A State acceding to this Convention shall be bound by any amendment which has been accepted in accordance with paragraph 4. When an amendment has been adopted by the Committee but the /6/ month period for its acceptance has not yet expired, a State acceding to this Convention shall be deemed to have accepted such amendment unless that State declares upon deposit of its instrument of accession with the Depositary that it does not accept it.

"* The Conference of Plenipotentiaries may wish to insert a list of criteria to be taken into account by the Committee."

84. The opinion was expressed that since the object of this sample procedure was the same as that contained in the Sample Price Index Provision, namely, to adjust liability limits, the sample procedure should refer to "adjustments" rather than to "amendments". This would make it clear that the purpose of the revision was merely to adjust the convention to its original intention. It was suggested that this might eliminate any necessity of submitting a revision of the limits to national parliaments for approval.

85. Another view suggested that the use of the word "adjustment" could wrongly imply that the revision of the limits was based only on a price index. It should be possible to base a revision upon other criteria in addition to an increase in inflation.

86. It was suggested that if the words "increasing or decreasing" were used in paragraph 1, it would make it clear that the purpose of the revision procedure was only to change the limits of liability. In that case the word "amendments" could remain elsewhere in the sample provision, since it would be clear that the amendments referred to were the increases or decreases of the liability limits. This approach was agreed to by the Working Group.

87. With reference to paragraphs 1 (b) and 2, it was pointed out that these provisions did not provide for the first meeting of the Committee if the convention or protocol came into force less than five years after it had been opened for signature. It was therefore agreed to add, in paragraph 1 (b), that a meeting shall be convened five years after the convention or protocol has been opened for signature.

88. With reference to paragraph 6, it was generally agreed that if a revision had entered into force before a State acceded to the convention, the State should be bound by the revised limits. Moreover, a State which acceded after the revised limits had been accepted but before they had entered into force should also be bound by them when they did enter into force.

89. A question arose as to the position of a State which acceded before the expiration of the six-month period following the adoption of the revised limits

by the revision committee, but who lodged an objection to the revised limits during the six-month period. The question was whether such a State should be counted toward the one-third of States parties whose objections would prevent the revised limits from coming into force. It was generally agreed that such a State should not be counted for this purpose. In order to give effect to this understanding it was agreed that the Contracting States which could express their objection under paragraph 4 should only be States which were parties at the time of adoption of the amendment by the committee.

90. The Working Group decided to adopt the following text and to recommend it to the Commission as the other alternative means of revising limit of liability provisions in conventions:

"SAMPLE AMENDMENT PROCEDURE FOR LIMIT OF LIABILITY

"1. The Depositary shall convene a meeting of a Committee composed of a representative from each Contracting State to consider increasing or decreasing the amounts in article /__/

(a) upon the request of at least /__/ Contracting States, or

(b) when five years have passed since the /Protocol-Convention/ was opened for signature or since the Committee last met.

"2. If the present /Protocol-Convention/ comes into force more than five years after it was opened for signature, the Depositary shall convene a meeting of the Committee within the first year after it comes into force.

"3. Amendments shall be adopted by the Committee by a /__/ majority of its members present and voting.*

"4. Any amendment adopted in accordance with paragraph 3 of this article shall be notified by the Depositary to all Contracting States. The amendment shall be deemed to have been accepted at the end of a period of /6/ months after it has been notified, unless within that period not less than /one-third/ of the States that were Contracting States at the time of the adoption of the amendment by the Committee have communicated to the Depositary that they do not accept the amendment. An amendment deemed to have been accepted in accordance with this paragraph shall enter into force for all Contracting States /12/ months after its acceptance.

"5. A Contracting State which has not accepted an amendment shall nevertheless be bound by it, unless such State denounces the present Convention at least one month before the amendment has entered into force. Such denunciation shall take effect when the amendment enters into force.

"6. When an amendment has been adopted by the Committee but the /6/ month period for its acceptance has not yet expired, a

State becoming a Party to this Convention during that period shall be bound by the amendment if it comes into force. A State becoming a Party to this Convention after that period shall be bound by any amendment which has been accepted in accordance with paragraph 4.

"* The Conference of Plenipotentiaries may wish to insert a list of criteria to be taken into account by the Committee."

A Universal unit of account for liability conventions

91. During its detailed consideration of the draft texts before it, the Working Group returned to the consideration of the use of the SDR as the unit of account in international transport and liability conventions.

92. The delegate of the Soviet Union stated that although the Soviet Union was not a member of the International Monetary Fund and under its law the Special Drawing Right could not be used as a means of payment, the Soviet Union was prepared to agree to the use as a unit of account in international transport and liability conventions of the SDR as calculated by the IMF. It did not insist that these conventions include a separate means of calculating the limit of liability in "monetary units" equivalent to specified quantities of gold, as had previously been the case. In this matter it could not, of course, speak for other States which were also not members of the International Monetary Fund which might wish to continue to calculate the limit of liability in "monetary units". 6/

93. The Working Group welcomed this statement of the delegate from the Soviet Union. It expressed its hope that other States which were not members of the International Monetary Fund would also be able to rely upon the SDR as the unit of account in limit of liability provisions in international conventions.

94. The Working Group noted that under a provision such as article 26, paragraph 1, of the Hamburg Rules, "The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State." The Working Group took note of the statement of the observer from Switzerland that Switzerland, which is also not a member of the International Monetary Fund, establishes the value of the Swiss franc in terms of the SDR through a cross-rate with the United States dollar.

95. It was suggested that in future conventions or in revisions of conventions which use a unit of account article in the form of article 26, paragraph 1 of the Hamburg Rules, the third and fourth sentences might read as follows:

"The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the

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6/ Also see the written statement submitted by the delegation of the Soviet Union in the Annex to this report.

> International Monetary Fund in effect at the date in question for its operations and transactions. The value of the Special Drawing Right in terms of the national currency of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State."

It was noted by the delegation that made this suggestion that this change in text, which presented the relationship between the SDR and the national currency in a more logical order for the States not members of the IMF, was not meant to introduce changes in substance but was better suited to the currency regulations of some States which are not members of the IMF.

96. Another formulation of article 26, paragraph 1 which was suggested for consideration was as follows:

> "The unit of account referred to in article /_ _/ of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article /_ _/ are to be expressed in the national currency of a State according to the value of such currency at the date of judgment or the date agreed upon by the parties. The /relationship/ /equivalence/ between the national currency of a Contracting State which is a member of the International Monetary Fund and the Special Drawing Right is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The /relationship//equivalence/ between the national currency of a Contracting State which is not a member of the International Monetary Fund and the Special Drawing Right is to be calculated in a manner determined by that State."

97. The Working Group decided to recommend to the Commission that it recommend that in the preparation of future international conventions containing limitation of liability provisions or in the revision of existing conventions the unit of account article be substantially in the form of article 26, paragraph 1 of the Hamburg Rules and of paragraph 4 as modified to the extent necessary by the deletions of paragraphs 2 and 3.

Conclusion

98. The Working Group thus concluded its deliberations in response to the mandate entrusted to it by the Commission. The conclusions reached by the Working Group are contained in paragraphs 54, 90 and 97. All decisions were taken by consensus.

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ANNEX
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ANNEX

Statement of the delegation of the Soviet Union

Guided by the task which the Commission entrusted to this Working Group - namely, "establishing a system for determining a universal unit of constant value which would serve as a point of reference in international /transport and liability/ conventions for expressing amounts in monetary terms" - the Soviet Union is prepared to agree to the use for these purposes of the SDR as a unit of account calculated by the International Monetary Fund on the basis of a "basket" of the principal currencies of the capitalist countries. The Soviet Union assumes, in this connexion, that the limits of liability fixed in these units will, for practical purposes, be converted into the national currencies of the countries participating in the conventions, on the basis of their published currency exchange rates.

In taking this step, the Soviet Union hopes that it will help to eliminate the dualism in the methods of calculating liability under international conventions, a dualism which has persisted until recently since the time when the major capitalist currencies were backed by gold. This step does not imply any change in the Soviet Union's positions vis-à-vis IMF, but is an indication of its desire to find constructive approaches to the solution of existing international problems in keeping with the traditions of co-operation which have been established in the climate of international détente. In the view of the Soviet Union, the use of the SDR unit of account to express the limit of liability in international conventions must not encroach on the basic provisions in the currency leglislation of those countries which are not members of IMF and which, consequently, do not recognize the SDR as a medium of international payments.

Inasmuch as amounts expressed in SDRs are subject to depreciation under the effect of inflation, the task of maintaining their constant value can, in a more or less satisfactory manner, be solved by indexing these amounts to the current prices of the goods and services characteristic of the kinds of liability in question. The participants in the conventions must themselves determine the representative composition of these "baskets", and the Commission must subsequently ensure that their value is periodically calculated by competent international organizations (e.g. UNCTAD). The indexes obtained in this way may be used under the conventions for the periodic adjustment of the initial amounts of liability.