ences between national legal systems as to the form required for the conclusion of a contract and related matters. In the context of the facilitation of international trade procedures the article will, however, not solve the procedural and technical difficulties linked to the requirements referred to in the special declaration mentioned therein. The obligation to conclude a contract in writing, authenticated by signature, must now be considered as an obstacle to electronic and other automatic means of transmitting data for the conclusion of a contract or during the course of an international trade transaction. Certain transport contracts are already concluded by using such means and the rapid development of the market for mini-computers is expected to influence strongly also other trade procedures having legal implications. If UNCITRAL—in view of these developments—were to initiate studies of the legal consequences of the use of electronic and other automatic means of data transmission in international trade, the Working Party on Facilitation of International Trade Procedures would be most interested to follow this work and to provide a link with national trade facilitation bodies which are familiar with the practical aspects of everyday international trade procedures. In an informal team set up by the Working Party to study the practical aspects of such problems, one of the questions raised was the possible need of an international Convention to harmonize national laws on the acceptance of computer printouts as evidence.

130. The Federal Republic of Germany notes that the wording of article 3 (2), 7 (2), 12 (4), 18 (2) and (3) and (X) appears to be somewhat formalistic. These provisions make it possible for Contracting States whose national law does not recognize verbal agreements to assert their stricter formal requirements in international trade by means of the reservation permissible under article (X). This raises doubts for several reasons. In the first place, the possibility of making a reservation in a relatively important area of law relating to the formation of contracts is an obstacle to real international standardization. Secondly, it is hard to see the need for any such reservation at all, since contracts of any economic significance would normally be concluded in writing in any case. And thirdly, if agreements made in connexion with the implementation of international contracts for the sale of goods had to be in writing, this would be an obstacle to quick decisions, which might be necessary due to changed circumstances, and thus raise unnecessary problems for international trade. The Federal Government therefore requests those countries who up to now have not been able to dispense with the reservation provided for in article (X) to reconsider and if possible modify their position.

II. Comments by Madagascar, Norway, the United States of America and Yugoslavia (A/CN.9/146/Add.1)*

CONTENTS

*3 May 1978.

Introduction

1. This report is an addendum to the analytical compilation of comments by Governments and international organizations on the draft Convention on the Formation of Contracts for the International Sale of Goods as adopted by the Working Group on the International Sale of Goods (hereafter referred to as the draft Convention) and on the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods prepared by the International Institute for the Unification of Private Law (hereafter referred to as the UNIDROIT draft). It contains an analytical compilation of comments received between 20 April and 2 May 1978 from Madagascar, Norway, the United States of America and Yugoslavia.

Analytical compilation of comments

A. *Comments on the draft Convention as a whole*

1. *General comments on the draft Convention*

2. Norway finds the draft Convention on the whole to be a good basis for further work within UNCITRAL on the preparation of a new convention. Norway states that the amendments it would like to suggest are not of a fundamental character.

3. The United States views the draft Convention with general approval. It is believed that, for the most part, the text will render the draft Convention more widely acceptable than its predecessor.

4. Yugoslavia notes that the draft Convention has certain advantages over the Uniform Law on the Formation of Contracts for the International Sale of Goods. However, even this text has not met fully the needs of international trade. The draft Convention, for example, does not mention standard contracts or general conditions, even though the largest number of international trade contracts is concluded by making reference to, or by making use of, such contracts and general conditions. It would be important also to regulate the situation in which each party makes reference to its own forms or general conditions (the so-called "battle of the forms"). The draft Convention does not treat the question of export and import permits and other forms of permission which are of importance at the time of concluding such contracts. In many standard contracts and general conditions formulated by the United Nations Economic Commission for Europe this question is reg-

ulated, hence, in the opinion of Yugoslavia, adequate attention should be paid to this subject-matter by the draft Convention as well.

5. Yugoslavia also notes that there is no justification for the fact that the draft Convention does not include the provisions of article 11 of the Uniform Law on the Formation of Contracts for the International Sale of Goods on the effect of death and incapacity of a party to submit offers.[1] Yugoslavia states that it would be highly beneficial to international trade if such a convention were to regulate the question of initiating bankruptcy proceedings or other analogous proceedings for the conclusion of a contract.

6. Yugoslavia states that the draft Convention, for the most part, relates to the offer and acceptance (even though these questions are not regulated in detail). However, the draft Convention has failed to take into account a series of other questions which are also important for the formation of contracts, for example, the question of the subject-matter of the contract and the purpose or grounds of the contract. On the other hand, the draft Convention contains certain provisions for which it can rightly be said that they are irrelevant to the formation of contracts (article 18 on modification and rescission of contracts). Yugoslavia states that these provisions could give rise to confusion, particularly because the title of the draft Convention does not indicate that it relates to problems other than those concerning the formation of contracts.

2. *Relationship to the draft Convention on the International Sale of Goods*

7. Norway states that the scope of the draft Convention should be the same as the scope of the draft Convention on the International Sale of Goods (CISG). Whether the two draft Conventions should be amalgamated or not depends mainly on the question whether an over-all Convention would be as acceptable to States as CISG would be. One should refrain from efforts to amalgamate the two drafts if that would render CISG less acceptable or unnecessarily complicate and delay the work on the said Convention. The Norwegian Government is therefore not in favour of such amalgamation.

3. *Relationship to UNIDROIT draft*

8. Norway states that the problems covered by the UNIDROIT draft seem to be relatively rare events in respect of contracts for the international sale of goods. Further the draft deals with an area in which increased harmonization of national law would seem hard to achieve. It may also be a risk that the provisions might be understood as being exhaustive. This will increase the importance of the problem of qualifying a matter as a question of validity or of breach of contract. The draft as it stands would seem to be less mature for finalizing deliberations. It does not seem expedient to include additional provisions of the UNIDROIT draft into the draft Convention.

9. The United States notes that the draft Convention incorporates from the UNIDROIT draft the material on interpretation, which is the most important matter dealt with in that draft.

10. Yugoslavia states that the UNIDROIT draft has not been harmonized with the new codifications (Convention on the Limitation Period in the International Sale of Goods, draft Convention on the International Sale of Goods). Yugoslavia notes that it is rather unusual that this was not done by the UNCITRAL Working Group on the International Sale of Goods. Instead, a text was forwarded whose many provisions have not been harmonized with the other texts with which the draft Convention should constitute a single whole. Proceeding from the foregoing observations and the circumstances that this draft was produced under the auspices of UNIDROIT as early as 1972, Yugoslav experts are of the opinion that it will need to undergo substantive changes in order that it may be adapted to a whole series of conventions which are being drafted by UNCITRAL on purchase-sale problems.

B. *Comments on specific provisions of the draft Convention*

Article 2

Unilateral variation or exclusion of Convention

11. Norway notes that, under paragraphs (1) and (2), the parties may agree to exclude the application of the draft Convention or derogate from or vary the effect of its provisions. The wording of the paragraphs suggests that the offeror may not unilaterally exclude the application of the draft Convention or derogate from its provisions. This differs from the system in article 2 of the 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods and seems to raise problems which need further consideration. It should here be noted that the question of application of alternative rules does not seem to be quite the same with regard to formation of contracts as with regard to the material content of contracts (see the different rules in this respect in the Norwegian Acts of Agreements and of Sales).

12. Yugoslavia notes that it emerges from paragraphs (1) and (2) of this article that it is possible to exclude the application of this Convention only through explicit agreements, while individual provisions may be tacitly excluded. In the view of Yugoslavia this concept has not been sufficiently clearly expressed.

Article 3

Paragraph (1)

13. Yugoslavia notes that as regards form it would suffice to stipulate simply that a contract "may be proved by any means". There is no need to make specific reference to "witnesses" as this is understood.

Paragraph (2)

14. See the comments of Norway on article (X) at paragraph 46 below.

Article 4

Article as a whole

[1] Article 11 provides: "The formation of the contract is not affected by the death of one of the parties or by his becoming incapable of contracting before acceptance unless the contrary results from the intention of the parties, usage or the nature of the transaction".

Scope of the article

15. Norway notes that the commentary states that "article 4 on interpretation, as is the case with all the provisions in this draft Convention, relates only to the formation process. This article does not provide rules for interpreting the contract of sale, once a contract of sale has been concluded".[2] Norway questions whether this limited application of the article has been expressed sufficiently clearly in the text.

Nature of test for determining intent

16. Norway notes that it seems that the main rule from a practical point of view is found in paragraph (2), whilst an exception from this rule is included in paragraph (1). It is therefore proposed to change the order of the paragraphs.

17. Yugoslavia states that the provisions relating to interpretation are good, necessary and useful in such a text. The draft Convention proceeds from a subjective criterion (paragraph (1)) to an objective criterion (paragraph (2)) and that the objective criterion is applied in a subsidiary manner. Yugoslavia points out that, in principle, this approach is good, although, perhaps, these two paragraphs should be made more uniform and formulated in a way to constitute a single norm. More specifically, it would be necessary to further examine the intent of parties, so that imprecise provisions are interpreted according to the "understanding that a reasonable person would have had in the same circumstances". This is even more important in view of the fact that an objective criterion should help in formulating uniform rules on interpretation. Such a criterion would also serve the interests of economically weaker contracting parties who, more often than not, are not familiar with all the finesse involved in the process of concluding contracts in international trade. Therefore, although it would be advisable to proceed from the intent of parties as the basic principle, it would be useful to draw the objective criterion closer to it as the two criteria should not be separate.

18. Yugoslavia also notes that in paragraph (1) a question arises of how to interpret the intent "where the other party knew or ought to have known what that intent was". Will the criterion of a "reasonable person" apply in this case, or will it be interpreted in such a way as to take into account the mutual relations of the negotiating parties?

Paragraph (1)

19. Norway suggests that consideration be given to replacing the expression "ought to have known" by "could not have been unaware of".[3]

Paragraphs (1) and (2)

20. The United States points out that it would simplify the draft if the long phrase, "communications, statements and declarations by and conduct of a party", were replaced by "a party's language and conduct" in both (1) and (2). They would then read:

"(1) A party's language and conduct are to be interpreted according to his intent, where the other party knew or ought to have known what that intent was.

"(2) If the preceding paragraph is not applicable, a party's language and conduct are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances."

Article 5

Article as a whole

21. The United States favours the deletion of this article. The United States observes that the provision has no counterpart in the draft Convention on the International Sale of Goods and the terms "fair dealing" and "good faith" do not have a sufficiently precise meaning in international trade to warrant their use in such a statute.

22. Yugoslavia notes that this article is well formulated. However, because of its importance Yugoslavia states that it should be placed among the preceding articles.

Consequences of failure to comply with article 5

23. Norway notes that the article as drafted seems to contain only a declaration of principle to which no specific consequences have been attached. It might be asked whether such a provision should not be redrafted and placed in a possible future convention on the validity of contracts.

Article 7

Article as a whole

24. Yugoslavia notes that the heading of the article is inadequate.

Paragraph (1)

25. Yugoslavia notes that linguistically the provision could be more clearly formulated. For example, Yugoslavia states that it cannot be said that "an offer, declaration of acceptance. . . was delivered to his place of business". Also it is not clear what is meant by the term "indication of intention". Is it a declaration of intent, irrespective of whether made explicitly or implicitly?

Paragraph (2)

26. See the comments of Norway on article (X) at paragraph 46 below.

Article 8

Paragraphs (1) and (2)

27. Yugoslavia notes that in this article the definition of offer is given in the sense of a proposal addressed to one or more specific persons. However, a question could be posed about public offers addressed to an unspecified number of persons.

Paragraph (3)

28. Norway states that according to paragraph (3) a

[2] A/CN.9/144, para. 1, of the commentary on article 4 (reproduced in the present volume, part two, I, D,).

[3] The expression "ought to have known" also appears in articles 1 (4) (*a*) and 6.

proposal may in some cases be deemed not to be sufficiently definite if it makes no provision for determining the price. Consideration should be given to modifying this condition when the contract has been performed by delivery of the goods.

Article 10

Paragraph (1)

29. The United States notes that it would be desirable to add language to deal with acceptance by conduct where nothing is "dispatched". The relation of this paragraph to article 12 should be clarified.

30. Yugoslavia states that the principle of "irrevocability" (and not "revocability") is more suitable for the security of international trade, and this should constitute one of the fundamental objectives which the draft Convention should aim at achieving. The right of revocability creates insecurity on the part of the offeree. He is obliged to make, within a specified time, the necessary preparations, negotiate with subcontractors and buyers, and to carry out other studies so that he may make a decision on acceptance or refusal of the offer. For all these reasons, Yugoslavia suggests that this question be re-examined and that paragraph (1) should contain a formulation of the principle of irrevocability, and the following paragraph contain exceptions to this principle.

Paragraph (2) (b)

31. The United States proposes that paragraph (2) (*b*) should be deleted. Time-limits in offers may have two distinct purposes. One—that of lapse—is to indicate a time after which it is too late to accept ("This offer expires if not accepted in 10 days."). Another—that of irrevocability—is to indicate a time during which the offeror cannot revoke his offer ("This offer is irrevocable for 10 days."). This clause confuses the two by assuming that any time-limit has the second effect of irrevocability, even if the parties may have made it clear that they intended only the first effect of lapse. This is a particularly objectionable rule for countries, such as the United States, where there is a well-recognized difference between provisions for lapse and those for irrevocability, and both are given effect according to their terms. An American businessman would be startled to find that language clearly indicating only the purpose of lapse was to be given the effect of irrevocability as well. Even more so this is unfortunate if both parties come from such countries that the understanding of both would be frustrated by paragraph (2) (*b*).

Paragraph (2) (c)

32. Norway questions whether paragraph (2) (*c*) is sufficiently precise. Norway prefers a more elaborated rule on irrevocability of offers.

33. Yugoslavia states that the term "the offer being held open" is not clear. Should it be retained, a definition would be required. In practice, moreover, difficulties could emerge (especially in legal systems in which this is not known) with respect to determining when, and how, the offeree "has acted in reliance on the offer". Consequently, Yugoslavia suggests that a more precise formulation be given or that paragraph (2) (*c*) be deleted.

Article 12

Acceptance by conduct

34. Yugoslavia notes that the formulation "a declaration or other conduct by the offeree" is not the most suitable since the term "other conduct" could be interpreted as not constituting a declaration of intent by action (a tacit declaration of intent). The meaning could be made more precise by adding the word "explicit" declaration...

Acceptance by silence

35. Yugoslavia makes the following observations in relation to the second sentence of article 12 which provides that silence shall not in itself amount to acceptance. Yugoslavia notes that if the expression "shall not in itself" is intended to apply only to exceptions, this phrase should be better formulated and more precisely stated. On the other hand, if the parties maintain continuing business relations, silence, in itself, could constitute an acceptance in so far as the offeree does not declare that he does not accept the offer.

Paragraph (3)

36. The United States points out that this paragraph does not appear to be consistent with article 10 (1). (See the comments of the United States on article 10 (1) at para. 29 above.)

Paragraph (4)

37. See the comments of Norway on article (X) at paragraph 46 below.

Article 13

Paragraph (1)

38. The United States points out that this paragraph would be easier to read if the words "a reply to an offer" were replaced by "a purported acceptance". The United States also points out that the present version of paragraph (1) is inaccurate in that it suggests that a request for clarification that is sent in reply to an offer is a rejection.

Paragraph (2)

39. The United States points out that this paragraph would be easier to read if the words "a reply to an offer which purports to be an acceptance but" were replaced by "a purported acceptance".

40. Yugoslavia states that in this article the basic problem is to establish the circumstances in which additional or different terms do not "materially alter the terms of the offer". It would be highly useful if the concept of substantive change could be defined, a task extremely difficult to accomplish. Perhaps the same effect could be achieved if instead of the aforementioned words it could be said that a reply to an offer containing additional or different terms could constitute an acceptance "if the circumstances indicate that

the parties, in spite of this, are intent on concluding a contract".

Article 15

Paragraph (1)

41. See the comments of Norway on article (X) at paragraph 46 below.

Article 17

42/43. Yugoslavia is of the opinion that this article should be deleted.

Article 18

Article as a whole

44. Yugoslavia is of the opinion that this article should be deleted because it is irrelevant to the formation of contracts. These provisions could give rise to confusion, particularly because the title to the draft Convention does not indicate that it relates to problems other than those concerning the formation of contracts (see also para. 6 above).

45. See the comments of Norway on article (X) at paragraph 46 below.

Article (X)

46. Norway states that article (X) is supplemented by a separate paragraph in articles 3 (2), 7 (2), 12 (4) and 18 (3). This system seems to be unnecessarily complicated. These separate paragraphs do not add anything which cannot be achieved by the formulation of article (X). Further, the system of the draft Convention with separate paragraphs in the affected articles does not seem to be quite consistent. Thus there is no separate reservation for writing in connexion with the information given orally after article 15 (1).

C. *Comments on the UNIDROIT draft*

47. Madagascar notes that since, on the one hand, the provisions concerning defects in the contract, particularly those relating to mistake and consent, are of a general and conventional nature and, on the other, they seem to be in keeping with legal practice in this field, it has no comments to make on them.

48. The Malagasy Government does, however, express some reservations with respect to article 4, paragraph 2, of the draft law, which permits the use of oral evidence for the purpose of applying article 3, concerning substantive procedures for the establishment of the contract; this method by itself is very unreliable, especially now that modern technology, particularly telegraphic communication, provides the parties with much more reliable procedures for international sales. It is hard to see, once it is agreed, as it must be, that in many cases contracts for the international sale of goods can be concluded by modern means such as telegraphic communication, how oral evidence can be accepted in this connexion. If there is no other way of establishing the facts—although this will very seldom be the case—then oral evidence will no doubt have to be used, but the question is whether it is really necessary to spell it out, thus opening the way to practices that are far too unreliable, particularly if it is borne in mind that, by definition, any contract for the international sale of goods involves a number of important details (nature and quality of goods, terms of payment, place and date of delivery, etc.) on which, in case of dispute, it is likely to prove difficult to rule in favour of one party or the other. Accordingly, although it appears likely that this type of evidence will in practice be very seldom used, it would seem wiser not to refer to it at all in the draft law.

III. Comments by France (A/CN.9/146/Add.2)*

1. This addendum contains the observations of France which were received by the Secretariat on 9 May 1978.

I. *General observations*

2. There seems to be no reason for maintaining two separate instruments governing respectively the formation of contracts of sale and the effects of such contracts, since the sphere of application as laid down in article 1 is exactly the same.

3. Accordingly, the French Government is of the view that the draft Convention on the Formation of Contracts should be integrated into the draft Convention on the International Sale of Goods (CISG) adopted by UNCITRAL at its tenth session.

4. The French delegation looks forward with interest to the document on this question which the Secretariat will be submitting at the request of the Working Group.

5. It is regrettable that no provisions relating to the validity of contracts have been included in the draft Convention, since this would have been the only point on which the new draft Conventions went beyond the two Hague Conventions of 1964.

6. Articles 4 and 5 are innovations not found in earlier instruments. The French Government is favourably disposed towards them. The rules relating to good faith and interpretation should apply to both the content and the performance of a contract. Accordingly, they should also be included in CISG.

7. The article headings should be deleted. They add nothing to the text and are sometimes ambiguous (arts. 1, 2, 7 and (X)) or incorrect (art. 16: "*révocation*" instead of "*retrait*"; art. 17: "*date*" instead of "*moment*").** Moreover, there are no article headings in the draft CISG adopted at Vienna in 1977. The chapter titles provide sufficient guidance to the reader.

II. *Specific observations*

Title of the draft Convention

8. The title should be amended to read: "*Projet de convention sur la formation du contrat de vente internationale de marchandise*".**

Article 8

Paragraph (2)

9. It would be desirable to reverse the rule, so that

* 9 May 1978.

** These observations do not appear to apply to the English text.