

V. NEW INTERNATIONAL ECONOMIC ORDER

A. Report of the Working Group on the New International Economic Order on the work of its session (New York, 14-25 January 1980) (A/CN.9/176)*

INTRODUCTION

1. The United Nations Commission on International Trade Law decided at its eleventh session to include in its work programme a topic entitled "The legal implications of the new international economic order" and to accord priority to the consideration of this subject. The Commission on that occasion also established a Working Group, but deferred the designation of the States members of that Group until its twelfth session.¹

2. At its twelfth session the Commission designated the following States as members of the Working Group: Argentina, Australia, Chile, Czechoslovakia, France, German Democratic Republic, Germany, Federal Republic of, Ghana, India, Indonesia, Japan, Kenya, Mexico, Nigeria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, and United States of America.

3. The mandate given to the Working Group is to examine the report of the Secretary-General entitled "New international economic order: possible work programme of the Commission" (A/CN.9/171)* taking into account the records of the discussions of UNCITRAL on its eleventh and twelfth sessions and to make recommendations as to specific topics which could appropriately form part of the programme of work of the Commission, and as to the steps that could usefully be taken by the Commission in respect of co-ordination in the field of international trade law.

4. The Working Group held its session at United Nations Headquarters in New York from 14 January to 25 January 1980. With the exception of Nigeria, all the members of the Working Group were represented at the session. The session was attended by observers from: Austria, Belgium, Burma, Canada, Colombia, Cuba, Egypt, Finland, Guatemala, Guyana, Hungary, Italy, Netherlands, Nicaragua, Portugal, Qatar, Senegal, Sierra Leone, Spain, Thailand, Trinidad and Tobago, Uruguay, Venezuela, Yugoslavia, Zaire, and Zambia, and from the following intergovernmental and international non-governmental organizations: Centre on Transnational Corporations, Food and Agriculture Organization of the United Nations, United Nations Conference on Trade and Development, United Nations Industrial Development Organization, European Community, Hague Conference on Private International Law, International Institute for the Unification of Private Law, Organization of African Unity and Organization of American States.

* 25 January 1980.

¹ 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. 71 (Yearbook . . . 1978, part one, II, A).

5. The Working Group elected the following officers:

Chairman Mr. Kazuaki Sono (Japan)
Rapporteur Mr. Gerardo Gil-Valdivia
(Mexico)

6. The following documents were before the Working Group:

- (a) Provisional agenda (A/CN.9/WG.5/I/WP.1);
- (b) Report of the Secretary-General on the new international economic order, possible work programme of the Commission (A/CN.9/171);*
- (c) Report of the United Nations Commission on International Trade Law on the work of its eleventh session (1978), *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*;**
- (d) Report of the United Nations Commission on International Trade Law on the work of its twelfth session (1979), *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*;***
- (e) Working paper by the Secretariat: Considerations of the legal implications of the new international economic order in the context of the possible work programme of the Commission (A/CN.9/WG.5/I/WP.2).

7. The Working Group adopted the following agenda:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda
4. Consideration of the report of the Secretary-General on the new international economic order (A/CN.9/171)**** and the records of the discussions of UNCITRAL on the eleventh and twelfth sessions with a view to making recommendations;
 - (a) As to specific topics which could appropriately form part of the work programme of the Commission;
 - (b) As to the steps that could usefully be taken by the Commission in respect of co-ordination in the field of international trade law
5. Other business
6. Adoption of the report

DELIBERATIONS AND DECISIONS

8. The Working Group began its deliberations with a general exchange of views in respect of the mandate entrusted to it by the Commission. The Group subsequently examined the report of the Secretary-General and reached consensus on a list of topics which it proposes to the Commission for possible inclusion in its programme of

* Reproduced as Yearbook . . . 1979, part two, IV.

** Reproduced as Yearbook . . . 1978, part one, II, A.

*** Reproduced as Yearbook . . . 1979, part one, II, A.

**** Reproduced as Yearbook . . . 1979, part two, IV.

work (see paragraph 31 below). The Group also considered the question of priorities among the proposed topics but left the decision to the Commission. A recommendation to this effect is included in this report (see paragraph 32 below). Finally, the Group exchanged views on the important question of co-ordination in the area of international trade law. Its conclusions in this respect are set forth in paragraphs 38 and 39 below.

*Examination of the report of the Secretary-General (A/CN.9/171)**

9. The Working Group reviewed the subject matters set forth in the Secretary-General's report separately and in turn. Its views and conclusions were as follows.

10. Divergent views are expressed as to the sphere of competence of the Commission and the interpretation of its mandate. Under one view, the Commission had accomplished valuable work in various areas within the framework of existing legal systems. However, because of the need to establish a new international economic order, the Commission should now take a broader approach to legal matters and this included the consideration of legal relationships that were of a public law character. According to this view, the Commission should consider and identify the principles of international public law that underlay the structure of international private law. Under another view, the Commission should continue with its traditional pragmatic approach and deal with specific topics concerning the harmonization, unification, and progressive development of the law of international trade. In this respect, reference was made to the observations formulated by the Asian-African Legal Consultative Committee regarding the work of the Commission in the area of the carriage of goods by sea. The resulting United Nations Convention of 1978 (Hamburg Rules), in that it established an equitable balance of interest between the rights and obligations of the shipper and the carrier, constituted an important contribution to the establishment of a new international economic order, and there was no reason why this approach could not also be followed in respect of other specific subject matters that were of particular interest to developing countries.

11. The Working Group, after discussion, was of the view that, in conformity with the mandate entrusted to it, it should select specific topics of international trade law that were relevant in the context of the new international economic order. Such topics could well have aspects of international trade law involving legal relationships between States or between States and private enterprises. The Commission, in dealing with such topics, should bear in mind the objectives set forth in such documents as the Declaration on the Establishment of a New International Economic Order and the Charter of Economic Rights and Duties of States.

Commodities

12. In the view of the Working Group, it would obviously not be for the Commission itself to deal with multilateral commodity agreements, which could best be

left to other United Nations bodies such as UNCTAD. However, thought could be given to the drawing up of model clauses or guidelines on some legal aspects of commodity agreements.

Trade

13. The view was expressed that the questions of a generalized system of preferences, most-favoured-nation treatment and trade obstacles were all matters of trade policy rather than of trade law. The Working Group, therefore, was in agreement that these questions were not appropriate for inclusion in the work programme of the Commission. Furthermore, it was noted that the International Law Commission had already prepared draft articles in respect of most-favoured-nation treatment. The view was expressed by some representatives, however, that the principle of non-discrimination in international trade, as a principle of international law, was different from most-favoured-nation treatment and that it should be the subject of work by the Commission.

14. In regard to a code on international trade law, the view was held that the preparation of such a code might serve as a basic outline for the future work of not only the Commission, but of other bodies engaged in the unification of international trade law. In this manner the code would not only serve to clarify and simplify the law, but it would also serve as a vehicle to aid in the co-ordination activities of the Commission. It was noted by the Working Group that the International Institute for the Unification of Private Law (UNIDROIT) had begun the preparation of a code of international trade law and that a group of experts had prepared the chapters on formation of contracts in general and on interpretation of contracts. The Working Group was of the opinion, however, that the preparation of a code by the Commission need not duplicate the work of UNIDROIT and could be considered in the longer run.

15. In respect of conflict of law rules the Working Group noted that, since its inception, the Commission has co-operated actively with the Hague Conference on Private International Law. The Working Group was of the opinion that this co-operation should continue, but that the Commission should inform the Hague Conference that it was imperative that in areas of universal interest, such as the international sale of goods or negotiable instruments, the Conference should enable all interested States, even if not members of the Conference, to participate in sessions convened to conclude a convention in such an area.

16. It was noted that the subject of general conditions, standard clauses and model rules had been on the work programme of the Commission since its creation. At the present time a Working Group on Contract Practices was considering the subject of liquidated damages and penalty clauses and the Commission had requested the Secretariat to study also "hardship", *force majeure*, and currency fluctuation clauses.

17. In this respect the Working Group took note of the fact that the Secretariat had, by a note verbale to all Governments and through direct contacts with the commercial community, acquired a large number of contracts currently used in international trade. However, the Secre-

* Reproduced as Yearbook ... 1979, part two, IV.

tary of the Commission reported that the majority of the contracts which had been received had come from sources in developed countries. The Working Group took note of the desirability for more contracts to be furnished by the developing countries if the collection of contracts was to present a balanced view of the clauses in actual use.

18. The Working Group was in agreement that the subject of arbitration was important in the context of a new international economic order and that the Commission should continue its work in this field as a matter of priority. On the other hand, the Working Group was of the view that work on recognition and enforcement of judgements was not a subject which should be pursued at this time.

Monetary system

19. The Working Group noted the Commission currently had on its programme of work the subject of currency fluctuation clauses. The Group decided not to recommend to the Commission any further subjects in respect of the monetary system.

Industrial development

20. The Working Group considered subchapters E and F, Industrialization and Transfer of Technology, of the report of the Secretary-General together. The Group was of the view that industrialization should be the central theme for the Working Group's recommendation to the Commission in that the legal regulation of the various contracts relating to industrialization and transfer of technology were of importance to developing countries.

21. The Working Group, after an exchange of views, decided to recommend to the Commission as a topic for inclusion in its work programme "The harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development, such as contracts on research and development, consulting, engineering, supply and construction of large industrial works (including turn-key contracts or contracts *produit en main*), transfer of technology (including licensing), service and maintenance, technical assistance, leasing, joint venture, and industrial co-operation in general". The Working Group was of the view that the Secretary-General should be requested to carry out the necessary preliminary studies so as to enable the Commission to develop its work programme in this area in full knowledge of the issues involved.

22. The Working Group considered proposals to include a model law for investment and model clauses for investment protection agreements into its recommendation to the Commission. The view was held that a model investment law gave rise to complicated issues of administrative law and economic policy which could not successfully be solved by the Commission. According to another view, however, a study should be carried out to determine which problems existed in this field, how they could be solved, and be solved by UNCITRAL. In the absence of a clear consensus, the Working Group was agreed that certain legal aspects of investments, such as the settlement of disputes, the applicable law and jurisdiction, should be taken into account in preparing the study on the various

investment contracts referred to earlier. Furthermore a study should be carried out aimed at identifying legal issues arising in the context of foreign investment that might be suitable for consideration by the Commission.

23. The proposal was made to give consideration to an international convention on international economic co-operation. However, the Working Group was of the view that the study on general principles of international economic law which the General Assembly had asked the Secretary-General to submit to it at its next session would also deal with the economic co-operation between States and that it would consequently be premature to take any decision on this item at the present stage.

24. The Working Group was of the view that an item entitled "Study on intergovernmental bilateral agreements on industrial co-operation" should be included in the list to be recommended to the Commission. To facilitate later decisions, it was suggested to prepare, as a first step, a universal register of intergovernmental agreements on industrial co-operation, bearing in mind that the United Nations Economic Commission for Europe kept such a register only on a regional level.

25. It was generally considered that the filling of gaps in contracts was an important issue arising in the context of long-term contracts in general and in contracts on industrial co-operation in particular. Gaps could occur because the parties had not agreed on each and every clause at the time of conclusion of the contract and because changed circumstances could give rise to problems which had not been anticipated. It was noted that some of the issues involved were currently being studied by the Secretariat in connexion with its work on hardship clauses and in connexion with commercial arbitration. The Working Group, after consideration, was of the view that this issue should not be proposed to the Commission as a separate item.

26. The Working Group considered the question whether work in the areas of general conditions, standard contracts and definition of trade terms would be of relevance to the establishment of a new international economic order. There was general agreement that such was indeed the case, but that the considerable work undertaken by the Commission and its secretariat in the past had shown that the most promising approach for the time being was to concentrate work in the area of contract provisions. The Group was therefore agreed not to make any specific recommendation in respect of general conditions, standard contracts and trade terms.

Transnational corporations

27. The Working Group noted that the subject of transnational corporations was already on the work programme of the Commission.² It also noted that, pursuant to a decision of the Commission taken at its eighth session in 1975, the Chairman of the Commission had addressed a letter to the President of the Commission on Transnational Corporations indicating the willingness of the Commission to consider undertaking work in respect of any specific legal subjects which might be identified by the Commission

² The subject has previously been referred to in the work programme of the Commission as "multinational corporations".

on Transnational Corporations in the course of its work.³ The Group further noted that the President of the Commission on Transnational Corporations had indicated the willingness of the Commission to forward any suggestion it might have to the United Nations Commission on International Trade Law,⁴ but that so far no such suggestion had been made.

28. The Working Group decided that it should recommend to the Commission as a topic for possible inclusion in its programme of work the identification of concrete legal problems arising from the activities of transnational corporations, having regard, in particular, to the need for co-ordination of work with other competent bodies in the field. As a first step the Group requested the secretariat to inquire of the Centre on Transnational Corporations and the United Nations Conference on Trade and Development which legal subjects in respect of transnational corporations might be the subject of work by the Commission and to report its findings to the Commission.

Natural resources

29. In respect of the legal issues which arise in the context of natural resources, the Working Group noted that the question of permanent sovereignty over natural resources was a regular item on the agenda of the Committee on Natural Resources and that questions of permanent sovereignty formed part of the Code of Conduct on Transnational Corporations. In the light of this current work in the area, the Group was of the view that the Commission should not take up the question of permanent sovereignty over natural resources as part of its programme of work.

30. However, the Working Group was of the view that the Commission should consider the legal aspects of concession agreements and other agreements in the field of natural resources, taking into account the work carried out by other competent bodies in this area and the need for co-ordination. In particular, it was pointed out that, as part of its programme of work, the Centre on Transnational Corporations had already collected a large number of concession agreements in developing countries.

List of specific topics

31. On the basis of its deliberations and decisions, the Working Group submits to the Commission the following list of topics for possible inclusion in its work programme:⁵

1. Legal aspects of multilateral commodity agreements.
2. Study aimed at identifying legal issues arising in the context of foreign investment that might be suitable for consideration by the Commission.
3. Study on intergovernmental bilateral agreements on industrial co-operation.

³ A/10017, para. 94 (Yearbook ... 1975, part one, II, A). The letter is reproduced as document E/C.10/7.

⁴ The letter from the President of the Commission on Transnational Corporations has been reproduced in document A/CN.9/148.

⁵ These topics are listed in the order of their deliberations.

4. Harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development, such as contracts on research and development, consulting, engineering, supply and construction of large industrial works (including turn-key contracts or *contrats produit en main*), transfer of technology (including licensing), service and maintenance, technical assistance, leasing, joint venture, and industrial co-operation in general.
5. Identification of concrete legal problems arising from the activities of transnational corporations, having regard to, in particular, the need for co-ordination of work with other competent bodies in this field.
6. Study on concession agreements and other agreements in the field of natural resources taking into account the work carried out by other competent bodies in this field and the need for co-ordination.

32. The Working Group is of the view that the priority to be given to the topics proposed by it is a matter for the Commission to decide in the light of its current programme of work. However, discussions in the Working Group have revealed that item 4 of the proposed list would be of special importance to developing countries and to the work of the Commission in the context of the new international economic order. The Group therefore requested the secretariat to prepare a study on this item and to submit it to the Commission at its next session so that the Commission may take its decisions in full knowledge of the issues involved.

33. The Working Group draws the attention of the Commission to the fact that the subject-matter of international commercial arbitration is not included in the above list of suggested topics, although it is of great relevance to the establishment of a new international economic order. The sole reason for this omission is that international commercial arbitration is already included in the programme of work of the Commission as a matter of priority. Nevertheless, the Group is unanimously of the view that it is in the area of international commercial arbitration that the Commission should continue its work and accord it the highest priority.

34. The Working Group noted with satisfaction the close co-operation that had been developed in this area between the Commission and the Asian-African Legal Consultative Committee (AALCC). In particular the Group welcomed the establishment by the AALCC of regional centres for arbitration and the adoption by these centres of the UNCITRAL arbitration rules.

35. The Working Group did not include in the list of suggested topics the legal regulation of the warehousing contract and the liability of terminal operators. There was, however, considerable support that the Commission should take up at some future date the study of these topics. The Group therefore requested the secretariat to submit to the Commission at a future session a study on the legal issues involved and information regarding the progress of work on these matters by UNIDROIT.

36. One observer suggested that the subject-matter of products liability be included in the list of proposed items. It was noted that the Secretariat had submitted a detailed study on this subject to the Commission but that the Commission had decided not to allocate priority to the item. However, the Commission, at its tenth session, had agreed to reconsider its decision if a State member of the Commission made a proposal to that effect. The observer therefore withdrew his proposal and reserved the right to suggest this item to the Commission at a future session.

Co-ordination

37. In accordance with the terms of reference given to it by the Commission the Working Group considered the question of co-ordination of work of organizations. Though it was realized that the problems which arose in this respect were of an identical nature in the area of international trade law in general and the area of the new international economic order in particular, it was generally agreed that the Commission should give particular attention to the need for co-ordination in respect of legal work relevant to the new international economic order by reason of the fact that the General Assembly had requested all United Nations organs and bodies to contribute to the establishment of a new international economic order. Therefore, the danger of duplication of efforts and work was much greater in the latter area.

38. The Working Group heard statements by the Secretary of the Commission and by the observers of the United Nations Conference on Trade and Development and the Centre for Transnational Corporations regarding the experience of the secretariats they represent in respect of co-ordination and possible steps that could be taken.

39. The Working Group was of the view that the present report should set forth the various suggestions that were made in the course of the discussions and agreed to suggest to the Commission that it should include in the agenda of its forthcoming session an item entitled "co-ordination of work". In that connexion the Working Group wishes to place the following considerations before the Commission:

(a) It is in the first instance the duty of Governments represented in United Nations bodies to exercise control over the programmes of work of these bodies and in particular to ensure that in drawing up those programmes work programmes already existing should be taken into account. In this respect attention was drawn to the usefulness of the reports on the work of other organizations in the field of international trade law which the Secretary-Gen-

eral submitted to the annual sessions of the Commission. The suggestion was made that such reports would gain in usefulness if they contained more detailed information on the scope of subject matters dealt with by these organizations and on the progress made in respect of them. It was further suggested that the Secretariat of the Commission should submit detailed reports in respect of a given subject matter similar to the report submitted to the twelfth session of the Commission regarding transport law;

(b) There should be a greater co-operation between the secretariats of the United Nations bodies concerned, in particular between those serving the Commission, the United Nations Conference on Trade and Development, the United Nations Industrial Development Organization, the Centre for Transnational Corporations and the Committee for Natural Resources. Such co-operation could be achieved by periodic meetings between the heads of the secretariats involved. Furthermore, in areas where this was relevant, the secretariat of a United Nations body dealing with a given subject related to any subject on which certain results had already been achieved by another United Nations body, should inform its body of those results. In this connexion, reference was made to the successful work of the Commission in the area of international commercial arbitration and the desirability that other United Nations bodies should be informed of that work whenever, in their own work, the question of settlement of disputes arose;

(c) It was noted that under General Assembly resolution 34/142* the Secretary-General had been requested to take effective steps to secure a close co-ordination, especially between those parts of the Secretariat which are serving UNCITRAL, the International Law Commission, UNCTAD, UNIDO, and the Commission on Transnational Corporations. The view was expressed that there might well be an urgent need for a more rational approach by the United Nations to the legislative work of its various organs;

(d) Thought was also given to the feasibility of regular meetings of chairmen of commissions and committees.

40. While it was recognized that the Commission could not claim sole competence in all areas of international trade law the Working Group was of the view that the Commission was fully competent to co-ordinate work of other bodies in areas where it had itself carried out substantive work. Reference was made in particular to the area of international commercial arbitration.

41. The Working Group adopted this report unanimously.

* Reproduced in this volume, part one, I, C, above.

B. Study by the Secretary-General: international contracts in the field of industrial development (A/CN.9/191)*

Introduction

1. The Working Group on the New International Economic Order, at its session held in New York in January 1980, recommended to the Commission for possible inclusion in its work programme, *inter alia*:

"4. Harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development, such as contracts on research and development, consulting, engineering, supply and construction of large industrial works (including turn-key contracts or *contrats produit en main*), transfer of technology (including licensing),

* 16 May 1980.