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ORGANIZATION AND METHODS OF WORK

Note by the Secretary-General

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I. INTRODUCTION

1. The object of this Note is to present considerations which may assist the Commission in discussing the organization of its work and methods to be used in the performance of its functions under the terms of section II, paragraph 8 of General Assembly resolution 2205 (XXI).

2. This study consists of four chapters. Chapter I is the introduction. Chapter II, entitled "Establishment of the work programme", is divided in two sections: the first discusses alternative approaches which the Commission might decide to follow in establishing its work programme; the second section lists a number of factors which the Commission may consider relevant in selecting the topics for inclusion in the work programme and the order of priority among them. Chapter III, entitled "Implementation of the work programme", is also divided in two sections: the first deals with arrangements relating to the organization of the work of the Commission; the second discusses ways and means by which the work programme may be implemented in the light of the functions given by the General Assembly to the Commission. The last chapter contains some brief concluding remarks.

3. It is not the purpose of this study to discuss in a substantive manner specific topics and priorities for the work programme of the Commission.

4. In preparing this study account has been taken of the discussion in the Sixth Committee preceding the adoption of the resolution (A/C.6/SR.946 to A/C.6/SR.955), the comments made by Member States, organs and organizations on the work programme of the Commission (A/CN.9/4), the practice of United Nations organs, in particular the International Law Commission, and other relevant information.

ESTABLISHMENT OF THE WORK PROGRAMME

A. Approaches

5. In considering the criteria which might be followed by the Commission in establishing its work programme a variety of approaches may be envisaged, ranging from the inclusion of the whole field of international trade law in the work programme to limiting it to one particular topic at a time.

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6. In this connexion it may be recalled that the Commission was created because the General Assembly, as stated in the preamble of resolution 2205 (XXI), considered desirable "that the process of harmonization and unification of the law of international trade should be substantially co-ordinated, systematized and accelerated". A similar concept was expressed in the Hungarian comments on the work programme of the Commission in the following words:

"The Commission has to take into account that it has been established not in order that one more organization should deal with the scientific problems of the unification and harmonization of international trade law. Its aims are to sum up all the work conducted sporadically in this field and, by accumulating the scientific results achieved, to induce States and trade organizations to adopt legislative and other measures producing tangible benefits by simplifying and unifying the law of international trade." 1/

7. One possible approach might be for the Commission to select one specific topic at a time, concentrate on it, and pass on to another subject after completing work on the first. However, in the light of the guiding principles mentioned in the preceding paragraph, this approach might be regarded as merely adding the Commission to the existing institutions operating in the field of harmonization and unification of international trade law rather than giving it the central role and enabling it to perform the co-ordination envisaged by the General Assembly.

8. The opposite approach would be for the Commission to include in its work programme all the subjects falling within the scope of international trade law. Should the Commission decide in favour of an all-inclusive work programme, it might be necessary to determine the boundaries of international trade law, which was broadly defined in the Secretary-General's Report to the twenty-first session of the General Assembly (A/6396, para. 10) as "the body of rules governing commercial relationships of a private law nature involving different countries". While a number of items were listed therein as examples of topics falling within

1/ A/CN.9/4, page 30.

the scope of the law of international trade,^{2/} the formulation of a precise definition and the establishment of a complete list of topics might give rise to the difficulties inherent in any attempt to determine the outer limits of international trade law.

9. If the Commission finds it desirable to take a middle course between the two foregoing approaches the criteria described below may be envisaged.

10. One approach would be for the Commission to choose a single broad topic on the general subject of its work, and then take up, simultaneously or successively, various aspects of that topic for detailed study. For example, if the Commission were to choose the international sale of goods as the broad topic, it might then concentrate its attention on the harmonization and unification of the law in areas such as non-fulfilment of contracts, transfer of title, commercial frustration, limitations, etc.

11. Another approach would be for the Commission to choose a number of topics which would not necessarily be related to one another, and establish an order of priority among them. This was done by the International Law Commission which, at its first session in 1949, drew up a list of fourteen topics for possible codification, and from that list decided to give priority to the law of treaties, arbitral procedure, and the régime of the high seas.^{3/}

12. The Commission may of course follow other criteria, or variations on the ones described above. Whatever approach is chosen, the Commission might consider it

2/ "(a) International sale of goods:

- (i) Formation of contracts;
- (ii) Agency arrangements;
- (iii) Exclusive sale arrangements.
- (b) Negotiable instruments and banker's commercial credits.
- (c) Laws relating to conduct of business activities pertaining to international trade.
- (d) Insurance.
- (e) Transportation:
 - (i) Carriage of goods by sea;
 - (ii) Carriage of goods by air;
 - (iii) Carriage of goods by road and rail;
 - (iv) Carriage of goods by inland waterways.
- (f) Industrial property and copyright.
- (g) Commercial arbitration."

3/ See Yearbook of the International Law Commission 1949, p.53 and pp. 58-59.

desirable to give priority to a number of topics (perhaps four or five) and to deal concurrently with all of them, so as to multiply the chances of achieving concrete results within a reasonably short time,

13. The Commission may wish to adopt a work -programme for a number of years. Alternatively, it may find it expedient to confine itself to establishing the work to be carried out until its second session; and postpone the adoption of a work programme until the matter has been thoroughly studied.

14. In adopting a work programme the Commission may wish to take into account that it should be flexible enough to allow for possible adjustments owing to requests from the General Assembly, suggestions from UNCTAD or other sources, or changed circumstances.

B. Factors relevant to the selection of topics and priorities

15. In selecting the topics with which the Commission may wish to deal and in establishing its work programme there are several factors which the Commission might take into account. These, however, may not be wholly applicable to the co-ordinating functions of the Commission, which might be regarded by it as not being necessarily limited to the specific topics included in the work programme.^{4/}

16. Among the factors which the Commission may find relevant in selecting the topics and priorities for its work programme the following may be mentioned:

1. Whether a topic falls clearly within the competence of the Commission

17. The examples given in paragraph 10 of document A/6396^{5/} and the topics mentioned in the comments on the work programme^{6/} show that the scope of the Commission's potential activities embrace an exceedingly wide area. Since there are numerous subjects clearly falling within the scope of international trade law, the Commission may find it convenient to limit its selection of topics and priorities to these subjects, rather than consider matters which, being at the -periphery of international trade law, might give rise to controversy as to the competence of the Commission.

^{4/} See paragraphs 30-31 below.

^{5/} See foot-note 2 above.

^{6/} See A/CN.9/4/Add.1.

/... 3...

2. Whether there is an economic need for unifying legal measures which, if adopted, would remove real obstacles and have a beneficial effect on international trade

18. In selecting a topic the Commission may deem it important to ascertain that a unifying measure on that subject would have a significant practical value and facilitate the flow of international trade.

3. Whether the planned unifying measures are reliable

19. One of the main purposes of the Commission is to accelerate the pace of the unification process in the field of international trade law. To achieve this aim the Commission, at least in the first phase of its activities, may wish to avoid subjects where, owing to the existence of fundamental differences between legal or economic systems, there is little chance of finding a common ground. In selecting items for its work programme, the Commission may consider, therefore, whether there is a reasonably good chance that the proposed unifying measures will be achieved.

4. Whether existing organizations are adequately dealing with a topic

20. Having ascertained that, for a particular subject clearly within the purview of the Commission, there is an economic need for unifying measures and such measures are reliable, the Commission may wish to examine whether and to what extent that subject is already being dealt with by existing organizations. Should the Commission be satisfied that one or more other organizations are competently and adequately promoting harmonization and unification in respect of that subject, and there are no problems of co-ordination, it might find it convenient not to include that particular topic in its work programme. This would be in line with the widespread desire that the Commission should refrain from duplicating the work of existing organizations and playing a competitive role.^{7/}

III. IMPLEMENTATION OF THE WORK PROGRAMME

21. The question of how to implement the work programme of the Commission may be considered under two headings: first, organizational arrangements; second,

^{7/} See report of the Sixth Committee, A/6594, para. 22, and A/CN.9/4/Add.1, para. 4.

ways and means to promote the harmonization and unification of international trade law.

A. Organizational arrangements

22. Section II, paragraph 6 of General Assembly resolution 2205 (XXI) provides that the Commission shall normally hold one regular session a year. The first session has been scheduled to last four weeks. If this becomes the normal practice, the Commission may be expected to meet for about one month each year.

23. At each session the Commission may wish to consider whether to conduct all its proceedings in plenary meetings or to form sub-committees and working groups for the purpose of studying particular matters and reporting to the Commission itself. On this point too, a pragmatic approach would seem to commend itself.

24. It may be noted that the International Law Commission, since its first session, has made use of a Drafting Committee, which, in recent years has been composed in principle of eleven members, consisting of the First Vice-Chairman (who presides over the Committee), the Second Vice-Chairman, the General Rapporteur and seven others; Special Rapporteurs participate in the Drafting Committee when it is considering their topics. At recent sessions, the Drafting Committee has been asked to deal not only with purely drafting points but also with points of substance which the full Commission has been unable to resolve or which seemed likely to give rise to unduly protracted discussion.^{8/}

25. In the light of experience the Commission may wish to consider, at the appropriate time, whether the practice of the International Law Commission in this respect would be suitable to the Commission when dealing with certain matters.

26. In view of the breadth and complexity of the Commission's responsibilities, it is clear that the work should be carried on all year round. For this purpose the Commission may wish to consider a variety of methods which may be suitable in the different stages of implementation of the work programme. These include, for example, the appointment of inter-sessional sub-committees, inviting other organizations, scientific institutions or individual experts to work on particular

^{8/} See The Work of the International Law Commission, cit., page 14.

topics,^{9/} assignments to the Secretariat, and other methods that may be found appropriate.

27. At this stage the Commission may find it expedient to maintain a flexible attitude, rather than commit itself in favour of one or another of the procedures mentioned in the preceding paragraphs. Which of these procedures is best suited for dealing with a particular matter may be decided in each case by the Commission in the light of the relevant factors, including the financial implications of the decision.

B. Ways and means

28. The ways and means whereby the Commission may implement its work programme have been laid down in section II, paragraph 8 of resolution 2205 (XXI), the relevant provisions of which are discussed below.^{10/}

29. As provided in paragraph 8 of the resolution the Commission shall further the progressive harmonization and unification of the law of international trade by the following means:

1. Co-ordinating the work of organizations active in this field and encouraging co-operation among them

30. Not infrequently there are conflicts, overlapping and duplication between different organizations dealing with the same topic. This occurs not only between organizations concerned with world-wide as opposed to regional unification, but sometimes between different regional organizations as well.^{11/}

9/ Section II, paragraph 11 of resolution 2205 (XXI) provides:

"The Commission may consult with or request the services of any international or national organization, scientific institution and individual expert, on any subject entrusted to it, if it considers that such consultation or services might assist it in the performance of its functions."

^{10/} The provisions of sub-paragraphs (f) and (g) concerning collaboration and liaison with UNCTAD, other United Nations organs, and specialized agencies, are not discussed in this study. These matters have been dealt with in document A/CN.9/7.

^{11/} See a table of examples of multiple conflicts in Jean Limpens, "Relations entre l'unification au niveau regional et l'unification au niveau universal", Revue Internationale de Droit Compare (Paris), vol. 16, 1964, page 13.

31. In areas where co-ordination is needed the Commission may wish to study the work of existing organizations and consider such measures as:

(a) Acting as a clearing house for information relating to the unification activities of different organizations, so as to avoid conflicts and duplication due to lack of knowledge of what is being done elsewhere;

(b) Making recommendations as to which organization or organizations may be considered to be best equipped for dealing with a topic and taking the necessary unifying measures, whether on a world-wide scale or otherwise.

2. Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws

32. Where one or more conventions exist on a particular topic, the Commission may wish to examine whether they meet modern requirements, whether they are suitable to developing as well as developed countries and to the exigencies of different legal and economic systems.

33. Having ascertained that it would be desirable to increase the participation in a convention, the Commission might decide to call upon States to adhere to that convention. The General Assembly, in considering the annual report of the Commission, may also wish to take appropriate action to promote wider acceptance of suitable conventions.^{12/}

34. In some cases, on the other hand, the Commission might consider that a convention should be brought up to date or that certain modifications should be made to adapt it for wider acceptance or to harmonize it where the same subject is covered by different and divergent conventions. In such cases the Commission may wish to recommend that steps be taken to revise the convention.

^{12/} For instance the General Assembly may adopt a resolution urging States to become parties to such conventions without delay, and instructing the Secretary-General to submit to a subsequent session of the Assembly a report on the status of signatures, ratifications, accessions, etc. in respect of the conventions. This type of action was taken by the General Assembly with respect to a number of conventions, most recently as regards the International Conventions on Economic, Social and Cultural Rights and on Civil and Political Rights (resolutions 2200 (XXI) and 2337 (XXII), adopted on 16 December 1966 and 18 December 1967, respectively) and the International Convention on the Elimination of All Forms of Racial Discrimination (resolution 2106 (XX) of 21 December 1965, 2142 (XXI) of 26 October 1966 and 2332 (XXII) of 18 December 1967).

3. Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field

35. Having determined that harmonizing or unifying measures are desirable on a particular topic the Commission, in collaboration, where appropriate, with other organizations operating in this field, may consider, inter alia:

(a) Whether the subject is ripe for unification or whether harmonization would be more suitable;

(b) Whether harmonization or unification should be sought at the world or regional level; whether it should be promoted between countries having similar economic or legal systems or comparable stages of development; or whether different types of approaches should be encouraged concurrently;

(c) Whether it would be preferable to adopt uniform substantive rules or uniform conflict rules;

(d) Whether harmonization and unification should be promoted by means of legally binding instruments (i.e. conventions, uniform laws or model laws) or by standardization of commercial practice (i.e. codification and wider acceptance of international trade terms, provisions, customs and practices, as well as other suitable means).

36. Where the Commission considers that a new convention should be adopted on a given subject, it may either invite another competent organization to prepare a draft, or, in some cases, assume responsibility for the preparation of the draft convention. In either case the Commission may wish to examine the text and when approved, make appropriate recommendations to the General Assembly. The Assembly may then decide to convene a diplomatic conference for the adoption of the convention; alternatively, it may decide to consider the text of the convention and adopt it directly.

4. Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade

37. In connexion with the implementation of this provision it may be recalled that the International Institute for the Unification of Private Law (UNIDROIT), which

publishes the Uniform Law Cases, has offered to submit to the Commission a survey of its research and conclusions in this matter.^{13/}

5. Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade

38. In commenting on the work programme of the Commission, a variety of suggestions has been made by Governments and organizations on ways and means to carry out this provision.^{14/} These range from the establishment of a legal reference centre for commercial law to bringing up to date and revising periodically the survey of activities in the field of international trade law contained in the Secretary-General's report to the twenty-first session of the General Assembly.^{15/}

39. In considering the suggestions already made in this matter and any others which may be put forward, the Commission may wish to take into account the financial implications of such suggestions.

6. Taking any other action the Commission may deem useful to fulfil its functions

40. In addition to the foregoing ways and means the Commission might consider other measures in carrying out its responsibilities. For example, it was suggested that the general aim of the Commission might be the progressive development of an international commercial code.^{16/} It was also suggested, before the creation of the Commission, that a corpus of international commercial law should be established as a modern version of jus commune.^{17/}

^{13/} See A/CN.9/4, page 83.

^{14/} See A/CN.9/4/Add.1, paragraph 36.

^{15/} A/6396.

^{16/} See A/CN.9/4/Add.1, paragraph 23 (g).

^{17/} See Rene David, "Société des états et droit du commerce international", McGill Law Journal (Montreal, 1967), vol. 13, No. 2, page 218.

IV. CONCLUDING REMARKS

41. The foregoing observations have been made in the hope that they may be useful to the Commission at this early stage, while considering the organization and methods of work in connexion with its work programme. The establishment of suitable procedures in this respect might contribute to ensuring: that each topic should be thoroughly and competently studied and full consideration given by the Commission to the steps to be taken to achieve the most useful and practical harmonization or unification on the subject; that the work of other institutions active in the field of international trade law should be taken into account and properly co-ordinated; and that the recommendations made by the Commission and the draft instruments which it might prepare should be, in so far as possible, acceptable to countries belonging to different legal and political systems, and to developed and developing countries as well.
