

changes in transport technology and documentation. The Commission adopted a decision by which it commended the use of the 1983 revision of UCP in transactions involving the use of a documentary credit (A/39/17, para. 129).

18. Article 4 of the draft uniform rules on the liability of operators of transport terminals contains provisions on the document that may be issued by operators of transport terminals (A/CN.9/298, Annex).

19. A report of the Secretary-General to the twentieth session of the Commission on the legal implications of automatic data processing described the efforts of the International Rail Transport Committee (CIT) to establish an electronic replacement for the rail consignment note that would be acceptable to banks for use in documentary credits and to custom officials (A/CN.9/292, paras. 19-23).

20. An international subcommittee of the Comité Maritime International (CMI) is currently preparing draft rules on sea waybills and on electronic waybills, which may be approaching completion within the next

year. The secretariat has submitted comments on the current draft to CMI.

21. The Commission might wish to consider whether these developments would make it desirable for it to engage in a general review of the subject of the changes taking place in transport techniques and transport documentation, with special attention to the CMI draft rules, and with a view to determining whether it might make a further contribution in this field. Such a discussion might be particularly appropriate at the Commission's twenty-second session in 1989 when the major item on the agenda is expected to be the uniform rules on liability of operators of transport terminals.

#### E. Other possible subjects

22. At the session of the Commission the secretariat plans to bring to the Commission's attention additional subjects for consideration for its future programme of work. These will be subjects that the secretariat has some reason would be appropriate for work by the Commission, but about which the secretariat does not currently have enough information to make a suggestion.

### B. Working methods of the Commission: note by the Secretariat (A/CN.9/299) [Original: English]

#### INTRODUCTION

1. The Commission at its twentieth session in 1987 decided that consideration should be given at its twenty-first session to several different issues regarding the working methods of the Commission. This note is intended to give background information for the consideration of those issues.

##### I. Increase in membership of the Commission

2. The Commission decided that at the twenty-first session consideration should be given to requesting the General Assembly to increase the membership of the Commission (A/42/17, para. 344).<sup>1</sup>

3. The original membership of the Commission as provided in General Assembly resolution 2205 (XXI) was 29 States with the following distribution of seats:

- (a) Seven from African States;
- (b) Five from Asian States;
- (c) Four from Eastern European States;

<sup>1</sup>Report of the United Nations Commission on International Trade Law on the work of its twentieth session, *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*. Reports of the annual session of the Commission are reprinted in the *Yearbook of the United Nations Commission on International Trade Law* for the year in question.

(d) Five from Latin American States;

(e) Eight from Western European and other States.

4. Of the original 29 members, 14 were elected for a period of three years, with their mandates expiring on 31 December 1970, and 15 were elected for a period of six years, with their mandates expiring on 31 December 1973. In subsequent elections all members were to be elected for periods of six years with their mandates expiring on 31 December of the year in question. The date of expiration of membership was later changed by resolution 31/99 to the last day prior to the opening of the seventh annual session of the Commission following the date of election.

5. At the sixth session of the Commission in 1973 attention was drawn to the fact that the mandate of 15 member States would expire on 31 December 1973 and that this would have certain implications for the membership of Working Groups that were scheduled to meet between 1 January 1974 and the Commission's seventh session later that year (A/9017, para. 139).

6. At the session of the General Assembly later in 1973, a draft resolution was introduced in the Sixth Committee that would have increased the membership of the Commission from 29 to 35 with the following distribution of the additional seats:

- (a) Two from African States;

- (b) One from Asian States;
- (c) One from Eastern European States;
- (d) One from Latin American States;
- (e) One from Western European and other States (A/9408, para. 5).<sup>2</sup>

7. An oral amendment to the draft resolution was proposed by Kuwait to increase the membership of the Commission to 36 rather than 35, with the additional seat to be held by an Asian State (A/9408, para. 8). At the request of the representative of Uruguay a roll call vote was taken on the proposed amendment. "In explanation of his request, the representative of Uruguay, on behalf of the Latin American Group, stated that the members of his Group would vote against the amendment on the ground that it was contrary to the principle of geographical distribution of seats in the Commission ensuring the adequate representation of the various regions. The representative of Uruguay also stated that the position taken by the Latin American Group should not be interpreted as an opposition to the aspirations of the Asian Group and that, if the amendment were approved, it should not constitute a precedent" (A/9408, para. 52).

8. The amendment was adopted by 79 votes to 14 with 7 abstentions and the current pattern of membership of the Commission was established.

9. In 1973 when the increase in membership was considered by the General Assembly, only representatives from member States of the Commission were permitted to participate in meetings of the Commission along with observers from international organizations. However, since 1977, on the recommendation of the Commission at its ninth session in 1976 (A/31/17, para. 74) and the decision of the General Assembly in its resolution 31/99, paragraph 10(c), reaffirmed most recently by its resolution 38/134, paragraph 7(c), Governments of all States that are not a member of the Commission are invited to participate at sessions of the Commission and its Working Groups as observers. Since all States are invited to attend either as member or as observer, the principle of regional representation may have less practical significance than it did in earlier days. Nevertheless, the principle of regional representation may continue to have a political significance, especially when the report of the Commission is considered in the General Assembly.

10. The Commission has interpreted broadly the role of observers at sessions of the Commission and its Working Groups in order to encourage the widest level of participation and interest in the development of its work. It has done so in the belief that this would lead to the most generally acceptable texts emanating from its work. Once a State is represented at a meeting of the Commission or a Working Group, there has been little practical difference whether it is present as a member State or as an observer, except in respect of serving as

an officer of the meeting. Even then two of the Working Groups have elected chairmen to serve in their personal capacity from amongst representatives of observer States.

11. It appears, therefore, that the primary consequence of membership in the Commission may be that a member State will be more likely than a non-member State to be represented at meetings of the Commission and its Working Groups. Furthermore, the representation of member States may be more likely to be drawn "from among persons of eminence in the field of the law of international trade", as called for by the General Assembly in resolution 2205(XXI), and member States may thereby be more likely to contribute actively to the unification and harmonization of international trade law. Membership may affect both the ministry officials charged with substantive responsibility for international trade law and the financial authorities. In the former case membership may stimulate interest in the subject and better justify the expenditure of human resources to prepare for and to attend meetings. In the latter case membership may better justify the spending of the necessary funds.

12. Change in the number of member States in the Commission would have no financial implications for the United Nations.

## II. Working groups

13. The Commission at its twentieth session decided that there should be a review of the policy in regard to membership of the Working Groups of the Commission (A/42/17, para. 344). That review also calls for a review of the role of Working Groups in implementing the programme of work of the Commission.

### A. *Size of Working Groups: historical development*

14. The Commission has created five inter-sessional Working Groups, of which three are currently active.

(a) The Working Group on Time-Limits and Limitations (Prescription) was created by the Commission at its second session in 1969 with seven members (A/7618, para. 46). After it had prepared the draft Convention on the Limitation Period in the International Sale of Goods in three sessions, it was allowed to go out of existence.

(b) The Working Group on the International Sale of Goods was created by the Commission at its second session with 14 members, which was increased to 15 at the Commission's eighth session (A/7618, para. 38, A/10017, paras. 114-115). Upon completion of the work leading to the adoption by the Commission of the draft Convention on Contracts for the International Sale of Goods, the Working Group was renamed by the Commission at its twelfth session in 1979 as the Working Group on International Contract Practices (A/34/17, para. 126).

<sup>2</sup>Report of the Sixth Committee, *Official Records of the General Assembly, Twenty-eighth Session, Annexes, agenda item 92 (A/9408)*.

(c) Although the Working Group on International Contract Practices was the Working Group on the International Sale of Goods with a new name but the same 15 members, it was treated as a new Working Group for all other purposes. It has been assigned the preparation of the uniform rules on liquidated damages and penalty clauses and the UNCITRAL Model Law on International Commercial Arbitration and it is currently assigned the preparation of uniform rules on the liability of operators of transport terminals. Its membership was increased from 15 to the full 36 members of the Commission at the Commission's sixteenth session in 1983 (A/38/17, para. 143).

(d) The Working Group on International Shipping Legislation was created by the Commission at its second session with seven members (A/7618, para. 133) and a mandate to indicate to the Commission the topics and method of work that might be followed in respect of international shipping legislation. At the Commission's fourth session in 1971 the Working Group was assigned the task of preparing the draft Convention on the Carriage of Goods by Sea and was enlarged to 21 members (A/8417, para. 19). At the conclusion of that task in 1975, the Commission kept the Working Group in existence, for the time being, "since it might be necessary to refer certain matters to it after the Commission had considered the draft Convention, but that, for the present, no new mandate should be given to the Working Group" (A/10017, para. 76). At the Commission's eleventh session in 1978, it was noted that the former Working Group on International Shipping Legislation had been dissolved (A/33/17, para. 60).

(e) The Working Group on International Negotiable Instruments was created by the Commission at its fifth session in 1972 with eight members (A/8717, para. 61), which was subsequently increased to 14 in 1984 (A/39/17, para. 88) and to the full 36 members of the Commission in 1986 (A/41/17, para. 221). From 1973 to 1987 the Working Group held 15 sessions, of which 14 were devoted to the draft Convention on International Bills of Exchange and International Promissory Notes and one to the universal unit of account. The Commission at its nineteenth session in 1986 renamed the Working Group as the Working Group on International Payments and assigned it the task of preparing Model Rules on Electronic Funds Transfers (A/41/17, para. 230).

(f) The Working Group on the New International Economic Order was created by the Commission at its eleventh session in 1978 (A/33/17, para. 41). At the Commission's twelfth session in 1979 it decided that the Working Group should be composed of 17 members and should recommend to the Commission topics which could appropriately form part of the programme of work of the Commission (A/34/17, para. 100). The Commission at its thirteenth session in 1980 increased the membership of the Working Group to all 36 members of the Commission (A/35/17, para. 143). The Commission, at its nineteenth session in 1986, decided that when the Working Group completed its work preparing the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial

Works, the Working Group should undertake work on international procurement (A/41/17, para. 243).

15. This review of the history shows that in the early years of the Commission it was assumed that individual Working Groups were to be created for a particular task and that they would be dissolved at the completion of that task. In later years Working Groups have been treated as continuing bodies so that, on the completion of one task, a new task has been assigned to them. While the assignment of tasks has been roughly consistent with the names of the Working Groups, that has not been held to be an absolute necessity. In recent years, Working Groups have been renamed to indicate the broader mandates they have been given. Since 1978 it has been recognized that the Commission could have three Working Groups. In the pattern of conferences each of the Working Groups has been authorized to meet twice a year for two weeks each, for an authorized total of 12 weeks of Working Group meetings. However, since meetings of Working Groups are scheduled only when necessary to carry out the programme of work, eight to 10 weeks of Working Group meetings have been held in most years.

16. In the early years, Working Groups consisted of small numbers of members. Only member States of the Commission and international organizations could participate as observers. Gradually the size of the Working Groups has increased until at the present time all three Working Groups are composed of all member States of the Commission.

#### **B. Role of Working Groups and relationship to Commission**

17. Working Groups have been assigned the task on several occasions to consider what specific topic the Commission might undertake within a general subject matter already decided upon by the Commission. However, the most characteristic role of the Working Groups has been to prepare a draft text for subsequent consideration and adoption by the Commission.

18. The role of a Working Group was first considered by the Commission at its third session when it received the report of the Working Group on the International Sale of Goods in which the Working Group had analysed the studies and comments of Governments on the Uniform Law on the International Sale of Goods (ULIS). At the end of the Commission's discussion it decided that the Working Group should consider ULIS systematically, chapter by chapter, and said that "before the new text of a uniform law or the revised text of ULIS is completed, the Working Group should only submit questions of principle to the Commission for consideration" (A/8017, para. 72).

19. By the Commission's fifth session in 1972 there was some concern that the working methods followed by it to that point of time had not been sufficiently productive. As a result, a sessional Working Group was requested to

consider a proposal that had been submitted by the representative of Spain. The sessional Working Group recommended:

“(a) As a general rule, sessions of working groups should be extended to three weeks;

(b) Consequently, sessions of the Commission could be reduced to two weeks, keeping in mind, however, the items for each session in order to allow for any necessary extension of the plenary session for a given year;

(c) As a general rule, the size of future working groups should be limited to the extent consistent with the representation of viewpoints represented in the Commission” (A/8717, para. 108).

20. While no decision was reached by the Commission at its fifth session, the report indicates in part that

“Several representatives, however, while stating that working methods could be further refined, expressed preference for a more pragmatic approach. In their view, the Commission should plan its future work in accordance with the exigencies of individual topics. Other representatives were of the opinion that the proposals of the Working Group might shift the power of the Commission to the various working groups, which would be undesirable” (A/8717, para. 109).

21. At the sixth session of the Commission in 1973, while discussing the report of the Working Group on International Negotiable Instruments,

“The Commission was agreed that it should defer consideration of the substantive provisions of the draft uniform law until the Working Group had completed its work and submitted a final draft with commentary” (A/9017, para. 33).

22. At the Commission’s seventh session in 1974, the report noted that “The Commission, in accordance with its general policy of considering the substance of the work carried out by working groups only upon completion of that work, took note of the report of the Working Group on International Negotiable Instruments” (9617, para. 27). The only time the Commission has deviated from this policy was at its seventeenth session in 1984 when it considered the main controversial issues in respect of the draft Convention on International Bills of Exchange and International Promissory Notes and the draft Convention on International Cheques with a view to giving policy advice to the Working Group.

23. The Commission’s policy of considering the substance of the work carried out by Working Groups only upon completion of that work has increased the role and authority of the Working Groups. It could be said that the basic policy issues in the development of a legal text by the Commission have been settled in the Working Groups and that, during the past 15 years, with the single exception of the Commission’s seventeenth session in 1984, the consideration of texts by the Commission has been largely restricted to placing the

final polish on a structure that had been already agreed upon. It is undoubtedly for that reason that all three of the Commission’s Working Groups have been increased to the full membership of the Commission. By so doing the distinction between a session of a Working Group and a session of the Commission has been substantially diminished.

24. In regard to the substance of the work, a session of the Commission and a session of a Working Group composed of all member States of the Commission are treated as being of nearly equal importance. For example, the Commission at its twentieth session in 1987 adopted with a minimum of discussion the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (A/42/17, para. 315). The Legal Guide had been thoroughly discussed in a number of sessions of the Working Group on the New International Economic Order, which had been composed of all 36 member States of the Commission almost since its creation. In respect of the draft Convention on International Bills of Exchange and International Promissory Notes, the Commission began its consideration of the text at article 33, where the fifteenth session of the Working Group on International Negotiable Instruments had terminated its consideration of the text (A/42/17, paras. 13-15). The Commission had increased the size of the Working Group to all 36 member States for the Working Group’s final review of the draft Convention.

25. The differences between a session of the Commission and of a Working Group are currently primarily procedural. The session of a Working Group is limited to one subject while the session of the Commission may deal with a wide range of subjects. Only the Commission can adopt a text in definitive form or as a draft convention to be recommended to the General Assembly for action. According to General Assembly resolution 41/177D the Commission has a right to summary records of its meetings and they are requested by the secretariat when legal texts are under consideration. A Working Group does not have a right to summary records even though most of the preparation of a legal text takes place in the Working Groups.

### C. *Size of Working Groups—policy considerations*

26. The increase in the size of the Working Groups has had several undoubted advantages. Broad participation of all interested parties throughout the development of a text, whether as member of the Working Group or as observer from a non-member State or from an international organization, increases the likelihood that the text will be properly balanced and that any significant difficulties in accommodating the text in the national legal systems of various States will have been solved or reduced. In addition to improving the quality of the final version of the text, broad participation throughout its preparation is likely to increase the level of interest in it and contribute to its subsequent widespread adoption.

27. However, the policy articulated at the Commission's fifth session that Working Groups should remain small also has its advantages. A smaller Working Group may be more efficient in drafting the legal text within the policy guidelines laid down by the Commission since better communication may be stimulated between the participants. While there would be no financial advantage to the United Nations in having smaller Working Groups, unless that led to a reduction in the number of languages needed for simultaneous interpretation, some member States of the Commission might prefer not to be an automatic member of all three Working Groups with the call on human and financial resources that it implies.

28. If the Commission were to decide that it wished to return to the earlier practice of Working Groups with limited membership, it would have to decide on the size of the different Working Groups, the principle of selection of membership and the term of office. In particular, it would need to decide whether all Working Groups should be of the same size or whether the size of the Working Group should depend on the project undertaken. A further question would be whether the term of office should terminate on completion of a project or should continue to new projects, as was the case in the past.

29. Unless a decision to return to the practice of Working Groups of limited size was combined with a

request to the General Assembly to withdraw paragraph 7(c) of resolution 38/134 by which it "Reaffirms the importance of the participation of observers from all States and interested international organizations at sessions of the Commission and its Working Groups", all States would continue to be invited to meetings of Working Groups, either in the capacity of member or in the capacity of observer. Therefore, it might be thought that a predetermined size of a Working Group, as well as its regional composition, was of little importance.

30. One suggestion as to how these considerations could be accommodated would be that a Working Group would consist of all member States of the Commission that expressed a desire to be a member of the Working Group for a particular project. All member States of the Commission that had not expressed the desire to be a member of the Working Group might still be invited to attend as observers, as would all other States, and might be permitted at any time to indicate their desire to become a member of the Working Group.

31. Whether or not the Commission decides that its Working Groups should be of limited size, it may wish to consider whether it should continue to follow its current practice of not discussing the substance of a project until the Working Group has completed preparation of a draft text.