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Other business

France's Observations on UNCITRAL's working methods

Note by the Secretariat

I. Introduction

1. In preparation for the fortieth session of the Commission, the Government of France submitted observations on UNCITRAL's working methods for consideration by the Commission. The French language version of these observations was submitted to the Secretariat on 10 May 2007 and the English language version on 24 May 2007. The text communicated by the Government of France is reproduced as an annex to this note, in the form in which it was received by the Secretariat.



Annex

UNCITRAL'S WORKING METHODS: FRANCE'S OBSERVATIONS

1. Introduction

France wishes to inform Member-State delegations of our analysis of UNCITRAL's working methods, together with proposals intended to clarify its rules of procedure, which France considers to be desirable at this time.

This appears to be the right time for such a clarification. UNCITRAL is no longer a small "club" whose rules, based on custom, were well known to all its members. It has grown in recent years, almost doubling its membership from 32 to 60 countries, in order in particular to include the emerging countries engaged in globalisation. Similarly, its Secretariat has been strengthened and restructured, and its working groups have doubled in number. And recent UN General Assembly resolutions have enshrined UNCITRAL as the "core legal body of the United Nations system in the field of international trade law".

Two options appear to be available to this end. It might be considered appropriate to refer explicitly to the rules operating within the entire UN system, which are clearly applicable to UNCITRAL as to the other organs. Or it might be useful to provide UNCITRAL with its own rules of procedure, as is the case with other UN organs that already have them, such as the Statute of the International Law Commission.

First we recapitulate the rules that currently apply to the functioning of UNCITRAL.

2. Texts governing UNCITRAL

2.1. The rules that specifically cover how UNCITRAL works provide only a general framework:

- UNCITRAL's mandate is defined by Resolution 2205 of the United Nations General Assembly dated 17 December 1966. This document merely stipulates the number of its Member States (29 in 1966, 60 since 2002), allocates the number of seats for each of the five regional groups, lays down Member States' period of office as six years and specifies that Member States are re-eligible.
- Since then, two separate General Assembly decisions have, first, allowed other UN Member States who do not belong to UNCITRAL to attend UNCITRAL's sessions and working groups as observers, and, second, specified that members' periods of office begin on the first day of the calendar year following their election.
- **UNCITRAL does not have its own rules of procedure.**

2.2. The rules applicable to UNCITRAL as a subsidiary organ of the UN General Assembly are of two sorts:

- The functioning of the various UN Committees and Commissions is governed by the rules of procedure of the UN General Assembly, which contain a Chapter XIII on this point (Articles 96 to 1333). These provisions concern not only the six “Main Committees” to which subjects in their category are referred for examination before plenary sessions of the General Assembly, but also any other committees the General Assembly may establish.
- **With respect to the participation of NGOs in the work of UN organs, Resolution 1996/31 of the Economic and Social Council,**¹ a consultative organ, defined a general framework. NGO here is a generic term covering, in addition to the voluntary sector, all organisations that are not governmental or inter-governmental in nature, and consequently including private professional organisations such as those that are active in UNCITRAL’s working groups. This resolution is not binding on all UN system organs, which have adapted it where necessary to their specific requirements.

3. Stages in drafting instruments

3.1. Current position

There are no provisions in the UN General Assembly Rules of Procedure concerning how to produce standard-setting instruments, which is UNCITRAL’s specific activity.

A practice has grown up for this “legislative” process whereby private professional associations considered as NGOs play a major role because of the expertise they possess in the areas under discussion. Financial considerations also play a significant part: UNCITRAL has no funding available for these experts’ travel and accommodation expenses. The result is that the experts most frequently present alongside the delegates of those States that can afford to send them are the representatives of these private associations.

UNCITRAL relies heavily on these associations, as can be seen in the “typical” process for formulating a draft instrument:

- Upstream, the UNCITRAL Secretariat organises a colloquium, sometimes together with a professional association that co-sponsors an initiative. Experts, invited for their competence and not as delegates of States, consequently provide the input for the working group’s discussions.
- Documents are prepared on this basis, in a single language, together with the cosponsoring group.
- These NGOs participate on a de facto equal basis with Member States in the sessions of the working group to produce the draft instrument.
- Technical points are examined in greater detail by informal meetings, where a core of experts has the key role. These meetings, like the colloquia, are usually convened by the Secretariat.

¹ The participation of NGOs in the work of the institutions of the UN system is based on Article 71 of the UN Charter, which states that the Economic and Social Council may consult NGOs.

- The UNCITRAL plenary session, which does not initially set a precise mandate for the working groups, only rarely intervenes to lay down guidelines for them before they have completed their tasks.
- Once the draft instrument has been produced, it is submitted to the plenary session, which at this late stage makes marginal changes only if there is a strong current of opinion in favour of such changes.

3.2. Proposals

In order to gather the views and information necessary for its mission of formulating international law, UNCITRAL may legitimately convene colloquia, seminars or meetings of expert groups.

These meetings, whatever their name, must, however, be regarded as purely informal and their conclusions are not subsequently enforceable on States.

Similarly, **careful attention must be given to the documents circulated by the NGOs** (see section 6). The NGOs are naturally in a position to make available *information* documents for informal meetings. On the other hand, only Member States and observing States (non-members of UNCITRAL), should be officially entitled to circulate *working* documents to be submitted for discussion by UNCITRAL and its working groups. Non-state entities should only be allowed to do this at the request of the Member States or with their authorization.

4. Languages used

4.1. Current position

The matter of working languages is connected to the use of informal meetings within UNCITRAL. This extensive use meets the Secretariat's requirements for efficiency (given the tempo of discussion within working groups, which only meet twice a year). This motivation may be accepted. However, the use of informal group meetings should not introduce a bias towards cost cutting at the expense of applying the United Nations' rules on working languages.

On this point it is appropriate to recall that the UN General Assembly, in its second resolution adopted in 1946, decided that "[i]n all the organs of the United Nations, other than the International Court of Justice, Chinese, French, English, Russian and Spanish² shall be the official languages, and English and French the working languages".³ The initial distinction between working and official languages has largely broken down, as the official languages have become established in the main UN organs (Security Council, General Assembly). For example, the General Assembly Rules of Procedure stipulate that all UN official languages are also working languages (Rule 51).

This last provision applies to official meetings of UNCITRAL as a subsidiary organ of the General Assembly. It implies that working documents should be circulated in the six working languages and in particular be made simultaneously available on the UNCITRAL website. However, this rule is not applied in all cases, when documents

² Arabic was added later.

³ Resolution 2 (I) of 1 February 1946.

marked “informal, for discussion only” are circulated in English only or when notes by the Secretariat are sent first directly to national experts, here again in English.

Similarly the status of French as a working language that prevails at the UN Secretariat, where the parity between French and English is regularly reasserted,⁴ implies that UNCITRAL’s official activities should be conducted in these two languages.

4.2. Proposals

In addition to better enforcement of the language rules for *plenary sessions*, it is desirable as a priority that for *expert groups* the documents produced by or discussed at these informal meetings should be systematically translated into French and English. This requirement is particularly necessary for binding instruments under negotiation, such as the current draft convention on maritime transport. The experts should naturally be allowed to communicate in either language.

5. Decision-making process

5.1. Current position

Both for electing officers and conducting debates, it would be useful to take as a reference the UN General Assembly Rules of Procedure, either by explicit reference or by including similar rules in a specific UNCITRAL document. For example, the General Assembly Rule 103 states, “[e]ach Main Committee shall elect a Chairman, two Vice-Chairmen and a Rapporteur. These officers shall be elected on the basis of equitable geographical distribution, experience and personal competence”.

This provision applies both to the plenary sessions of the Commission and the working groups: Rule 102 states, “[e]ach committee may set up subcommittees, which shall elect their own officers”.

Since there is no secret ballot, whether at UNCITRAL or other UN organs, preliminary consultations are arranged between the Secretariat and the delegations to nominate the Chairman. In practice, the Secretariat plays an active role in nominating the Chairman. This may be approved, on condition that Member States are consulted in advance.

For adopting decisions, it is important to recall that the General Assembly Rules of Procedure do not mention consensus, which, as is well known, is widely used in UN organs, as a way of adopting decisions without requiring a vote. The precise term used for this form of decision-making is not consensus but adoption without a vote.

At UNCITRAL there has never been a vote: when the institution was set up, the Japanese representative Professor Shinichiro Michida suggested the consensus method that has since prevailed. This is consequently a well-established tradition at UNCITRAL, which enables it to maintain the cordial club-like atmosphere that it had at the beginning.

⁴ Most recently by Resolution 59/309 on multilingualism adopted by the General Assembly in 2004.

5.2. Proposals

One may, however, wonder whether this particular atmosphere is not likely to be dispelled after the recent increase in the number of members. At all events, it appears appropriate to clarify the notion of consensus.

As commonly understood at the United Nations, a consensus on a proposal is achieved when that proposal has not been objected to by any delegation. Not any sort of objection prevents a consensus. It is generally agreed that the objection must be nullifying or fundamental in nature.

Nevertheless there cannot be a consensus without the consent of all delegates.

For UNCITRAL's "legislative" work, a consensus should be considered not to exist when

- a simple majority of delegates supports a proposal and more than one other expresses a divergent opinion;
- a proposal presented as a compromise by the chair of a working group has not received the approval of all its members;
- a formal objection is presented by a delegation.

Clearly the opinions expressed by the observers, whether States or non-state entities, cannot be taken into account in assessing the degree of approval given to a proposal.

If the persistent endeavours of the working group to achieve a consensus are unsuccessful, it would seem appropriate to be able to vote under the majority rule laid down in the General Assembly Rules of Procedure. Rule 125 states that "[d]ecisions of committees shall be made by a majority of the members present and voting".

6. Non-Governmental Organisations

6.1. Current position

In the past the non-governmental organisations active within UNCITRAL were the small number that had a stated interest in the field of international trade.⁵ More recently, UNCITRAL has opened up to a larger number of NGOs that are more obviously national in nature. This opening occurred just as UNCITRAL was extending its scope of action beyond international trade law to domestic business law, for which non-binding instruments, such as legislative guides, are produced.

A general framework for NGO activities was laid down by Resolution 1996/31 of the UN Economic and Social Council. Three categories were established: general consultative status; special consultative status; inclusion in a list (Roster). On this pattern, a number of organs have produced their own procedures. For example, UNCTAD, which does not report to the Economic and Social Council but to the General Assembly, like UNCITRAL, has produced three similar types of consultative status. There are general category organisations, which are most

⁵ In particular, the Comité Maritime International, a venerable institution responsible for the Hague-Visby Rules for maritime transport, and the International Chamber of Commerce, which publishes the Incoterms, the standards for international trade.

concerned with UNCTAD activities, special category organisations with special competence in a few fields of UNCTAD activities, and national organisations that are entered in a Register with the agreement of their governments.

In practice the current role of private associations within UNCITRAL is far greater than that stipulated in the Economic and Social Council's framework-resolution, which is quite explicit on this point. These NGOs are active not merely in a consultative role, as provided for in the ESC resolution, or even in a higher advisory role, but in actually participating in the production of a standard-setting instrument.⁶

6.2. Proposals

Here again, given the changes that have occurred, there is a case for organising the participation in UNCITRAL work of “non-state entities” or “professional associations”, terms that seem more appropriate than “NGOs”.

It is up to the UNCITRAL plenary session and its working groups to decide which bodies may be admitted. Any newly formed working group should be given the opportunity to express its opinion on this point. To that end it is therefore the Secretariat's duty to circulate to Member States in advance all relevant information concerning those bodies that wish to participate in particular work, in order to enable the Member States to decide whether or not those bodies may participate in all or part of a meeting. Finally “in camera” meetings should be allowed, at the request of one or more Member States.

7. Conclusions

In brief, in the opinion of the French delegation, the main points for clarifying UNCITRAL procedures, which could be laid down in rules of procedure, are the following:

- a) Give the working groups precise mandates, and resubmit to the plenary session or consult Member States in writing if any change is envisaged to those mandates.
- b) The Secretariat to inform Member States in advance of the international colloquia it intends to convene on topics addressed by one or more working groups, and to provide Member States with all necessary information.
- c) Hold formal consultation with States whenever necessary, in particular if controversial points have been raised at colloquia or seminars, and produce reports on the proceedings of these meetings.

⁶ The ESC resolution is particularly explicit here: “A clear distinction is drawn in the Charter of the United Nations between participation without vote in the deliberations of the Council and the arrangements for consultation. Under Articles 69 and 70, participation is provided for only in the case of States not members of the Council, and of specialized agencies. Article 71, applying to non-governmental organizations, provides for suitable arrangements for consultation. This distinction, deliberately made in the Charter, is fundamental and the arrangements for consultation should not be such as to accord to non-governmental organizations the same rights of participation as are accorded to States not members of the Council and to the specialized agencies brought into relationship with the United Nations.” (Paragraph 18).

d) For informal meetings of expert groups, seek the agreement of the plenary session when the annual timetable of sessions is established, taking care to achieve a balance between these meetings and working group sessions.

e) Ensure simultaneous translation into English and French of the documents submitted to the expert groups, and apply the principle of parity between these two UN working languages in UNCITRAL's official activities.

f) For decision-making processes, reassert that no consensus exists when a simple majority of delegates approves a proposal, that a working group chair's compromise proposal must always be approved by the working group, and that a formal objection presented by one or more delegations blocks the consensus and must be reported in the minutes.

g) Establish an observer status for non-governmental organisations, to be divided into two categories, namely those institutions with a general interest in international trade, which may be granted permanent status, and those organisations with expertise on a particular topic, which may be approved only for the duration of the work on that topic.

h) Specify the rights of these non-state entities: to be consulted and speak at the start of a session in order to give their views on the topic under debate, but not to take part in the discussion or decision at the end of the debate; to circulate information documents but not working documents.

i) Authorize a working group meeting to be held in camera if one or more delegations belonging to the group request it.
