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UNCITRAL rules of procedure and methods of work

Comments received from Member States

Note by the Secretariat*

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* This document was submitted less than ten weeks before the opening of the session because it contains comments received in response to a note verbale circulated by the Secretariat on 6 May 2008.



I. Introduction

1. At its fortieth session (Vienna, 25 June-12 July 2007 and 10-14 December 2007), the Commission considered the issue of its working methods on the basis of the following documents: observations by the French Government on the working methods of the Commission (A/CN.9/635); observations by the United States on the same topic (A/CN.9/639); and a note by the Secretariat on UNCITRAL rules of procedure and methods of work (A/CN.9/638 and Add. 1 to 6).¹ The Commission requested the Secretariat to prepare a working document that would describe current practices of the Commission concerning the application of rules of procedure and methods of work, in particular as regards decision-making and the participation of non-State entities in the work of UNCITRAL.² The note by the Secretariat relating to rules of procedure and methods of work (A/CN.9/653) was submitted pursuant to that request. By a note verbale dated 6 May 2008, States were invited to submit their observations on the subject.

2. The present document reproduces the initial comments received by the Secretariat on rules of procedure and methods of work. Comments received by the Secretariat after the publication of the present document will form the subject of addenda in the order in which they are received.

II. Comments received from Member States

A. Member States

France

[Original: French]
[20 May 2008]

1. By way of introduction, France wishes to recall that its main focus relates to the procedure for decision-making and to the role played in that process by non-governmental organizations (see document A/CN.9/635 setting out France's observations on working methods). These two elements are closely linked. The French delegation is not at all opposed to the principle of consensus or to the active participation of observers in the work of UNCITRAL. What could, however, give rise to serious concerns for the French delegation is the combination of the method of consensus and unrestricted access of observers to the working groups.

2. Regarding the decision-making process, the Secretariat rightly points out that consensus is the preferred method for the adoption of decisions by UNCITRAL. It notes that, according to the United Nations Office of Legal Affairs, the notion of consensus "is generally understood to mean adoption of a decision without formal objection and vote" (see A/CN.9/653, paragraph 11 (a)).

The French delegation believes that this is the only possible definition of consensus. Any attempt to further develop the notion, for example by indicating that

¹ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), paras. 234-241; and *ibid.* (A/62/17 (Part II)), paras. 101-107.

² *Ibid.* (A/62/17 (Part II)), para. 107.

a “substantially prevailing view” within a working group constitutes consensus (see paragraph 17), would conflict with the most generally accepted understanding.³

Nevertheless, this does not in any way mean that consensus is the same as unanimity. While unanimity is based on all voting in favour, consensus is reached when no one formally objects. The method of consensus involves attempting in good faith to find a compromise and, as pointed out in paragraph 11 (c), it is for an objecting delegation to formulate the grounds for its objection and to put forward alternative proposals if necessary.

In summary, the French delegation considers it desirable:

(a) To draw the attention of working groups to the definition given by the United Nations Office of Legal Affairs (see paragraph 11 (a));

(b) To reaffirm the UNCITRAL practice whereby each State member is entitled to have any dissent recorded in the reports of the Commission and working groups (see paragraph 5);

(c) To establish the limits of presiding officers’ discretion and to affirm the right of States to request a vote on a proposal, in accordance with the guidelines contained in paragraph 11 (c).

3. France supports the option, as put forward in the Secretariat’s note, regarding the compilation of a list of observers allowed to participate in sessions and working groups. As stated in the note, a distinction should be drawn between organizations whose activities are concerned with the entire sphere of operation of UNCITRAL and those whose area of specialization could involve a particular subject being dealt with by a working group. The former, which unquestionably include the organizations mentioned by the Secretariat in paragraph 32, would have a standing invitation while the latter would have to be invited by the Commission for the duration of the working group’s mandate.

The criteria to be met by invited organizations (see paragraph 36) should include the notion of independence vis-à-vis States members, as required under Economic and Social Council resolution 1996/31, which is the reference document on this matter.

4. Regarding participation arrangements for observers, it is necessary to distinguish, as is done by the Secretariat, between States and non-governmental organizations.

Observer States should not be entitled to a vote. It is all the more important to reaffirm that rule in view of the considerably expanded composition of UNCITRAL, which in practice enables any State wishing to do so to become a member of the Commission. If need be, a State whose mandate has expired could be allowed to continue to participate fully in a working group, strictly in the interests of continuity of the group’s work (see paragraph 41).

Regarding non-governmental organizations, the Secretariat’s note points out how far UNCITRAL practice differs from that of the United Nations in general, in

³ It would, however, be possible, where necessary, in particular for the guidance of working group chairpersons, to specify those situations in which it must be deemed that consensus has not been reached (see document A/CN.9/635).

terms of both participation in deliberations (see paragraph 42) and the submission of written proposals (see paragraph 47).

The Secretariat's assessment is accurate: in these two areas, the practice followed by UNCITRAL is such that the distinction between States members of the Commission and observers has become blurred.

The latter "have participated in deliberations on substantive matters to the same extent as full members" (see paragraph 44). Also, "observers have occasionally been given the opportunity to submit written proposals and to have their documents officially circulated in the Commission and its subsidiary organs as a Secretariat document" (see paragraph 49).

France believes it highly desirable:

(a) To make a clear distinction between the time when observers take the floor and when States members do so. Observers could state their positions either before or after the States members have spoken, as is the practice in many United Nations organizations (see paragraph 45). This distinction is vital to ensuring that only States members of UNCITRAL are involved in the consensus-building process;

(b) To refrain from allowing observers to circulate written documents for possible discussion as working documents submitted to the Commission unless this is specifically requested by the working group in question (see paragraph 50).

5. Concerning preparatory work, the French delegation has, as already stated by it, no objection to maintaining the Secretariat's active role in initiating new topics and carrying out preliminary studies (see paragraphs 56 and 57).

However, it considers it most desirable for there to be more transparency in the Secretariat's recourse to outside expert assistance.

In particular, this means that the following should be published:

- (a) Lists of experts invited to preparatory work seminars;
- (b) Reports of meetings organized by the Secretariat;
- (c) The dates of these seminars and informal meetings.

The issue of working languages, which is not mentioned in the Secretariat's note, should also be addressed. The need for documents produced at informal meetings organized by the Secretariat to be translated into both working languages of the United Nations Secretariat is of paramount importance to France.

6. The French delegation welcomes the exercise that has been initiated, whose importance is clear. It wishes to emphasize that it would be very useful for this activity to be followed up on a permanent basis.

The first phase will be to establish the main principles, on the basis of the Secretariat's note. It will additionally be necessary to make a detailed analysis of the areas where working methods might be improved. To that end, a standing group on methods of work could be formed, meeting every year during the plenary session and reporting to the plenary.

Without doubt, methods of work need to be regularly reviewed at each session so that they can be improved continuously. In that connection, it seems hardly

satisfactory for this subject to be one of the last items on the agenda (cf. the provisional agenda for the 2008 session, on which the issue of working methods appears as item 15).
