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UNCITRAL rules of procedure and methods of work

Note by the Secretariat

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1-2	3
II. Decision-making in the Commission	3-21	3
A. Background information	3-7	3
B. Commission's options	8-21	4
1. Consensus as the preferred method for taking decisions	9-12	4
2. Voting as the Charter-given right of United Nations Member States	13-18	6
3. Other methods of decision-making	19-21	7
III. Status of observers in UNCITRAL	22-52	8
A. Attendance of meetings by non-member States	22-24	8
1. Background information	22-23	8
2. Commission's options	24	8
B. Attendance of meetings by intergovernmental and non-governmental organizations	25-36	9
1. Background information	25-28	9
2. Commission's options	29-36	9
C. Extent of observers' participation in the work of UNCITRAL	37-52	11
1. Participation in decision-making	37-39	11



2.	Election as officers	40-41	12
3.	Participation in deliberations	42-46	12
4.	Submission of written proposals/circulation of documents	47-50	13
5.	Circulation of drafts to observers for comment	51-52	14
IV.	Preparatory work by the Commission's secretariat	53-61	14
1.	The role of the secretariat in proposing new topics	56-57	15
2.	The role of the secretariat once a topic is included in the Commission's work programme	58-61	15

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: the observations and proposals by France on the working methods of the Commission (A/CN.9/635); the observations by the United States on the same topic (A/CN.9/639); and a note by the Secretariat on the rules of procedure and methods of work of the Commission (A/CN.9/638 and Add.1 to 6)¹ (these and most of the other documents cited hereunder are available on the UNCITRAL website: www.uncitral.org). The Commission requested the Secretariat to prepare a working document that would describe current practices of the Commission with 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, distilling the relevant information from its previous note (A/CN.9/638 and addenda). It was understood that, where appropriate, the Secretariat should indicate in the document its observations on rules of procedure and methods of work for consideration by the Commission.²

2. The present document is submitted pursuant to that request. It focuses on: (i) decision-making (chapter II); (ii) the status of observers in UNCITRAL (chapter III); and (iii) preparatory work by the Commission's secretariat (chapter IV). The document draws extensively on the note by the Secretariat A/CN.9/638 and its addenda.

II. Decision-making in the Commission

A. Background information

3. At its first session, in 1968, the Commission agreed that its decisions should as far as possible be reached by way of consensus, but in the absence of a consensus, decisions should be made by a vote as provided for in the relevant rules of procedure of the General Assembly.³ The General Assembly has endorsed the Commission's practice of reaching decisions by consensus.⁴

4. Except on one occasion,⁵ decisions in the Commission and its subsidiary organs have been reached without a vote.

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.

³ A/7216, paras. 18, 35, 40 V and 44.

⁴ See e.g., resolutions 38/134, para. 2; 39/82, para. 2; 40/71, para. 2; 41/77, para. 2; 42/152, para. 2; 43/166, para. 2; and most recently, resolution 57/20, the third preambular paragraph.

⁵ At its eleventh session, in 1978, the Commission held a formal voting on a motion to reopen discussion on the Commission's recommendation to the General Assembly that it should defer the transfer of the Commission's secretariat to Vienna for a period of three years, an issue on which the Commission had already adopted a decision at that session (see *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17), paras. 97 and 101-102).

5. Explicit reservations made to the contents of decisions have not blocked the adoption of the decisions without a vote in the Commission and its subsidiary organs.⁶ Consistent with United Nations practice,⁷ any dissent, in the words of the dissenter when this was specifically requested, has been recorded in the reports of the Commission and its subsidiary organs.⁸

6. In the absence of a consensus, the Commission or its subsidiary organs have placed the provisions on which reaching consensus was not possible within square brackets, or presented alternative formulations,⁹ for final consideration by the Commission or the General Assembly or an international conference of plenipotentiaries, as applicable.¹⁰

7. For further background information, see A/CN.9/638/Add.4.

B. Commission's options

8. How States members of UNCITRAL decide to reach a decision is an essentially political decision and an exercise of their sovereignty. Adopted decisions are equal in status regardless of the manner in which they are adopted.¹¹

1. Consensus as the preferred method for taking decisions

9. The Commission may wish to decide to continue using consensus as the preferred method for taking decisions. The justifications for preferring this method given in the early years of the Commission's work remain valid today. This method permits the Commission, whose members are States with different social-economic systems, different levels of development and different legal systems and traditions, to base its work on careful regard for proposals submitted and respect for mutual interests. It is conducive to achieving a larger cooperation among countries having different legal, economic and social systems and ensuring that the uniform rules derived from the work of the Commission are generally acceptable.¹² It would not be conducive to the harmonization of commercial laws if some provisions or instruments were approved by a small majority.¹³

10. In addition, this practice is consistent with the long-established and common practice in the General Assembly, its committees, subsidiary organs and plenipotentiary conferences convened under United Nations auspices to operate on

⁶ See, e.g., A/7618, para. 130; A/8417, para. 56; A/9017, para. 86; A/31/17, annex I (under article 5, para. 33; article 6, para. 11; article 8; article 15, para. 20; article 21, para. 15; and footnotes m, p and q) and annex II (paras. 29, 97, 106 and 178); A/32/17, paras. 41 and 44, and annex I (paras. 216, 228, 338 and 560); and A/42/17, para. 305.

⁷ See *United Nations Juridical Yearbook, 1983* (United Nations publication, Sales No. E.90.V.1), p. 172, under item 11, para. 3.

⁸ See e.g., A/32/17, annex I, para. 338; and A/42/17, para. 305.

⁹ This course of action was explicitly recommended in the Sixth Committee. See e.g., A/9408, para. 18.

¹⁰ See, e.g., A/8717, paras. 18 and 20 (1); and A/31/17, annex I, under article 6.

¹¹ See *United Nations Juridical Yearbook, 1987* (United Nations publication, Sales No. E.96.V.6), pp. 174-175, under item 5.

¹² See, e.g., A/7408, para. 9; A/8146, para. 13; A/9408, para. 18; A/9920, para. 14; A/10420, para. 13; and A/31/390, para. 12.

¹³ See, e.g., A/7214, para. 159; and A/9015/Rev.1, para. 556.

the basis of consensus.¹⁴ The Special Committee on the Rationalization of the Procedures and Organization of the General Assembly considered that “the adoption of decisions and resolutions by consensus is desirable when it contributes to the effective and lasting settlement of differences, thus strengthening the authority of the United Nations.”¹⁵ This conclusion of the Special Committee, among others, was approved by the General Assembly in its resolution 2837 (XXVI) of 17 December 1971, in which it declared the conclusions to be useful and worthy of consideration by the Assembly, its committees and other relevant organs, and decided that they should be annexed to its Rules of Procedure.

11. If the Commission decides to continue relying on consensus as its preferred method for taking decisions, it may wish to bear the following points in mind:

(a) As regards the notion of “consensus”, the United Nations Office of Legal Affairs, in its legal opinions analyzing the United Nations practice of taking decisions by consensus, stated that there is no definitive or authoritative interpretation of the notion “consensus” in the United Nations.¹⁶ Although it is somewhat difficult to arrive at an exact definition of consensus, the notion is generally understood to mean adoption of a decision without formal objection and vote;¹⁷

(b) As regards objections and reservations blocking adoption of decisions by consensus, there have been numerous occasions in the United Nations practice where States have made declarations or reservations to the substantive matter at issue or a part thereof while not objecting to a decision being recorded as taken by consensus. Those dissenting from the general trend have been prepared simply to make their position or reservation known and placed on the record.¹⁸ In that respect, consensus may not necessarily reflect unanimity of opinion, and should not be confused with unanimity, i.e., the decision-taking process that arrives at a decision by a vote wherein no negative votes are cast, albeit with abstentions;¹⁹ and

(c) As regards chairpersons’ role in determining the existence of consensus, the practice followed in the United Nations has limited the discretion of the presiding officer in determining whether consensus has been reached. First of all, in the light of the right to exercise a vote given by the United Nations Charter to Member States of the United Nations,²⁰ if any Member State formally requests that a vote be taken, such a vote must be taken regardless of the views of the majority, even of a substantial majority. In such situations, the presiding officer cannot declare consensus by disregarding a demand for a vote even by one State. Nor can

¹⁴ See *United Nations Juridical Yearbook, 1987* (United Nations publication, Sales No. E.96.V.6), pp. 174-175, under item 5.

¹⁵ See paragraph 104 of annex IV of the Rules of Procedure of the General Assembly (A/520/Rev.16 and Corr.1).

¹⁶ See *United Nations Juridical Yearbook, 1974* (United Nations publication, Sales No. E.76.V.1), pp. 163-164, under item 12; *ibid.*, 1983 (United Nations publication, Sales No. E.90.V.1), p. 184, under item 23, para. 2; and *ibid.*, 1987 (United Nations publication, Sales No. E.96.V.6), p. 174, under item 5.

¹⁷ *Ibid.*, 1987 (United Nations publication, Sales No. E.96.V.6), pp. 174-175, under item 5.

¹⁸ *Ibid.*, 1982 (United Nations publication, Sales No. E.89.V.1), p. 177, under item 16; and *ibid.*, 1987 (United Nations publication, Sales No. E.96.V.6), pp. 174-175, under item 5.

¹⁹ *Ibid.*, 1987 (United Nations publication, Sales No. E.96.V.6), pp. 174-175, under item 5.

²⁰ See Article 18 of the United Nations Charter.

the presiding officer demand that more than one State request taking a decision by vote.²¹ Secondly, a formal objection to a decision being recorded as taken by consensus blocks the adoption of that decision by consensus. In practical terms, when the presiding officer announces, for example, that it is his/her understanding that the organ wishes to adopt a proposal by consensus, any delegation may block a consensus by lodging an objection or by specifically requesting a vote on the proposal. It is for the objecting delegation to formulate the grounds for its objection, which, in any event has the same effect as requesting a vote on the proposal.²² If a delegation announces that it is not participating in the decision-making but does not prevent the presiding officer from stating that the decision has been adopted by consensus, the presiding officer can make such an announcement and then, in effect, the situation would be viewed as if such a State was not present when the decision was taken. Those delegations which do not expressly indicate that they do not participate in a consensus must be deemed to have participated in it.²³

12. The Commission may wish to reiterate that, in the light of the principle of sovereign equality and consistent with a well-established custom in the United Nations,²⁴ records of the Commission and its subsidiary organs will continue reflecting clearly any dissents, generally in the words of the dissenter.

2. Voting as the Charter-given right of United Nations Member States

13. As was noted at the Commission's first session, consensus, while being the preferred decision-making method, is not the only method for taking decisions in the Commission and its subsidiary organs. In the light of the Charter-given right of Member States to exercise their votes (see paragraph 11 (c) above), it cannot be the only method since States members of the Commission are entitled to request a vote and cannot be deprived of this right merely because the organ concerned has agreed to operate by consensus.²⁵

14. The General Assembly, in its resolutions endorsing the practice of its organs of taking decisions by consensus and by agreeing that such practice should continue, has consistently emphasized that this practice should be without prejudice to the provisions of the Charter of the United Nations and the Rules of Procedure of the General Assembly governing the decision-making process.²⁶

15. Apart from that Charter-based consideration, there may be other considerations justifying recourse to voting. For example, in the early years of the Commission's work, it was considered that consensus should not be reached at all costs as if this were the essential objective of the Commission's discussions, nor should its purpose be merely to satisfy a dissident minority. Differing views with respect to the approach to specific problems are inevitable and the consensus

²¹ See *United Nations Juridical Yearbook, 1987* (United Nations publication, Sales No. E.96.V.6), pp. 174-175, under item 5.

²² *Ibid.*, 1987 (United Nations publication, Sales No. E.96.V.6), pp. 174-175, under item 5; and *ibid.*, 2003 (United Nations publication, Sales No. E.06.V.1), p. 533.

²³ *Ibid.*, 1987 (United Nations publication, Sales No. E.96.V.6), pp. 174-175, under item 5.

²⁴ *Ibid.*, 1983 (United Nations publication, Sales No. E.90.V.1), p. 172, under item 11, para. 3.

²⁵ *Ibid.*, 1987 (United Nations publication, Sales No. E.96.V.6), pp. 174-175, under item 5.

²⁶ See e.g., resolution 41/213, section II, para. 5. The references therein are to Article 18 of the United Nations Charter and current rule 82 (plenary meetings) and corresponding rule 124 (committees' meetings) of the Rules of Procedure of the General Assembly.

method should not be allowed to block the solutions to these problems. In appropriate circumstances, decisions should be made by vote.²⁷

16. The Commission may wish to guide its chairpersons and chairpersons of its subsidiary organs that they, in considering issues of possible voting, should bear in mind the above considerations as well as the following points.

17. A formal objection by a delegation to a decision being adopted by consensus does not have effect akin to a veto but is to be treated as a request for formal voting (see paragraph 11 (c) above). Under rules 124-133 (“voting”) of the Rules of Procedure of the General Assembly, in particular rule 125, a decision by voting “shall be made by a majority of the members present and voting”. The fact that such voting may result in decisions being taken by a simple majority of members present and voting may explain why the Commission, to ensure that decisions would reflect a broader majority, developed a practice of determining consensus based on what was sometimes described as “substantially prevailing view”. While such a flexible notion does not embody a pre-defined mode of calculation, it has ensured that decisions have been made by a proportion of members present that, in any event, was considerably larger than a simple majority.

18. In the elaboration of legislative standards such as those prepared by UNCITRAL, tens of decisions may have to be made in the course of a single day, for example when each subparagraph of a draft legislative text is reviewed by UNCITRAL or one of its subsidiary organs. Making such series of decisions by a simple majority may increase the risk that, in the course of the discussion, decisions are taken in isolation, to the detriment of the coherence of the legislative text as a whole. In that context, it may be noted that an international organization involved in the preparation of legislative standards in the field of private international law, The Hague Conference on Private International Law (“The Hague Conference”), has recently reviewed its working methods and, with respect to decision-making, as a general rule, has departed from a voting system to adopt a system based on consensus.

3. Other methods of decision-making

19. The Commission may wish to consider other methods of taking decisions.

20. Some United Nations organs, including the Sixth Committee of the General Assembly, draw a distinction between adoption of a decision “without a vote” and “by consensus”. The former term is used to indicate a weaker form of agreement as regards the adopted decision: while there is no formal objection to its being adopted without a vote, the participating delegations do not consider themselves too closely associated with the adopted text. The term “adopted by consensus” implies, on the other hand, that the decision was arrived as a result of a collective effort to achieve a generally acceptable text, and consequently the participating delegations are considered to be more closely associated with the decision.²⁸

²⁷ See, e.g., A/7408, para. 9; A/8146, para. 13; and A/9408, para. 18.

²⁸ See *United Nations Juridical Yearbook, 1987* (United Nations publication, Sales No. E.96.V.6), pp. 174-175, under item 5.

21. Some United Nations organs describe procedures for decision-making that should be followed before recourse to a formal vote.²⁹ For example, there is practice in some subsidiary organs to take indicative votes on the proposals to determine which level of support the proposals gain in the intergovernmental organ and whether it is feasible to achieve a consensus.³⁰ On the basis of the results of indicative voting, the organ may decide to proceed to the voting or to continue negotiating in order to reach consensus.

III. Status of observers in UNCITRAL

A. Attendance of meetings by non-member States

1. Background information

22. The General Assembly, in its resolution 31/99, paragraph 10 (c), decided that: “Governments of Member States that are not members of the United Nations Commission on International Trade Law are entitled, when they so request, to attend the sessions of the Commission and its Working Groups as observers.” In its subsequent resolutions, the General Assembly reaffirmed the importance of the participation of observers from all States at sessions of the Commission and its working groups.³¹

23. Since resolution 31/99, the Secretariat, by a note verbale separate from the one sent to the member States of the Commission, has been notifying all States that are not members of the Commission about upcoming sessions of the Commission and its working groups and inviting them to attend the sessions as observers. In addition, representatives from observer States have also participated in informal meetings.³²

2. Commission’s options

24. While not prejudicing the general right of non-member States to attend the sessions, derived from the relevant General Assembly resolutions, the Commission may wish to assess the appropriateness of its current practices as regards the extent of the participation of non-member States in the work of UNCITRAL described in section C below.

²⁹ See e.g., the Rules of Procedure of the Third United Nations Conference on the Law of the Sea (A/CONF.62/30/Rev.3, United Nations publication, Sales No. E.81.I.5), rule 37.

³⁰ See *United Nations Juridical Yearbook, 1983* (United Nations publication, Sales No. E.90.V.1), p. 184, under item 23, para. 2. Apparently, such a practice existed also in UNCITRAL (see E. Suy, the former Legal Counsel of the United Nations, “The Status of Observers in International Organizations”, *Collected Courses of the Hague Academy of International Law, 1978 (II)*, p. 148), although official records of the Commission do not confirm this.

³¹ See, e.g., resolutions 36/32, para. 9; 37/106, para. 7 (b); and 38/134, para. 7 (c). In some other resolutions, the General Assembly stressed the value of participation by States at all levels of economic development, including developing countries, and from different legal systems, in the process of harmonizing and unifying international trade law (see, e.g., resolutions 40/71, 41/77, 42/152, 43/166, 47/34, 48/32, 49/55, 50/47, 51/161, 52/157, 53/103, 54/103, 55/151, and 56/79, preambular paragraphs). In its resolutions 3108 (XXVIII) and 57/20, the General Assembly expressed conviction that wider participation of States in the work of the Commission would further the progress of its work.

³² See A/CN.9/638/Add.5, paras. 42-44.

B. Attendance of meetings by intergovernmental and non-governmental organizations

1. Background information

25. The General Assembly, in its resolution 2205 (XXI) establishing UNCITRAL, laid down the basis for collaboration and coordination of UNCITRAL with various organizations active in the field of the law of international trade.³³ Since the early years of the Commission, attendance at sessions of the Commission and its working groups by the relevant organizations has been regarded as one of the appropriate and effective means to achieve collaboration and coordination between UNCITRAL and these organizations.³⁴

26. Since the first session of the Commission, the Secretariat has been inviting relevant organizations to the sessions of the Commission and of its working groups on the basis of the General Assembly resolutions, the general authority delegated by the Commission to the Secretariat to issue such invitations, and a specific request by the Commission or its working groups to the Secretariat to invite certain organization(s) to the session(s) of the Commission or its working groups.³⁵

27. The Commission has repeatedly endorsed the practice of the Secretariat inviting intergovernmental and non-governmental organizations to send observers to the Commission sessions.³⁶ The General Assembly, on several occasions in its resolutions, affirmed the importance of the participation of observers from interested international organizations at sessions of the Commission and its working groups.³⁷ Most recently, in its resolution 57/20, the General Assembly expressed satisfaction with the practice of the Commission of inviting relevant organizations to participate as observers in the sessions of the Commission and its working groups and to take part in the formulation of texts by the Commission.³⁸

28. For the description of the Secretariat's practice with respect to inviting intergovernmental and non-governmental organizations to sessions of the Commission and its working groups, see A/CN.9/638/Add.5, paragraphs 26-28.

2. Commission's options

29. The Commission may wish to continue following the flexible approach described in document A/CN.9/638/Add.5, paragraphs 20-32, in inviting intergovernmental and non-governmental organizations to attend sessions of the Commission and its working groups, or it may decide to set up a procedure for such purposes.

30. In the latter case, the Commission may decide to draw a distinction among organizations with whom working relationships have been established or may be established in the future. For example, as was suggested by the Secretary-General in

³³ See section II, paras. 8 (a, c and f-h), 11 and 12, of the resolution.

³⁴ See, e.g., A/7618, paras. 147 and 155; A/8017, paras. 189-190; and A/40/17, para. 351.

³⁵ See A/CN.9/638/Add.5, paras. 11, 20 and 22-26.

³⁶ See, e.g., A/7618, para. 147; and in A/58/17 and subsequent reports of the Commission, para. 8.

³⁷ See, e.g., resolutions 36/32, para. 9; 37/106, preambular para. 3 and operative para. 7 (b); and 38/134, para. 7 (c).

³⁸ Preambular paragraph 3.

his note A/CN.9/7 at the Commission's first session, the Commission may wish to decide to draw a distinction between organizations directly concerned with the whole range of the activities of the Commission, and organizations having special competence in topics that are of a particular concern to the Commission for which relationship arrangements are to be made.³⁹ While the former would be entitled to attending any session of the Commission and its working groups, the latter would be invited to a specific session according to the needs of the Commission and its working groups.

31. A special group would comprise United Nations organs, specialized agencies and other organizations enjoying observer status with the General Assembly. The relationship between this type of organization and the United Nations, including their right to attend sessions of United Nations bodies, is regulated by the General Assembly resolutions granting them the observer status.⁴⁰ Such organizations may be considered to be functional observers since upon their request they may attend sessions of United Nations organs on the subjects of their interest as determined by them. In order for the Commission to comply with the provisions of those resolutions as regards the rights of such organizations in the United Nations, these organizations should continue to be invited to the sessions of the Commission and its working groups on subjects of their interest upon their request.⁴¹

32. The Commission may wish to compile a list of organizations concerned with the whole range of the activities of the Commission and invite them to each session of the Commission and its working groups or to authorize the Secretariat to issue a standing invitation to them. In accordance with General Assembly resolution 2205 (XXI), the United Nations Conference on Trade and Development (UNCTAD) will belong to the first group. On the basis of the special arrangements with the United Nations and the understanding existing at the time the Commission was established,⁴² the International Institute for the Unification of Private Law (Unidroit) and The Hague Conference would also fall into the same group. The Commission may decide that the International Chamber of Commerce (ICC) would belong to the same group on the basis of the scope and outreach of its work as relevant to the Commission, and work arrangements between two organizations established since the Commission's first session. Organizations may be added or excluded from the list upon decision of the Commission.

³⁹ At that time, the Commission opted for a more flexible approach than that suggested in the Secretary-General's note. See A/CN.9/638/Add.5, paras. 23-25.

⁴⁰ According to the legal opinions issued by the United Nations Office of Legal Affairs, the General Assembly does not consider itself bound by decisions of other United Nations organs taken as regards questions of representation. (See e.g., *United Nations Juridical Yearbook, 1979* (United Nations publication, Sales No. E.82.V.1), pp. 166-168, under item 2, last paragraph). With particular reference to ECOSOC resolution 1996/31, one of the legal opinions states that, being a resolution of a separate principal organ of the United Nations, the resolution cannot bind the General Assembly, its Main Committees or subsidiary organs or international conferences convened by the General Assembly unless the Assembly so decides. (See an advance version of the 2000 *Juridical Yearbook* at <http://www.un.org/law/UNJuridicalYearbook/index.htm>, p. 59). In some cases, the General Assembly explicitly decided that ECOSOC resolution 1996/31 governs accreditation of non-governmental organizations to its organs. See further A/CN.9/638/Add.5, para. 5.

⁴¹ See A/CN.9/638/Add.5, paras. 6, 7 and 11.

⁴² See A/CN.9/638/Add.5, para. 29.

33. Other relevant organizations not belonging to the groups of organizations directly concerned with the whole range of the Commission's activities and those that are not functional observers would fall into the group of organizations having special competence in topics that are of a particular concern to the Commission for which relationship arrangements are made. With respect to these organizations, the Commission may wish to formulate criteria that organizations should meet so as to be eligible to be included in the list.

34. General requirements may include:

(a) The aims and purpose of the organization being in conformity with the spirit, purposes and principles of the Charter of the United Nations; and

(b) The organization's undertaking to support the work of UNCITRAL and to promote knowledge of its activities and work.⁴³

35. Specific requirements may include:

(a) The organization's recognized standing in the field of a particular concern to UNCITRAL;

(b) The organization's ability to contribute meaningfully to the work of UNCITRAL in view of the organization's membership and specificity of its role in representing a particular sector or industry; and

(c) As a general rule, the international, regional or subregional nature of the organization.

36. The Commission may wish periodically to review the list of such organizations as maintained by the Secretariat, for approval and any necessary revision.

C. Extent of observers' participation in the work of UNCITRAL

1. Participation in decision-making

37. It is a well-established rule in the United Nations that the right to vote is reserved exclusively for full members of an intergovernmental organ. On the only occasion when voting took place in the Commission (see paragraph 4 above), observers, consistent with the United Nations rules and practice,⁴⁴ participated neither in the voting nor in the explanation-of-vote period,⁴⁵ and they were not counted for quorum purposes. However, in the early years, the Commission had the

⁴³ These requirements are commonly found in rules of United Nations organs regulating relations with non-governmental organizations. See e.g., ECOSOC resolution 1996/31, and the Rules of Procedure of the UNCTAD Trade and Development Board (TD/B/16/Rev.4 and Corr.1, annex III).

⁴⁴ See, e.g., *United Nations Juridical Yearbook, 1975* (United Nations publication, Sales No. E.77.V.3), p. 167, para. 21; *ibid.*, 1980 (United Nations publication, Sales No. E.83.V.1), pp. 188-189; and *ibid.*, 1989 (United Nations publication, Sales No. E.00.V.1), pp. 364-365, under item 18. An observer may be permitted by the presiding officer to speak following the end of explanation of vote after the vote (i.e., after the debate has been closed and the decision taken), with the consent of the organ concerned.

⁴⁵ See A/CN.9/638/Add.3, paras. 18 and 57, and A/CN.9/638/Add.4, paras. 3-5.

practice of taking an “indicative” vote, with observers participating, before taking decisions by consensus (see paragraph 21 above).⁴⁶

38. As regards decision-making by consensus or without a vote, these terms are commonly interpreted in the General Assembly and its committees and other subsidiary organs as meaning decision-making with participation of only members of the organ concerned.

39. In the Commission, views of observer States have been taken into account in determining whether consensus had been reached. In deciding whether such practice should continue, the Commission may wish to consider the concerns expressed in the early years of the Commission’s work that consensus in the Commission with its limited membership would not necessarily represent universal consensus,⁴⁷ and this is especially so if views of observer States are not taken into account in reaching Commission decisions. The Commission may also wish to bear in mind the changing membership of UNCITRAL, which may affect the continuity and consistency in the decisions adopted by the Commission if views of non-member States are not taken into account.

2. Election as officers

40. The Commission may wish to note that there is no consistent practice in the United Nations as regards the election of observers’ representatives as officers of the organ concerned.⁴⁸

41. Individuals from observer States have occasionally been elected in their personal capacity as officers of the Commission’s subsidiary organs.⁴⁹ The Commission may wish to consider reaffirming this practice. In the light of the changing membership of UNCITRAL, preserving flexibility in this regard may be desirable. The practice in the Commission has shown that uninterrupted chairmanship of a working group during its work on a project may significantly contribute to the quality and speed of the work.

3. Participation in deliberations

42. The practice in the United Nations with granting observers an opportunity to make statements varies from one United Nations organ to another. The recent trend has been towards more flexibility: observers usually upon invitation of the presiding officer, subject to the agreement of the intergovernmental organ concerned, may address the organ, to the same extent as full members or only within the scope of their competence.⁵⁰ It is also in the United Nations practice that observers’ requests for reply, including in reply to statements made by the members of the organ concerned, are traditionally granted and very rarely denied by the presiding officer.⁵¹

⁴⁶ See A/CN.9/638/Add.5, para. 39.

⁴⁷ See, e.g., A/9408, para. 18.

⁴⁸ See A/CN.9/638/Add.5, para. 37.

⁴⁹ See A/CN.9/638/Add.2 and Add.5, para. 40.

⁵⁰ See A/CN.9/638/Add.5, para. 47.

⁵¹ *Ibid.*, para. 51.

43. As opposed to participation in deliberations on substantive matters, in United Nations practice, observers have not been given the right as a general rule to participate in deliberations on procedural matters, including by raising points of order. The presiding officer has, however, been expected to permit them to indicate objections to procedural matters directly affecting their interest, which might then be converted into a formal point of order by the representative of any member of the organ concerned.⁵²

44. In the Commission, observers have participated in deliberations on substantive matters to the same extent as full members: they have been allowed to make oral proposals and statements, including in reply to statements made by States members of the Commission.⁵³ The Commission has taken a flexible approach as regards observers' participation in deliberations on procedural issues.

45. The practice existing in many United Nations organs that observers are given the opportunity to speak after the members of the organ concerned have been given that opportunity⁵⁴ has not been followed in the Commission. Participants are given the floor in the order determined by the chairperson, which is usually, but not always, the order in which requests for the floor have been made.⁵⁵

46. The Commission may wish to consider confirming its existing practices, which ensure comprehensive, uninterrupted and structured debates that benefit from expert contributions of observers.

4. Submission of written proposals/circulation of documents

47. According to United Nations practice, the right to circulate written proposals/documents that entail financial implications for the Organization is reserved to Member States of the United Nations unless otherwise decided by the competent intergovernmental organ or already provided for in its rules of procedure. The practice in United Nations organs in this respect is not uniform. The General Assembly Rules of Procedure are silent on this point but do not preclude a presiding officer from consulting the members of the organ as regards the way to handle communications received from a non-member with a request for circulation. The presiding officer remains under the authority of the organ concerned, which has the final decision on the matter.⁵⁶

48. In some United Nations organs, the right to submit or sponsor or co-sponsor substantive proposals has traditionally been reserved only to members. In these organs, when an observer submits a proposal, that proposal cannot be put to vote unless it is so requested by a member of the organ concerned.⁵⁷

49. In the Commission, observers have occasionally been given the opportunity to submit written proposals⁵⁸ and to have their documents officially circulated in the

⁵² Ibid., para. 54.

⁵³ Ibid., paras. 38, 49 and 52.

⁵⁴ Ibid., para. 48.

⁵⁵ See A/CN.9/638/Add.3, para. 21 and A/CN.9/638/Add.5, para. 50.

⁵⁶ See A/CN.9/638/Add.5, paras. 56-58.

⁵⁷ Ibid., para. 53.

⁵⁸ Ibid., para. 55.

Commission and its subsidiary organs as a Secretariat document (usually as an annex thereto).⁵⁹

50. The Commission may wish to consider continuing the flexible approach that so far has prevailed in UNCITRAL, or to leave it to the organ concerned to decide on a case-by-case basis whether the circulation of written proposals/documents from observers should be permitted, or whether more stringent rules should be imposed on the circulation of such written proposals/documents.

5. Circulation of drafts to observers for comment

51. The general practice in the Commission, as endorsed by the General Assembly,⁶⁰ has been for the Secretariat to circulate, upon request of the Commission or its working group, drafts for comments to observers, including relevant organizations.⁶¹

52. The Commission may wish to consider confirming its existing practices on that matter.

IV. Preparatory work by the Commission's secretariat

53. At its first session, the Commission considered the issues of organization and methods of its work on the basis of a note by the Secretary-General (A/CN.9/6). It concluded that the particular methods of work to be followed by the Commission would be decided upon by the Commission in the light of requirements of each particular topic, including a stage of implementation of the work programme and the financial implications. Giving assignments to the Commission's secretariat was considered as one of the working methods.⁶²

54. Since then, the Commission itself or its working groups have delegated a variety of different tasks to the secretariat and, in the light of limited resources available to the secretariat, has given to it a certain measure of discretion in the implementation of the assigned tasks.⁶³ The delegated tasks have included legal research and preparation of studies, reports and draft texts on matters that are being considered for possible future inclusion in the work programme, and on matters already included in the work programme. In addition, the secretariat was authorized to: (i) circulate questionnaires or draft texts prepared by the Commission or its working groups or by the secretariat itself to States and organizations; (ii) transmit comments, replies and studies received to the Commission for consideration; and (iii) prepare analyses of comments and replies received.

⁵⁹ Ibid., paras. 58-59.

⁶⁰ See, e.g., General Assembly resolutions 56/81 and 60/21, in both the seventh preambular paragraph.

⁶¹ See, e.g., A/9617, para. 53 (4); A/32/17, para. 34 (2) (b); A/50/17, para. 201; A/51/17, para. 56; A/55/17, para. 191; A/56/17, para. 200; and A/60/17, para. 167. See also A/CN.9/638/Add.1, para. 40, and A/CN.9/638/Add.5, para. 55.

⁶² A/7216, paras. 31-43.

⁶³ See, e.g., A/35/17, paras. 141-142; A/37/17, para. 106; A/42/17, para. 343; A/60/17, para. 191; and A/61/17, paras. 209 and 220.

55. In the early years, some delegates, both in the Commission and in the Sixth Committee, expressed concern about the Commission's practice of requesting the secretariat to do work which fell within the framework of the terms of reference of the Commission itself. The view often prevailed that the Commission's secretariat had played an indispensable role in the Commission's work and performed a valuable service in the preparatory work.⁶⁴ This view was reflected in a number of General Assembly resolutions related to the work of UNCITRAL.⁶⁵ The Commission itself on numerous occasions reiterated this view.⁶⁶

1. The role of the secretariat in proposing new topics

56. The secretariat has made proposals to the Commission as regards new topics to be considered for inclusion in its work programme on the basis of consultation with various international organizations, results of special colloquia and seminars or consideration of related subjects in the Commission or its working groups. In considering whether particular topics should be added to the programme, factors such as global significance, special interest to developing countries, developments in technology and changing trends in commercial practice have been taken into account.

57. In its early years, the Commission already envisaged the active role of its secretariat in shaping the Commission's work programme, in particular that the secretariat would preliminarily examine a matter with a view to preparing a possible study on it for submission to the Commission at the appropriate time. At its eleventh session, the Commission decided that: (i) as a general rule, the Commission should not refer subject-matters to a working group until after the preparatory studies had been made by the secretariat and the consideration of these studies by the Commission had indicated not only that the subject-matter was a suitable one but also that the preparatory work was sufficiently advanced for a working group to commence work in a profitable manner; (ii) the secretariat should, in the first instance, undertake preliminary studies, where necessary in consultation with interested international organizations; (iii) the secretariat could exercise its discretion in determining the order in which such studies were prepared but should take into account any priorities indicated by the Commission; and (iv) the Commission should decide on the scope of further work on these subjects, and their possible allocation to working groups after having examined the studies prepared by the secretariat.⁶⁷

2. The role of the secretariat once a topic is included in the Commission's work programme

58. Once a topic is included in the Commission's work programme, the Commission usually decides whether subsequent work is to be carried out in the Commission itself or in a working group or by the Commission's secretariat. When

⁶⁴ See, e.g., A/9408, para. 17; A/9920, paras. 10 and 13; and A/10420, para. 10.

⁶⁵ See, e.g., resolutions 35/51, para. 12; 36/32, para. 11; 37/106, para. 12; 38/134, para. 12; 40/71, para. 10; 41/77, para. 12; 42/152, para. 12; 43/166, para. 10; 57/19; and 58/75.

⁶⁶ See, e.g., A/7618, para. 181; A/8017, para. 220; A/8417, para. 160; A/50/17, paras. 442-443; A/54/17, paras. 397 and 408; A/55/17, paras. 442 and 453; A/56/17, paras. 403 and 415; A/57/17, paras. 258-271; and A/58/17, paras. 257-261. See further A/CN.9/538/Add.1, para. 37.

⁶⁷ See A/33/17, paras. 67 and 68.

the work has been assigned to a working group or the secretariat, the Commission may set out a course of action to be followed in the work on the topic or delegate this task to the working group or the secretariat as the case may be. The work in the Commission and working groups has often been based on the preliminary drafts prepared by the secretariat,⁶⁸ and the active role of the secretariat at subsequent stages of the work has almost always been envisaged.⁶⁹

59. In some cases, the Commission has instructed the secretariat to submit its observations to a working group for consideration and to render assistance to the working group in the performance of its tasks, in particular, by preparing either at the request of the working group or of its own motion studies and other preparatory documents and by submitting proposals for consideration.⁷⁰ In other cases, the Commission has authorized its working groups to request the secretariat to prepare studies and other documents that have been necessary for the continuation of their work.⁷¹ The working groups have as a rule requested the secretariat to prepare various studies to assist them in consideration of issues as well as to prepare revised drafts for further consideration.

60. It has been common for the Commission and its working groups to authorize the secretariat to have recourse to assistance of outside experts in its preparatory work.⁷² In its early years, the Commission already envisaged that the secretariat would hold consultations with the organs and organizations concerned as may be appropriate in the different phases of the work. In particular, it envisaged that studies and other preparatory documents would be prepared by the secretariat with the assistance of experts, if necessary, and budget permitting. The Commission agreed that budget and planning estimates prepared by the secretariat for subsequent years should take into account the need for obtaining the services of consultants or organizations with special expertise in matters dealt with by the Commission, in order to enable the Commission to carry out its work.⁷³ When the substantive preparation of a draft text has been undertaken by the secretariat, it has almost always been with the assistance of outside experts.⁷⁴

61. The secretariat has sought the assistance of outside experts from different legal traditions and affiliations, such as government officials, academics, practising lawyers, judges, bankers, arbitrators and members of various international, regional and professional organizations. Such assistance has taken different forms, such as consulting on an ad hoc basis with individuals or convening meetings of groups of experts in a particular field, as required. However, in all cases, the secretariat has not been bound by the advice of experts and has formulated the ultimate proposals

⁶⁸ See, e.g., A/47/17, paras. 83-86; A/50/17, para. 12; and A/51/17, para. 56. See also A/CN.9/638/Add.1, para. 33.

⁶⁹ See, e.g., A/7216, para. 48. See also document A/CN.9/9.

⁷⁰ See, e.g., A/8017, para. 72.

⁷¹ See, e.g., A/8417, para. 92.

⁷² See, e.g., A/8017, para. 72; A/52/17, para. 247; and A/53/17, para. 206.

⁷³ See, e.g., A/8017, paras. 219-221.

⁷⁴ For example, drafts of the arbitration rules, and of the conciliation rules, with commentaries, were prepared by the Secretariat in consultation with experts in the field. The preparation of the Legal Guide on Electronic Funds Transfers was undertaken by the Secretariat in cooperation with the Study Group on International Payments comprising experts from international organizations and banking and trade institutions. See further A/CN.9/638/Add.1, paras. 36 and 38.

for the Commission or its working groups under its own responsibility and in accordance with the instructions received from the Commission or its working groups, also bearing in mind the policies expressed in the relevant General Assembly resolutions and decisions of the Commission.
