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PROCESS AND METHODS OF INTERNATIONAL RULE-MAKING COORDINATION OF DOMESTIC POSITIONS IN INTERNATIONAL FORA

KATHRYN SABO
GENERAL COUNSEL, INTERNATIONAL PRIVATE LAW SECTION
DEPARTMENT OF JUSTICE
CANADA

INTRODUCTION

The importance of coordinating domestic positions in international fora cannot be stressed enough if States are to maximize the potential of these fora (and the resources they devote to them). There are multiple challenges inherent to coordinating domestic positions in international fora, but steps can be taken to ensure that effective coordination does take place or at least occurs more regularly.

This text simply aims to set out different aspects of the problem and put forward some ideas as to how the problem might be remedied, in hopes of stimulating discussion and, ideally, action in States.

THE PROBLEM

The problem manifests itself in several situations. For example, States may approve work programmes that duplicate work done elsewhere, leading to an inefficient use of resources. States may take a different position on the same or similar issue across various instruments and across international fora, which can result in delay in the process of development of an instrument or even in conflicting instruments. The seriousness of the latter case is that the acceptability and therefore the effectiveness of the instruments which conflict are directly reduced. Moreover, the credibility of the organizations under whose auspices the instruments were prepared might also be negatively affected.

The presumption here is that the apparent lack of coordination arises from inadequate information-sharing and not from any intention on the part of a State to seek duplication of efforts or conflicting results. While it is perhaps stating the obvious, governments are organized in different ways in different States. The allocation of responsibility for any given organization varies from one State to another. When this is combined with overlapping, but not identical, mandates in the various international organizations, and in many cases a perennial lack of resources, one can understand how inadequate information-sharing can result.

The simplest case where the need for coordination can arise would be within one State regarding different projects ongoing within one organization. Examples at UNCITRAL could include the work on the Legislative Guide on Insolvency Law and the Legislative Guide on Secured Transactions, or the draft Convention on Carriage of Goods and the UNCITRAL Arbitration Rules. In such cases, even though only one organization is involved, its projects may fall under the responsibility of different government ministries or different units of the same ministry because of the subject matter. For some States, including Canada, even this simplest illustration of the need for coordination is rendered more complex because of an allocation of responsibility over the different subjects among different levels of government.

Coordinating the position within one State with respect to the work of different organizations requires a broader perspective. In many countries, UNCITRAL, Unidroit and the Hague Conference on Private International Law all fall under the responsibility of the Ministry or Department of Foreign Affairs or its equivalent, making it fairly easy to coordinate. In other countries, some or all of the responsibility may lie with the Ministry or Department of Justice or Industry. On the other hand, the World Bank, for example, may be the responsibility of another department altogether. Moreover, the position of a State on a given issue usually needs to involve the part of the government that is responsible for that issue in domestic law, not just the ministry or department responsible for the organizations in question. To add to the complexity, there are many organizations whose interest in matters of commercial law is more or less direct depending on the subject matter of a given project and so the range of coordination necessary will vary.

SOLUTIONS

States need to understand and agree that a coordinated approach brings greater benefits. The solution will undoubtedly vary from one State to another and will be determined in part by the availability of resources, but will need to be based on the timely sharing of information about initiatives through a network of officials.

Member States, both new and old, should be invited to consider whether they have such a network or to review their existing information-sharing structures to determine whether they are adequate. Within a State, officials might ask whether centralization of responsibility might improve coordination. To the extent that information is shared regularly, centralization is not essential, but the centres of responsibility for the various organizations and for the specific subject matter need to be identified. Coordination should be viewed from a general perspective as well as with respect to particular projects. Can a permanent inter-ministerial body be created?

The limits of effective and efficient coordination need to be considered as well. A State's interest in coordinating its position in global and regional fora should be evaluated. The range of interests involved will vary depending on the subject matter: some initiatives go beyond private law to touch on areas of public law; some commercial law projects go into areas of more strictly private law.

The extent to which the secretariats of the various organizations concerned can assist member States in their internal coordination should also be taken into account. Certainly when there are horizontal links to be made between or among projects of one organization, the secretariat can assist by convening, for example, joint sessions of the respective groups involved. Coordination when more than one organization is involved is likely much more limited.

FURTHER PERSPECTIVES

Internal coordination might be viewed as only one building block among several that could be put in place to construct a more efficient and effective framework for the development of harmonized or unified commercial law. Consistently coordinated positions on behalf of one State from one project to another and from one organization to the next, at least at the level of global multilateral organizations, would be a step forward.

A well-established information-sharing network could also go beyond the preparation of new instruments and be helpful in the promotion and adoption of existing ones.

In seeking a more efficient and effective framework for the development of harmonized or unified commercial law, States might go even further. Where membership in global organizations overlaps, those States should seek to coordinate their respective positions. Because membership does not overlap in all cases, coordination of the work among organizations requires additional mechanisms. While some coordination can be done directly among secretariats of the various organizations, member States need to consider how they might establish effective inter-organizational coordination mechanisms.

The various organizations concerned could be more proactive to move their member States to take steps to coordinate, both internally and across organizations.

CONCLUSIONS

The suggestions for coordinating domestic positions may not completely resolve the problem, but would go some way toward improving the situation. States need to make the appropriate links and consider creating permanent structures to ensure timely information-sharing.

It should be recognized that coordination of domestic positions is only one aspect of the broader problem of coordination of harmonization and unification globally. The various organizations concerned and their member States would benefit from further discussion of the coordination of domestic positions in the context of a discussion of the process and methods of international rule-making.