

## IV. RATIFICATION OF OR ADHERENCE TO CONVENTIONS CONCERNING INTERNATIONAL TRADE LAW

### Report of the Secretary-General (A/CN.9/91)\*

#### I. INTRODUCTION

1. The Commission, at its sixth session, decided "to maintain on its agenda the question of the widest ratification of or adherence to conventions concerning international trade law".<sup>1</sup> The Commission also requested the Secretary-General "to prepare, if appropriate with the assistance of representatives of members of the Commission, a report examining the causes of delay in ratification of or adherence to such international conventions and the means of accelerating such ratification or adherence, based on the studies made and the experience gained by other United Nations organs or specialized agencies, in particular the United Nations Institute for Training and Research, the International Labour Organisation, the World Health Organization, the International Civil Aviation Organization and the Inter-Governmental Maritime Consultative Organization, and to submit such report to the Commission, if practicable, at its seventh session".<sup>2</sup>

2. The Commission further decided "to re-examine at its seventh session if time allows, and in the light of the Secretary-General's report, the desirability of establishing a small working party, to be entrusted with the formulation of proposals, for consideration by the Commission at a later session, regarding ways and means that would accelerate the ratification of or adherence to conventions concerning international trade law."<sup>3</sup>

3. The present report is submitted in response to the above decision of the Commission. The report takes into account information received from other United Nations organs and specialized agencies and the views expressed by some representatives to the Commission in reply to inquiries by the Secretariat.<sup>4</sup>

#### II. THE CAUSES OF DELAY IN RATIFICATION OR ADHERENCE

4. The replies to the above-mentioned inquiries indicate that the causes of delay in the ratification of or adherence to conventions are of two distinct types: (1) those that are related to the preparatory stages preceding the adoption of a convention and (2) those

that relate to the implementation of a convention on the national level.<sup>5</sup>

##### A. Causes related to the preparatory stages<sup>6</sup>

5. The following causes which originate at the preparatory stages of work on a convention may affect the subsequent implementation of a convention on the national level.

##### (a) Non-participation in the elaboration of a convention

Non-participation in the elaboration of a convention may result, on the part of the non-participating State, in a lack of interest in the subject-matter of the Convention. It may be noted that such lack of interest may reflect a view that the proposal does not respond to practical difficulties presented by divergency of legislation, but is prompted by projects for "unification for the sake of unification".

##### (b) Defects of substance

Defects of substance may cause dissatisfaction with certain provisions of a convention and in turn impair the prospects of ratification or adherence. Examples given are:

- (i) Narrowness of approach as to legal systems, in that in some cases conventions have been proposed without adequate attention being paid to solutions in various legal systems. It may be noted that such narrowness of approach may lead to deficiencies as to substance, in that modern solutions to certain problems are not taken into account, and to deficiencies as to drafting, through the use of legal idioms of one legal system that may not be comprehensible in another legal setting.
- (ii) Narrowness of approach as to geography, in that conventions have been prepared without a recognition that for many countries international trade involves the carriage of goods across oceans rather than merely across land borders.<sup>7</sup>
- (iii) Drafting by compromise, as there appears to be a tendency, in the preparation of international conventions, to draft legal provisions

\* 30 April 1974.

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its sixth session (1973), *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17 (A/9017)*, para. 132; UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> It regards previous documentation related to the item, see A/CN.9/60 (UNCITRAL Yearbook, Vol. II: 1971, part two, IV) setting forth the proposal by the French delegation for the establishment of a union for *jus commune*, and A/CN.9/81 setting forth the comments and observations on this proposal by member States of the Commission.

<sup>5</sup> In this report, the terms "ratification" and "implementation" include any action on the national level, such as legislative action, that may be necessary to give a convention municipal effect.

<sup>6</sup> The information given under this subheading is based on the written communications of three representatives to the Commission.

<sup>7</sup> The representative to the Commission who listed this defect mentions that the 1964 Hague Convention on the International Sale of Goods was subject to this objection.

by compromise which often results in a failure to face up to difficult problems by omitting provisions relating to them or to deal with them adequately by including only weak provisions based on the "lowest common denominator".

- (iv) Inadequate study, in that not enough time and energy is spent on the preparatory work of conventions.<sup>8</sup>

B. *Causes related to the implementation of conventions on the national level*

6. The causes under this heading relate to difficulties inherent in the constitution of a State and to difficulties of an administrative character.

7. Ratification or adherence may present problems in the case of a State with a federal structure when, under the constitution, the subject-matter of a convention falls within the jurisdiction of the constituent units of the federation.<sup>9</sup>

8. Administrative delays may be due to a great many factors. The following have been mentioned:

(a) Administrative inertia and indifference on the part of an administration towards international law;

(b) The heavy burden which national administrations face as a result of the activities of international organizations in the legal field;

(c) Lack of urgency or priority which a convention has or is being given, having regard to the workload of an administration or a parliament;

(d) Priority of matters of a domestic or political interest over matters dealt with in a convention;

(e) Some national administrations do not have the necessary expert staff to examine the merits of a convention, in particular when they have not participated in the preparatory work;

(f) The text of a convention must be translated into the national language which is often a difficult task. Where two or more countries with the same language are considering adhering to a convention drafted in a language other than that of these countries, it is desirable that the translations be identical and this requires the organization of translation conferences;

<sup>8</sup> The representative to the Commission who listed this defect of substance refers in his comments to the prodigious amount of time and energy that has been spent in the United States on, for example, the Uniform Commercial Code or the Uniform Consumer Credit Code. He notes that "this is due to the much greater interest that is provoked among the bar and other interested groups by proposals for domestic legislation, the enactment of which seem likely".

<sup>9</sup> For instance, one representative to the Commission, referring to the constitution of the United States of America, states that although the federal Government has the power to regulate interstate commerce, the private law aspects of commerce have in fact been left largely to the States. He notes that it is, for example, the States and not the federal Government that have enacted the Uniform Commercial Code; that Congress is not accustomed to deal with problems of sales or commercial paper in domestic commerce and that this may deter it from doing so in international commerce. He further notes that it is of interest in this connexion that the United States has acted favourably on conventions in two areas in which it has also enacted legislation: arbitration and shipping.

(g) In view of the fact that conventions usually enter into force upon their ratification by a specified number of countries, national administrations adopt a wait-and-see attitude and will take action only when the entry into force appears certain,<sup>10</sup>

(h) A national administration may be more favourably disposed to initiate ratification or adherence procedures if the convention in question is in force in neighbouring countries or in countries with which the administration's country has extensive economic relations.

III. PROCEDURES AND METHODS DESIGNED TO ACCELERATE THE ADOPTION AND IMPLEMENTATION OF INTERNATIONAL RULES

9. The procedures and methods developed to accelerate the adoption and implementation by national authorities of international rules, as reported in response to the Secretariat inquiries, fall into two distinct categories: (a) procedures that are designed to dispense with the process of formal ratification or adherence ("negative notification procedure"), and (b) methods that are designed to expedite the process of ratification or adherence.

(a) *Negative notification procedure*

10. Under the negative notification procedure, also referred to as an "opting-out" or "objection" procedure, rules adopted by an international body ("sponsoring body") will, on a specified date, become binding upon a member State of the sponsoring body unless such State, before such date, has declared that it does not wish to be bound.<sup>11</sup>

11. Examples of this type of procedure are the following:

(i) *International Civil Aviation Organization (ICAO)*

Under article 37 of the Chicago Convention on International Civil Aviation of 1944, ICAO shall adopt, as may be necessary, international standards and recommended practices and procedures.<sup>12</sup> These international standards are considered binding on member States of ICAO unless a member State has given notice to ICAO that it "finds it impracticable to comply in

<sup>10</sup> One representative of the Commission suggested that this problem may be mitigated by the requirement that Governments submit a convention to the competent authorities within a specified period of time. See paragraph 13, *infra*.

<sup>11</sup> Under the Treaty establishing the European Atomic Energy Community (EURATOM) of 1957, the Council of the Community is empowered to determine basic standards for maximum permissible levels of ionizing radiation (articles 30 and 31). Member States "shall enact the legislative and administrative provisions required to ensure compliance with the basic standards so determined..." (article 33). It will be noted that this legal obligation is not subject to any procedure for "opting-out".

See also articles 100-103 of the Treaty of 1957 establishing the European Economic Community regarding the issue of directives by the Council of the Community.

<sup>12</sup> These deal with communications systems and air navigation aids, rules of the air and air traffic control practices, licensing of operating and mechanical personnel, airworthiness of aircraft, registration and identification of aircraft, collection and exchange of meteorological information, log books, aeronautical maps and charts, customs and immigration procedures, aircraft in distress and investigation of accidents, and such other matters concerned with the safety, regularity, and efficiency of air navigation.

all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord" with any such standard or procedure (article 38 of the Chicago Convention). Under article 38, it falls to each member State to notify ICAO immediately of non-compliance, and of any difference between its own practice and that established by the international standard.

(ii) *World Health Organization (WHO)*

A similar procedure obtains under article 21 of the Constitution of WHO. In five specified technical areas, the WHO Assembly may adopt regulations which become binding upon members of WHO unless they expressly opt out. The members of WHO are notified by the Director-General of WHO of the adoption of a regulation. The notification specifies the period within which a member can reject a regulation or make reservations thereto. In WHO practice, the Assembly has occasionally rejected certain reservations on the ground that they substantially detracted from the character and purpose of the regulation. On other occasions, reservations have been accepted for a limited period of time with the possibility of subsequent extension. Regulations adopted under article 21 of the WHO Constitution have so far been adopted only in respect of relatively non-contentious matters with a highly technical content.

(iii) Amongst current proposals is that by the Inter-Governmental Maritime Consultative Organization (IMCO) for a tacit acceptance procedure for technical conventions. IMCO's Legal Committee has prepared draft model provisions for bringing amendments into force upon their adoption by the appropriate bodies.

(b) *Methods to expedite ratification*

12. These methods are designed to ensure that, immediately after their adoption within the sponsoring body, conventions are examined by the competent national authorities of member States and submitted to these authorities for ratification or other action.

13. Examples of these methods are the following:

(i) *International Labour Organisation (ILO)*

Under article 19, paragraph 5 (b) to (d) and paragraph 7 of the ILO Constitution, States members of the ILO are obliged to submit conventions adopted by the International Labour Conference, within a period of 12, or in exceptional circumstances 18, months of their adoption, to the national authorities within whose competence the matter lies for the enactment of legislation or other action. Article 19 also provides that if a State member obtains the consent of the competent authority, it will communicate the formal ratification of the convention to the Director-General of the ILO and will take such action as may be necessary to make effective the provisions of the Convention. These provisions of the ILO Constitution are reported to have two purposes. One is to bring conventions before the authority—usually the legislative authority—which has the power to take the measures necessary to give effect to conventions; the second purpose is to bring the conventions to the notice of public opinion.

Article 19, paragraph 5 (c) of the ILO Constitution also provides that States members shall inform the Director-General of the ILO of the measures taken to

submit conventions to the competent national authorities, with particulars of the action taken by them. On the basis of the information supplied under this provision, the ILO supervisory bodies follow up the way in which States members fulfil their obligations relating to submission of newly adopted conventions to the competent authorities.

14. Other provisions of the ILO Constitution (article 19, paragraphs 5 (c) and 7 (a) and (b) (iv)) provide further that when the Governing Body of the ILO so requests in relation to a given convention, States members which have not ratified the convention in question shall report the position of their law and practice on the matters dealt with in it and state the difficulties which prevent or delay ratification. On the basis of these reports, the ILO Committee of Experts on the Application of Conventions and Recommendations prepares a general survey in which it examines and comments on the reasons given as preventing or delaying ratification.

15. Among the means of action that are not based on a constitutional provision, it is reported that from time to time appeals for the ratification of a given Convention or group of conventions are made by the International Labour Conference or by the Regional Conference of the ILO. Also, since 1970, the regional advisory committees and regional conferences of the ILO, which meet periodically for the African, American and Asian regions, have included in their agenda the examination of the difficulties encountered in the ratification and application by State members in respect of selected international labour conventions. The studies made of these conventions and the resulting conclusions have led to a better understanding of the position in each region and to improved ratification prospects.

16. There has also been developed by the ILO a practice of having ILO conventions examined by regional organizations, in particular as regards the position of the member States of such organizations in relation to these conventions. The International Labour Office cites the example of the Social Committee of the Council of Europe, which since 1962 has examined the position in respect of over 50 conventions, chosen after consultations with the International Labour Office.

17. At each session of the International Labour Conference the ILO secretariat includes an "Information on Conventions Service" which is available to discuss, with government delegations, ratification possibilities as well as difficulties encountered and the means of overcoming them. Similar arrangements are made at ILO regional conferences.

18. The Director-General of the ILO is regularly requested by Governments to provide written opinions explaining the provisions of conventions. These opinions are communicated to the Governing Body of the ILO and published in the ILO Official Bulletin. While the formal interpretation of international labour conventions is the responsibility of the International Court of Justice, the explanations provided by the ILO are said to facilitate in certain cases a decision as to whether the convention in question can be ratified.

19. Other measures include a procedure for direct contacts, introduced in 1969, under which a repre-

sentative of the Director-General visits the country concerned, with the agreement and usually at the invitation of the Government, in order to examine with the competent national officials difficulties in implementing ratified conventions. This procedure has recently been extended to cases in which the Government wishes to discuss possible obstacles to the ratification of a given convention.

20. Through the methods described above, the ILO has been able to contribute to the current total of about 4,000 ratifications covering over 130 of its Conventions.

(ii) *World Health Organization*

21. Pursuant to article 19 of the Constitution of the World Health Organization, the WHO Assembly, by a two-thirds majority, may adopt conventions relating to any matter within the competence of WHO. Under article 20 of the WHO Constitution, the member States of WHO are obliged to take action with regard to ratification by the competent national authorities and to notify, within 18 months, the Director-General of WHO of the action they have taken.

#### IV. CONCLUSIONS

22. A survey of the constitutions and practice of international law-making and regulatory bodies indicates that the procedure under which rules adopted under their auspices become binding upon member States, unless they opt out within a specified period of time, has been used only in the context of international rules and standards that are of a technical nature. It does not appear that the rules contained in or envisaged for the conventions now being prepared by the commission are of the technical nature of conventions in respect of which an opting-out procedure has thus far been employed.

23. The Commission may, therefore, wish to give particular attention to those procedures, which are now in use or which may be developed, that have special relevance to the preparation of conventions by UNCITRAL, and their subsequent implementation on the national level. Such procedures may include the following:

(a) Selections of those projects for unification for which there is a widely-felt need, on the basis of an

examination of the extent of the divergencies between the rules of different legal systems and, most especially, on the basis of evidence of practical difficulties resulting therefrom.

(b) Wide participation in the preparatory work on projects, not only by States which are members of the Commission, but also by others, and by international organizations with special expertise in the subject-matter to be dealt with in a convention. Such participation could take various forms, such as the circulation of questionnaires concerning the need for and the proposed content of new uniform rules, the circulation of draft texts for comments, and periodic consultations with interested circles.<sup>13</sup>

(c) Once a convention has been adopted, the General Assembly might be asked to request the Secretary-General to transmit the convention to Governments, inviting them, within a specified period of time, to supply him with information on the steps that have been taken with regard to ratification.<sup>14</sup>

(d) Encouragement to regional bodies that they should consider recommending to their member States the ratification of, or adherence to, conventions prepared by the Commission.

(e) Regional seminars, held where feasible in collaboration with regional international organizations, for the explanation and analysis of proposed conventions.

(f) A request to States to designate a person who would have the responsibility to make pending conventions known to governmental and private circles in his country. The Commission might also wish, at some future time, to consider establishing procedures for liaison within each region between representatives of members of the Commission and such persons.

<sup>13</sup> Such procedures have been followed, for instance, in the course of the preparatory work on negotiable instruments and arbitration.

<sup>14</sup> It may be noted that a similar course has been followed in respect of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. See report of UNCITRAL on the work of its sixth session (A/9017; UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A), para. 85 (1), and para. 5 of General Assembly resolution 3108 (XXVIII), reproduced in this volume, part one, I, C *supra*.