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Contribution of law schools and their professors to the promotion of inter-American integration and commerce

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I have been asked to speak to you about the contribution of law schools and their professors to the promotion of inter-American integration and commerce from the vantage point of my experiences in the United Nations Commission on International Trade Law (UNCITRAL). The Commission's work does not, of course, focus on inter-American integration and commerce. Its responsibility is to promote the progressive harmonization and unification of international trade law at the universal level. However, as is becoming increasingly apparent, regional integration and universal integration respond to the same need to remove obstacles to the development of trade.

It is no surprise that the organizations at the regional and universal levels co-operate closely. In particular, many inter-governmental and non-governmental regional organizations organize consultative meetings to discuss texts that are under preparation in UNCITRAL so as to determine the impact of the proposed texts on the regional interests. Following their adoption, those same regional organizations often encourage the States in the region to adopt the texts prepared by UNCITRAL or by other universal organizations for the benefit of regional integration, as well as for the benefit of integration with the rest of the world.

In respect of Latin America there might be mentioned the seminar co-sponsored by UNCITRAL and FELABAN, the Federación Latinoamericana de Bancos, in Mexico City in March 1986 to discuss what was then the draft *Convention on International Bills of Exchange and International Promissory Notes*.¹ Now that the Convention has been adopted by the General Assembly of the United Nations,² FELABAN

* The views expressed are those of the author and do not necessarily express the opinion of the United Nations or of the United Nations Commission on International Trade Law.

1. The papers given at the seminar are published in *Revista de la Federación Latinoamericana de Bancos*, No. 67 (Bogota 1988).

2. Resolution 43/165 of 9 December 1988.

is holding another seminar in Montevideo from 5 to 7 June 1989 to discuss whether the bankers should recommend to their governments signature and ratification of the Convention. Similarly, at the Fourth Inter-American Specialized Conference on Private International Law (CIPID IV), sponsored by the Organization of American States (OAS), also to be held in Montevideo from 9 to 15 July 1989, the delegates will consider a proposal that

Considering the current situation of the United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980, negotiated with the member States of OAS participating, that CIDIP IV might adopt a resolution whereby it recommends to the member States that they examine the Convention with a view to swift accession or ratification.³

You may be sure that members of the UNCITRAL secretariat will be at the two meetings to help explain the value of the two Conventions to the countries of the region.

The proposal to CIDIP IV brings us directly to the theme of this paper. The OAS report in which the proposal appears was prepared by Professor Bogiano of Argentina. Professor Bogiano has represented Argentina in meetings of UNCITRAL and of other intergovernmental organizations and he wrote the OAS report in his capacity as a specialist in the field at the request of the OAS General Secretariat.

There are undoubtedly a number of other persons the OAS Secretariat could have called on to write the report, and it is likely that most of them would also have been professors. Unification of law is in large part the work of the academic profession. The pertinence of that statement is demonstrated by the experience of UNCITRAL.

Of the four men who have held the post of Secretary since 1970 when UNCITRAL entered into its substantive work, three had been a professor of law prior to coming to the Commission and the fourth became a professor of law when he left the Commission. Although the statistics are not quite as high in regard to the rest of the secretariat or in regard to the delegates who have actively represented their countries on the Commission, the vast majority of both categories have also either been titular professors at some stage of their careers or have been adjunct professors while holding full time positions with the Commission's secretariat, with their ministry or in their other professional activities.

The prominent role played by professors as direct participants in the unification of law is no accident. It arises out of the nature of the problem that the unification of law process works to overcome.

That problem is that differences in the law in different States create practical difficulties for trade and for individuals whose lives

3. OEA/Ser. K/XXI.4/CIDIP — IV/doc. 8/88, p. 125.

touch two or more countries. The differences in the law are not only in the nature of different rules on the points in question but, more importantly, they reflect different traditions and approaches to the solution of legal problems. In order to unify the law, the different traditions and approaches must first be understood so that they can be taken into consideration.

These are not, of course, the only difficulties in unifying law. In matters of trade and commerce the differences in economies, including differences in levels of economic development, may be significant factors. Where the countries concerned speak different languages, additional problems are created. This is particularly acute where English is one of the languages, since the common law is closely associated with the English language, whereas the Roman law tradition is expressed in many different languages. As a result, many common law concepts are difficult to express in other languages while many concepts from the Roman law tradition are difficult to express in English.

One might wish at times that geography, new trade patterns, the increasing economic and social integration of the entire world and the effects of history could be ignored so as not to have to face those problems. But we know that it is not possible to do so. Those strong forces are constantly pushing us and they must be dealt with. Sometimes they cause individual countries, such as Canada, the Camerouns and South Africa, to have to bridge the common law/civil law gap in two languages in their domestic legislation. Other times they have led to the creation of bilingual or multilingual countries, such as Belgium or Switzerland, that did not face the same degree of incompatibility in the substance or the expression of the underlying legal concepts when the new unified legal system was created, though that statement glosses over many problems.

It is obvious that the problems exist in an organization of universal competence such as UNCITRAL. UNCITRAL must attempt to take into consideration the common law and the Roman law traditions, the influence of Moslem law, the concerns of State-trading economies and the special needs of developing countries. While not all languages are represented in UNCITRAL, it works in the six languages of the General Assembly.⁴ That is already beyond the linguistic capacity of any of us, much less of our knowledge of the legal systems of even one country using each of the six languages.

Regional integration appears to be easier because the range of languages, legal systems, levels of economic development and other factors to be taken into consideration would seem to be fewer. That is, indeed, usually the case — at least to a degree. However, regional unification of law must also cope with different traditions and different

4. Arabic, Chinese, English, French, Russian and Spanish.

languages. Without going into the difficulties faced in Eastern Europe in the unification efforts in the Council for Mutual Economic Assistance or the experiences in the Western European Common Market, it is necessary only to point out that CIDIP IV, which will be held in Montevideo in July, as well as this very conference in which we are participating this week, will be held in four languages, English, French, Portuguese and Spanish. Each of those languages represents a major source of legal thought.

But what does that have to do with law professors being the primary source for the professionals who devote themselves full or part-time to the unification of law?

In most countries there are relatively few people who have the linguistic skills, the knowledge about foreign legal systems, the time available and the desire to devote themselves to the preparation of texts of high quality for the unification of law. In a few countries, especially in Europe, there are such people in the ministries. The high degree of economic and social integration that has always existed in Europe has forced the creation of offices in the Ministry of Justice in many of those countries to deal exclusively with international legal co-operation. In many of the socialist countries the legal office of the Ministry of Foreign Trade is highly competent in matters of foreign law. However, even in Europe there are too few civil servants who can deal adequately with the problems of foreign law. Civil servants usually are fully occupied with domestic problems. Fortunately, in Europe as in the Americas there is a certain number of professors who have the necessary characteristics and who find satisfaction in participating in the unification of law process.

In most cases the academic participants in international unification of law have had previous experience in other legal systems, perhaps as a student, perhaps as a professor, perhaps because they have engaged in research in foreign law. Most participants find it to be highly stimulating to put their prior knowledge to use. There is no learning experience more intense than the negotiation of a legal text designed to overcome common problems and to be applicable in a number of different languages in a wide range of legal systems. Nor is one apt to find more interesting colleagues than those who choose to share that experience.

I remember well the remarks of Professor Eorsi of Hungary at the close of the diplomatic conference in Vienna in 1980 at which the *United Nations Convention on Contracts for the International Sale of Goods* was adopted in which he expressed his great happiness at the successful conclusion of work that had gone on for so many years and his regret that he would no longer have the occasion to meet the many friends he had made from around the world. It is easy to become addicted to the process. One might suspect that certain projects, but not the

preparation of the Sales Convention, took as long as they did because the participants did not want to give up the seminar in comparative law that was being furnished to them.

My statement is not as cynical as it may sound. The participants have to be interested in the process for it to work. Over the years UNCITRAL has progressively become a better organization because the Commission has worked at a high intellectual and professional level and qualified people want to devote their time to the meetings.

The contribution of the academic profession to the process of unification of law is hardly limited to participation at meetings of UNCITRAL and similar organizations at the regional and universal levels. Before the meeting can be held, before the project can be undertaken, scholarly and professional investigation must be undertaken to know and to understand to problems that are to be overcome and to have an idea how they may be overcome. The scholarly research may be undertaken for its intrinsic intellectual interest. Professional writing may describe problems from the viewpoint of the practicing lawyer. In rare cases an article may be written to advocate the preparation of a text of uniform law. Whatever may be the motivation for their preparation, well written articles in the relevant subjects are of immense importance. Without that preparatory work there would be an inadequate foundation on which to begin. After all, unification of law is applied comparative law.

Some of the most interesting writing that might be done, but which is disappointing in its scarcity, is critical discussion of texts that are under preparation. It is during this formative period that the most constructive analysis can be done. The text is still open for revision and better solutions are always hoped for. Of course, it is to be hoped that individual delegates consult widely on the proper approach to be taken by the delegation at the next meeting. But such consultations, as valuable as they may be to the delegation, are essentially private. A thoughtful and provocative article in a respected journal can have an effect on a number of delegations.

A review of the bibliographies in the UNCITRAL Yearbooks⁵ shows that most of the articles on the texts prepared by UNCITRAL written while those texts were in preparation were intended to stimulate interest in the fact that the text was being prepared. Such articles are, of course, very welcome for the general publicity they give to UNCITRAL and to the individual project. However, the articles tend to be descriptive and laudatory, thereby limiting their usefulness for the improvement of the text itself.

5. A bibliography of recent writings related to the work of UNCITRAL is submitted to the annual session of the Commission. The bibliography is subsequently reprinted in the *United Nations Commission on International Trade Law Yearbook*, generally referred to as the *UNCITRAL Yearbook*.

On occasion there have been articles that were scholarly and critical. In particular a symposium issue of the *American Journal of Comparative Law* in 1979 that was entirely devoted to UNCITRAL contained a number of articles on the various conventions that were then under preparation.⁶ Several of those articles had an influence on the later development of the conventions, and in particular on the Sales Convention. At a colloquium on the draft *UNCITRAL Model Law on International Commercial Arbitration* held in Lausanne Switzerland in 1984 there was forceful and intelligent discussion that was sometimes highly critical. Both the colloquium and the later publication of the proceedings⁷ did much to shape the final text of the Model Law.

It must be admitted that it is difficult for a person who is not engaged in the process of drafting a law to engage in critical writing about the draft during the preparatory stage. That is true in respect of a domestic text. Critical writing about an international text under preparation presents additional difficulties. The first is that it may be hard to find the relevant documents. Many law libraries do not receive the UNCITRAL documents in their original form or, if they do, they do not file them in numerical order in an easily accessible location. Such libraries often rely for their information about UNCITRAL upon the publication of the UNCITRAL Yearbooks. Although the Yearbooks are an invaluable source of information about the history of the texts that have been prepared by UNCITRAL, since they are always published several years after the publication of the original reports, they are not an adequate means of keeping abreast of the Commission's work.⁸ Therefore, any scholar who wishes to follow the current work of UNCITRAL should request to be placed on the mailing list.

A second difficulty in criticizing a text in the course of preparation is that the reason why the draft text takes a particular position may not be clear. The provision in question may reflect a

6. (1979) 27 *American Journal of Comparative Law*, Nos. 2 and 3.

7. P. SANDERS, (ed.), *UNCITRAL's Project for a Model Law on International Commercial Arbitration*. Proceedings of the International Council for Commercial Arbitration interim meeting, May 9 — 12, 1984 in Lausanne, Switzerland. International Council for Commercial Arbitration Congress Series No. 2, Deventer, Kluwer, 1984.

8. Except for the early years when some selection was made, the Yearbooks contain all of the relevant documents issued by the United Nations in respect of the work of the Commission. A Yearbook terminates with the report of the annual session of the Commission, which is usually held in May or June, and the action of the General Assembly on that report during its subsequent session, which ends in December of the same year. The goal is for the Yearbook to be available in its four language versions by the end of the following year. However, at the date of the conference at which this paper was given, 10 May 1989, the most recent volume of the Yearbook available in English was 1986, in French 1983 and Spanish 1984.

provisional decision or it may reflect the law or commercial practice in another country. To the new eye the provision may look like an error, an error that should be corrected. Sometimes it is an error, but quite often the same provision looks better once the text is completed and the provision is part of a total package.

Finally, after several years of preparation the text is adopted at the international level, by UNCITRAL if it is a model law or by diplomatic conference or the General Assembly if it is a convention. The text exists, and it doesn't exist. It exists as a model law or as a convention. It is no longer open to change, except by the rather heavy procedures available at the international level. However, it is not as yet positive law in any State. From that point of view, it is just a draft. Before it becomes law, it must be adopted by the appropriate political process, and in the case of a convention, it must be adopted by the appropriate process in a certain number of States before it is law in any one of them.⁹ Moreover, a model law or a convention that is intended to unify the law so as to aid in the process of regional or universal integration must be adopted by a large number of the relevant States to achieve its goal.

Professors and law schools have a vital role to play in this process. It is usually through them that the text becomes known and acceptable to the political sector. By and large the political sector, and especially national members of Parliament or the civil servants in the ministries who must propose to Parliament the adoption of a model law or the ratification of a convention, is unaware of legal developments, and especially of the preparation of texts for the unification of private law. Therefore, the texts must be explained; they must be demystified; they must be shown to be in the best interests of the country. Normally that can be done only by people from the country in question.

This promotional role is carried out in essentially four ways: First, there are the articles in the scholarly and professional journals. Such articles may not have much direct political influence, but they are an invaluable part of the creation of an overall favorable atmosphere. Second, there are the symposia and professional meetings at

9. Of the four conventions prepared by UNCITRAL to date, three required ten States to ratify or accede in order to come into force, *i.e.* *United Nations Convention on Contracts for the International Sales of Goods*, *Convention on the Limitation Period in the International Sale of Goods* and *United Nations Convention on International Bills of Exchange and International Promissory Notes*. The fourth, the *United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)*, required that twenty States ratify or accede to it in order for it to come into force. These relatively strict requirements are a serious impediment to gaining the early ratifications and accessions and delay significantly their coming into force. However, they assure that the conventions are a serious factor in international trade law once they come into force.

which the new text is presented and explained. Such symposia are often organized by universities. Third, the new text may become the basis of teaching in the classroom, even though it is not yet positive law in the country in question. This idea is less radical than it may seem since the new text represents the international consensus as to appropriate legal rules in the area in question. As a result, the text usually presents a better vehicle for teaching about the legal problems to be encountered in international trade than does the domestic law on the subject. Fourth, official committees are often formed to consider the advisability of adopting the new international text or, alternatively, to prepare a new law on the same subject. Even when the committee is charged with preparing a new law, it may use the international text in whole or in part as the basis for its own work. Recently, we have found this to be a common occurrence in respect of the law of arbitration, and especially of international commercial arbitration, where the *UNCITRAL Model law on International Commercial Arbitration* has been adopted by a number of jurisdictions and has been recommended for adoption in a number of others.¹⁰ It is very common for professors to participate in such committees.

Finally, after the text of uniform law has been adopted and is positive law, do professors and law schools have any contribution to make that they would not have towards any other law adopted in that country? The answer is quite clearly that they do. A text for the unification of law is not like every other law adopted in the country. Since its purpose is the unification of law, its interpretation and application must further that purpose.¹¹ This is mainly a question of attitude. Students, practitioners and courts must learn to think in broader terms than they are normally used to doing, and professors can help them to do so. It is also a question of knowledge, since those who are called upon to interpret and apply the law or the convention may not have the resources to research the drafting history or to analyze the text from a comparative law point of view.¹² Professors who have the resources to do so can

10. The Model Law has been adopted in more or less pure form throughout Canada, and in Australia, Cyprus, Nigeria and the state of California. To our understanding its adoption has been officially recommended in Egypt, Hong Kong, Kenya, Peru and the state of Texas. Official and unofficial committees are in various stages of considering the Model Law in a number of other countries.

11. Article 7(1) of the *United Nations Conventions on Contracts for the International Sale of Goods* provides :

In the interpretation of the Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

12. In order to help assure that the conventions adopted by UNCITRAL are interpreted in a consistent manner, in 1988 the Commission decided that court decisions

perform an invaluable service by domesticating the text in its proper international and comparative law context.

Although I have set forth the role of professors and of law schools as supporters of uniform law, and thereby of international integration, it is not to suggest that a text of law is good simply because it was adopted by an international organization and it is labeled as a text of unification of law. We all probably have our candidates for texts that should be quietly forgotten. Uniformity of law is not an end in itself, it is but a means to the goal of reducing barriers to international trade and to other forms of international interchange.

However, a good text that unifies the law of a number of countries is better than that same text adopted by a single country. Therefore, I invite you to participate at every stage in the process of unification of law. Help assure that the texts that emerge from the process are technically sound and reflect appropriate policy. Help them to become known and acceptable throughout the region for which they were intended or, in the case of a text prepared at universal level, to become known and adopted throughout the entire world. And help them to be interpreted and applied in conformity with the interpretations given in other countries.

and arbitral awards interpreting the texts prepared by UNCITRAL should be collected by the Secretariat and a means should be devised to assure that they would be widely distributed. Report of the United Nations Commission on International Trade Law on the work of its twenty-second session, A/43/17, para. 99. A meeting of national correspondents of States that had adopted one or more texts prepared by UNCITRAL was scheduled to be held at the end of May 1989 during the Commission's twenty-third session to help the Secretariat plan how this task might be carried out.