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THE ESTABLISHMENT OF A UNION FOR "JUS COMMUNE" IN
MATTERS OF INTERNATIONAL TRADE

Analysis of comments and observations by Governments

Report of the Secretary-General

INTRODUCTION

1. At the Commission's second session, the representative of France submitted a proposal which was designed to promote ratification of international conventions concerning international trade law. According to this proposal, States would, pursuant to a general convention, agree to accept the rules established by the Commission or under its auspices, as a body of common law governing international trade. These rules would then be binding upon States unless they expressly declined to accept them. 1/
2. The Commission gave preliminary consideration to the proposal and requested the representative of France to submit a working paper on the subject. 2/
3. Pursuant to this request, the representative of France submitted to the Commission at its third session a working paper setting forth his proposal in greater detail. 3/ The Commission gave further consideration to the proposal and

1/ Report of the United Nations Commission on International Trade Law on the work of its second session (1969), Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618), paras. 168-172 (Yearbook of the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL Yearbook), vol. I: 1968-1970, part two, II, A).

2/ Ibid., para. 176.

3/ A/CN.9/L.9 (UNCITRAL Yearbook, 1968-1970, vol. I, part three, V, B.).

decided to defer final action thereon until its fourth session. ^{4/} The hope was expressed that the representative of France would, in the meantime, prepare a draft text of the basic convention that would establish procedures according to which a common body of international trade law could be created. ^{5/}

4. The Commission at its fourth session considered a document submitted by the representative of France which set forth a preliminary draft of an international convention establishing a union for jus commune in matters of international trade; the document also contained a statement of the reasons supporting the proposal. ^{6/}

5. Following a general debate on the subject, the Commission requested the Secretary-General:

"(a) To communicate to members of the Commission the proposal of the French delegation for the establishment of a Union for jus commune, together with the Commission's report on the subject, and to invite the members of the Commission to indicate before 1 October 1972:

- (i) Their comments and suggestions with respect to the French proposal;
- (ii) Whether the French proposal is consistent with the existing constitutional rules or practices of the Member States and, if not, whether it would be feasible to modify such constitutional rules or practices to accommodate the above proposal;
- (iii) Whether the subject should be included among the priority topics in the Commission's work programme;

(b) To submit the replies to this inquiry, together with an analysis thereof, to the Commission at its sixth session." ^{7/}

ANALYSIS OF GOVERNMENTS' COMMENTS AND OBSERVATIONS

6. Pursuant to the above decision, the Secretary-General, in a note verbale dated 20 August 1971, communicated the above decision to all members of the Commission and invited them to respond to the three questions set forth therein by the date indicated in the decision.

^{4/} Report of the United Nations Commission on International Trade Law on the work of its third session (1970), Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017), para. 216 (UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A).

^{5/} Ibid.

^{6/} A/CN.9/60 (UNCITRAL Yearbook, vol. II: 1971, part two, IV).

^{7/} Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417), para. 155 (UNCITRAL Yearbook, vol. II: 1971, part one, II, A).

7. Replies have been received from the Governments of the following five members of the Commission: Australia, Egypt, Japan, Union of Soviet Socialist Republics, and the United Kingdom of Great Britain and Northern Ireland. A summary of these replies is given below. The full text of the replies appears in the annex to this report.

Australia

8. The French proposal raises practical constitutional difficulties for Australia and it is not certain that it would be possible to modify the Australian constitutional rules and practices to accommodate the proposal.

9. The Government of Australia would not oppose the inclusion of the proposal among the priority topics in the work programme of UNCITRAL if this is the wish of the other members of the Commission.

Egypt

10. The Government of the Arab Republic of Egypt views with favour the principles upon which the French proposal is predicated and the goals which it seeks to attain. However, the Government has the following main observations on the proposed draft convention:

(a) The system of automatic application of conventions which is established under article 9 of the draft convention is excessive. It runs counter to the constitutional rules and practices of a number of States, including Egypt. In view of this difficulty the Government of Egypt prefers the pragmatic solution adopted by the International Labour Organisation which simply obligates member States, within a given time, to submit conventions concluded by the organization for ratification by their respective constitutional bodies.

(b) The period of three years set forth in article 8 of the draft convention for automatic entry into force of conventions adopted by the requisite majority of the General Conference is too short to allow for adequate consideration of the proposed convention in question, especially in developing countries. A period of five years is therefore proposed. The Government of Egypt also proposes the deletion of the last paragraph of this article which provides for the reduction of the period by a vote of a two-thirds majority.

(c) In order to avoid duplication and overlapping with the work of other international organizations active in the field of unification of international trade law, such as UNCITRAL, the proposed Union should have no competence to formulate new conventions; its competence should be limited to examination of draft conventions prepared by other international organizations.

(d) The phrase "in full respect for the sovereignty of States" in the second paragraph of article I, is superfluous and should be deleted.

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(e) It would be useful to add to article 10 a provision which, on the basis of the principle of reciprocity, would allow a Contracting State to exclude the application of any particular rule of the jus commune and to apply its own national rule vis-à-vis any other Contracting State which has excluded the application of the same rule of the jus commune under the system established in article 10.

11. In view of the importance of the French proposal, the Government of Egypt is in favour of including it among the priority topics in the Commission's work programme.

Japan

12. The Government of Japan, while sharing the view of the French delegation that the existing state of affairs relating to the law of international trade is far from satisfactory, is not fully convinced that the time is ripe for the establishment of a new international organization of the type envisaged in the French proposal.

13. In view of the above and of the difficulties involved in the division of functions between the proposed Union and existing international organizations, the French proposal should be subjected to careful study and the functions and activities of UNCITRAL and other existing international organizations active in this field should be strengthened for the time being.

The Union of Soviet Socialist Republics

14. The Government of the Union of Soviet Socialist Republics doubts whether the establishment of a union for jus commune in matters of international trade would contribute to the adoption of international instruments in this field.

15. In view of the above and of UNCITRAL's heavy schedule of work, it does not seem expedient to include the item in the programme of work of the Commission.

The United Kingdom of Great Britain and Northern Ireland

16. In the view of the United Kingdom Government, it would be premature to seek to establish a union for jus commune at this stage. Lack of sufficient ratifications of existing conventions may indicate that those conventions do not attract widespread support.

17. The establishment of a union for jus commune at this stage might prejudice the work of UNCITRAL, none of whose conventions are yet open for signature.

18. The Government of the United Kingdom, therefore, prefers not to include the French proposal among the priority topics in the Commission's programme of work.

ANNEX

TEXT OF COMMENTS AND OBSERVATIONS OF GOVERNMENTS ON THE
FRENCH PROPOSAL

AUSTRALIA

/Original: English/

Australia is sympathetic to all proposals that will aid in the unification and simplification of international trade law. The proposal however raises practical constitutional difficulties for Australia, and it is not certain that it would be possible to modify Australian constitutional rules and practices to accommodate the proposal. Australia would be happy for the subject to be included among the priority topics in the work programme of UNCITRAL if this is acceptable to the other members of the Committee.

EGYPT

/Original: French/

Convinced that the development of international trade is being impeded because of the diversity of national law and that such trade, by its very nature, has to be governed by rules of an international character, Egypt welcomes the principles underlying the French proposal for a basic convention on the establishment of a Union for Jus Commune in matters of international trade.

Although its principles and aims are acceptable, the proposal nevertheless calls for several comments, the most important being:

1. Article IX of the draft Convention establishes a procedure for the automatic implementation of conventions concluded by the General Conference. This procedure seems to go too far since in many countries, including Egypt, it runs counter to constitutional requirements which call for the ratification of conventions by the Legislative Branch (parliament or a national or people's council). To overcome this difficulty and give the proposal a greater chance of success, Egypt would prefer a procedure which is similar to that used in the International Labour Organisation and which, without going so far as to require automatic implementation of ILO conventions, none the less obliges Member States to submit them within a particular period to their Legislative Branch for ratification. Obviously, such a procedure is not the perfect answer to the problem of establishing a jus commune in matters of international trade, but it is certainly the most pragmatic in view of the present international situation.

2. The three-year time-limit laid down in article VIII for automatic entry into force of conventions concluded by the General Conference would be too short

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for developing countries without adequate technical or administrative facilities for considering such conventions within the time-limit laid down. This might be even more difficult if the Conference submitted several conventions at the same time. Countries in such a position might well reject a convention, not for reasons of substance, but simply because they have not been able to study it within the required period. It would therefore be more equitable to increase the time-limit to five years, with an opportunity of extending it by a decision requiring a simple majority. It would be to the advantage of the developing countries to prohibit any reduction of the time-limit. Accordingly, the third paragraph of article VIII should be deleted.

3. There is nothing in the draft to indicate whether the Union would be competent to draw up new conventions or merely to consider draft conventions prepared by international organizations working on the unification of international trade law. The second alternative is to be recommended, for it would enable the specialized organizations to carry on their work without duplicating that of the Union and it would also give the General Conference more time to consider the conventions formulated by those organizations. In that way there would be no incompatibility between, for example, the Union and UNCITRAL, two bodies working in similar fields and both belonging to the United Nations.

4. The reference in the second paragraph of article I to "respect for the sovereignty of States" seems redundant; it is an established principle and one that need not be cited. The reason why the authors of the draft insisted on adding this phrase is obvious - they want to dispel any fears that the sovereignty of States Members of the Union would be endangered. However, this fear is groundless and it is already dispelled in the preamble of the draft.

5. Article X grants a State the right to declare at any time that it will not apply in its territory any particular rule of jus commune. But the text does not say what attitude the other States would adopt towards a State making such a declaration. Would they be required to apply the rules of jus commune vis-à-vis that State? Or would they be entitled, on a reciprocal basis, to refuse to apply them and to replace the provisions of jus commune rejected by the State in question with rules of their own national law? It would be worthwhile adding a provision endorsing the principle of reciprocity.

These comments do not, we must reiterate, prevent Egypt from supporting the French proposal, which is unquestionably a laudable attempt to improve the present situation regarding international trade law. Egypt is therefore in favour of placing the question to which this proposal relates on the list of priority topics contained in the Commission's programme of work.

JAPAN

/Original: English/

In the field of international trade law, there exist few unified laws and rules, and legal problems, if they arise, are settled by the law indicated by the rules of conflict of laws. Therefore, the parties to a contract sometimes have difficulties in finding laws and rules which are actually applied in the performance of the contract. The Japanese Government shares the view with the French delegation that this situation is not desirable. The French delegation's proposal to establish a Union for jus commune will surely improve the situation.

The Japanese Government is, however, not fully convinced of the views expressed in the French proposal that the time for making unified laws and rules and for establishing a new international organization for this purpose is already ripe.

Although commercial laws might be more suitable for unification than other kinds of laws, the differences in commercial customs and domestic legal systems of States still constitute considerable difficulties for the establishment of these uniform laws and rules.

Such difficulties are shown in the fact that the past efforts for the unification have not brought about fruitful results as expected. For this reason, action to establish a new international organization for unification of commercial law should be started after the careful study of its feasibility. Furthermore, even if such a Union were to be established, it would be doubtful whether the Union would have a *raison d'être* unless its legislation binds all the Member States. The division of work and functions between this new Union and existing international and regional organizations will be another difficulty to be solved.

In conclusion, the Japanese Government is of the opinion that the proposal by the French delegation should be subjected to careful study and that the functions and activities of UNCITRAL and other existing international organizations in this field should be strengthened for the time being.

UNION OF SOVIET SOCIALIST REPUBLICS

/Original: Russian/

Since there is some question as to whether the establishment of a "union for jus commune" would assist in hastening the process of formulating and adopting international standards in the field of world trade and since the workload of the United Nations Commission on International Trade Law is already too heavy, it does not seem advisable at the present time to include this item in the Commission's programme of work.

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UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

/Original: English/

It is the view of the United Kingdom Government that it would be premature to seek to establish a Union for a Jus Commune at this stage. The United Kingdom Government believe that the fact that many conventions are inoperative owing to insufficient ratification may indicate that a convention along the lines proposed may not attract widespread support. The United Kingdom Government believe that there would be considerable merit in encouraging States first to take positive steps towards ratifying individual existing conventions, to ensure their satisfactory working.

Moreover, the United Kingdom Government consider that to establish a Jus Commune at this stage might prejudge the work of UNCITRAL, none of whose conventions is yet open for signature, and it would therefore be preferable not to include the French proposal among the priority topics in the Commission's programme of work.