

terpretation, but also definitions or classifications of certain concepts (such as those provided in the Uniform Commercial Code or those which some organizations are in the process of drawing up) without, however, turning the code into something akin to a dictionary.

As to the *object* of codification it is suggested that the latter should be restricted to the legal relationships arising in international trade relations. One could even provide a definition of those *international relations*, as has been done in some international conventions (for instance most of the conventions dealing with transport; article 1 of the Uniform Law on the International Sale of Goods (Corporeal Movables); and article 1 of the Czechoslovak Act No. 101/1963 which specifies "the relationships arising in international trade relations"). Suitable formulas must be found, however, to take account of possible connexions between the concept of "international relationship" and that of "legal relationship with a foreign element".

The basic principles presented in the introduction to the proposed codification should be followed by a general section on *obligations* (sources, effects, extinction, the transfer of claims, evidence, and so on).

The progressive codification of international trade law will unquestionably be a large scale operation, spanning a long period of time and fraught with considerable difficulties. It would be unthinkable, however, either to allow international trade to continue to be governed by a host of national laws, since that places it in an impossible position, or to leave all the legal problems arising in international trade to be solved simply by practice. The conclusion which emerges from the foregoing observations is that the progressive codification of international trade law must be undertaken without delay.

This proposal, which might at first sight seem over-ambitious, is feasible in UNIDROIT's opinion, provided that certain conditions are met.

First of all, the codification should be gradual. The object is not to prepare a code of international trade law overnight, but rather to prepare an outline of an ideal code, examining all the subjects which should be covered. The task would be facilitated by using the Czechoslovak code as a model and also to some extent the Uniform Commercial Code of the United States of America. The uniform laws which have already been drawn up or are in the process of elaboration should be included in this Code as special chapters. They should

therefore be studied and, where appropriate, revised and harmonized in the light of these new requirements.

At the practical level, UNIDROIT is studying the possibility of formulating a general, organic unification plan.

Once this over-all plan has been devised, the first task will be to prepare a draft for the general section containing the basic principles which will form the foundations and the framework of the unification. The drafts relating to special subjects, including those which have been prepared or are in preparation, should be harmonized to tally with the basic principles in the general section. Thus, codification will gradually grow within the framework of uniform general principles until it covers the whole field assigned to it.

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UNIDROIT took the initiative of arranging the four Meetings of Organizations Concerned with the Unification of Law previously referred to in this report. The discussions held on each of those occasions clearly pointed to the usefulness of regular meetings of the representatives of organizations contributing in some way to the unification of law, so that they can pool their experience, impart information about their individual programmes of action, air any problems of methodology they may have encountered and study some topics of common interest more closely.

As it is essential to start on the progressive codification of international trade law without delay, there is no alternative but to harness all the energies of all those who are willing to participate in this great scientific work if the end is to be attained. The best use must be made of all the experience acquired in the field by all the organizations concerned with the unification of trade law and by all those who, in one way or another, might assist in the task.

In this spirit UNIDROIT, which has already conducted a preliminary survey of the main problems likely to arise in the progressive codification of international trade law, has the honour to call the attention of the United Nations Commission on International Trade Law to this question. UNCITRAL's encouragement, support and co-operation would be an essential element in the accomplishment of a task whose successful outcome would do much to promote the development of international trade in the general interests of economic development and peace.

B. Draft basic convention establishing a common body of international trade law: proposal by the French delegation*

1. In the existing circumstances, international trade relations are customarily governed by municipal legislation, as though they were a matter of domestic legal relations. Only exceptionally have certain States agreed that such legal relations, which are international in character, should be governed by the municipal legislation of a given country (unification of rules governing con-

flicts) or should be subject to a particular régime (unification of substantive rules).

The very fact that UNCITRAL was established shows that this is an unsatisfactory situation. The results obtained in the matter of the unification of rules governing conflicts and of substantive rules are not such as to meet the needs of international trade.

* UNCITRAL/III/CRP/3.

2. Progress cannot be made merely by drafting new conventions or by urging States to ratify existing conventions. The very root of the difficulty must be attacked and the problem of international trade law must be dealt with in a new way. It is essential to formulate an approach different from that prevailing in the nineteenth century and recognize that international relations should as a matter of principle rather than by way of exception be regulated at the international level. The French Government urges UNCITRAL to adopt that approach by drafting a basic convention establishing a common body of international trade law.

3. This proposal would in no way entail sacrificing the sovereignty of States. It is not aimed at establishing a *supranational* law to be imposed on States in their own territory by decree of a body having higher authority than theirs. That would be an undesirable solution. It is legitimate, indeed necessary, that States should have some control over the rules to be enforced in their territory by their police. The French Government's proposal would leave the sovereignty of States entirely intact but would at the same time be based on the idea that co-operation and the search for appropriate solutions should be the rule in international trade relations rather than the exception, as had hitherto been the case. A system which would make that principle a reality should be devised and established.

4. History affords an example. From the thirteenth century to the nineteenth, the universities gradually built up a rational law based on the rules of Roman law, which was considered to constitute a common body of law (*jus commune*, *Gemeinrecht*) in every country on the continent of Europe. The universities had no authority to make laws; they merely proposed that the law they taught should be taken as a model. The courts in the individual countries could deviate from that model in order to take account of local customs or of decrees promulgated by their rulers. Nevertheless, a consensus emerged in the various countries of continental Europe to the effect that, in the absence of such customs or decrees, judges should, as a matter of principle, apply the rules of that common body of law because, since they were a product of man's reason, it was through them that justice was most likely to be achieved.

5. In the nineteenth century, the process of codification and the growth of nationalism destroyed this traditional concept. Today the problem is to revive it and constitute a new common body of law in such a way as to take account of present political realities.

The universities are no longer the proper authority to lay down the rules of a common body of law. They are disqualified from so doing by their multiplicity, their national ties and the role of law in modern societies. On the other hand, the scientific authority of a group of jurists might suffice to enable them to lay down the principles of a common body of law at the regional level affecting relations between countries whose legal systems are already very similar. The Restatement of the Law in the United States of America is a case in point. At the international level, where legal systems of great diversity may have to be reconciled, it is essential that

Governments should participate if a common body of law is to be reformulated in our era.

6. There are a number of ways in which UNCITRAL might serve this purpose. The French Government does not intend to propose a rigid plan but rather, at the present stage, to indicate the various approaches which might be contemplated. It will, however, be easier to present these ideas in the form of an outline which would serve merely as a starting point and to which various alternatives could be added.

7. A basic convention would be concluded, recognizing that it is for the United Nations to establish a new *jus gentium*, which would constitute a common body of international trade law. By virtue of that basic convention, four principles *applicable to the countries adhering to it* would be laid down: (1) UNCITRAL would be made responsible for establishing appropriate regulations within the various branches of law concerned with international trade; (2) those regulations would constitute the *common body of international trade law* and, under certain conditions, would automatically enter into force in those countries adhering to the basic convention; (3) in those States, they would henceforth constitute the law applicable to international legal relations, except in so far as a State had informed the international organization that it did not accept certain provisions proposed by UNCITRAL; (4) a country which rejected or modified a provision of the convention would have to stipulate which rule of its municipal law would replace that provision.

The following paragraphs set forth some of the details of this outline and should serve to demonstrate that it would have considerable flexibility.

8. The now accepted principle that UNCITRAL would be made responsible for establishing appropriate regulations within the various branches of the law concerned with international trade calls for some comment. Existing organizations and institutions dealing with a very broad range of subjects are considering the unification of international trade law: the International Civil Aviation Organization (ICAO), the United International Bureaux for the Protection of Intellectual Property (BIRPI), the Inter-Governmental Maritime Consultative Organization (IMCO), the International Institute for the Unification of Private Law (UNIDROIT), etc. It has already been recognized that UNCITRAL would not act in place of those bodies; its role could and should be merely to provide them with incentives, to induce them to bring existing Conventions up to date and perfect them, to encourage them to adopt new approaches and to urge States to give them more solid and more universal support. However, under the system provided for by the basic convention UNCITRAL would also have the function of examining the texts prepared by those bodies to determine whether, having regard to the circumstances in which they were drafted, their subject-matter and the advantages they might offer, they warranted elevation to the level of "common" law, with all the consequences which that would imply.

Rather than actually drafting texts, UNCITRAL would have the task of approving texts drafted elsewhere,

although perhaps on UNCITRAL's initiative and at its suggestion. More specifically, since UNCITRAL comprises representatives of only twenty-nine States, it would confine itself to making reports for submission to a higher body with broader representation, and it would be for the latter to make decisions.

The regulations approved by UNCITRAL could, of course, be highly varied in form and substance. Sometimes it would approve actual laws with specific, detailed provisions; sometimes it would approve mere principles for States to apply; and sometimes it would simply be a matter of definitions to elucidate the meaning and scope of various terms. Every kind of formula can be utilized in reconstituting a common body of law.

9. The regulations thus established, which would constitute the body of law governing international trade, would, under certain conditions, enter into force in all countries which had acceded to the basic convention.

The principle put forward here is inseparable from the accompanying reservation. Before taking up the latter, however, let us consider the principle itself. In the context of the proposed formula, it remains to be determined under what conditions the regulations established or approved by UNCITRAL would be elevated to the status of "common" law.

UNCITRAL itself is not competent to take that decision, which, in our view, falls within the purview of the General Assembly, where all the Member States of the United Nations are represented; under another formula, a conference comprising only those States which had acceded to the basic convention might be recognized as having the requisite competence. In addition, in the General Assembly or the conference a special majority of two-thirds or three-quarters might be required to enable a text to become a part of the common body of law. The length of the interval after which a text thus approved would be considered as an expression of the "common" law could also be discussed. Such an interval must be provided for so that the various States can, as appropriate, take advantage of the opportunity which will be afforded them to introduce into their municipal law changes reflecting the "common" law.

To impose the application of particular provisions on a State would be to infringe on the sovereignty of that State. The declaration that certain provisions constituted the "common" law of international trade would not have that effect; that would be no infringement of the sovereignty of a State when a majority of the other States declared that, in their view, certain rules were best and expressed the wish that the various States should take account of that circumstance and adapt their municipal legislation accordingly. A decision making a text a part of the "common" law of international trade would naturally have been taken by a majority; a unanimity rule would be justified only if it were a question of imposing an obligation on States, but that would not be the case in establishing the "common" law.

10. The regulations thus established would thenceforth constitute the law applicable in all countries to international legal relations, except in so far as a State (bound by the basic convention) had made it known

that it would not accept the elevation of a particular provision to the status of "common" law.

This reservation makes clear our thinking on the matter. No restriction would or should be placed upon the sovereignty of States. They could say at any time that they did not accept the elevation of any particular provision to the status of "common" law. However, one element in the existing situation would be changed and the change would be a basic one: a State which did not wish to introduce a provision of the "common" law into its municipal legislation would have to make that fact known to a particular international organization (which would have to be specified in the case of each text declared to be "common" law).

The proposal thus formulated would have the effect of confronting each State with its responsibilities. However, that would not be its main objective, which would rather be to counteract the effects of bureaucratic routine. The reason why international conventions are rarely or belatedly ratified is not that they give rise to objections; more often, it is that they are lost in the archives or forgotten in the files of some administrative office. A text drawn up at the international level and approved by a high international authority deserves a better fate. It might very well happen that some State would not be satisfied and would not wish to accept it; that would be legitimate. What cannot be tolerated is the possibility that a State might be unaware of the existence of the text and take no position on it; it is not asking too much of States to impose upon them the obligation to take a position on a text and state that it is unacceptable to them. Of course certain States, as a precautionary measure, might adopt the practice of objecting to all texts proposed as "common" law without considering them. It is to be hoped, however, that a spirit of international co-operation would prevail in the majority of States, that there would be a predisposition in favour of texts declared to be "common" law, and that they would be rejected only with full knowledge of their context where pressing considerations gave rise to serious objections to them in a particular country.

The system proposed here is not entirely original. It is already in effect in certain international organizations: ICAO (with respect to the annexes to the Chicago Convention), the Food and Agriculture Organization (FAO), the World Health Organization (WHO), the Central Office for International Transport by Rail (OCTI). There seems to be nothing to prevent the general application of the system to all international trade matters dealt with by UNCITRAL.

If, despite its moderation, the system still appears too revolutionary, States which are hesitant to adopt it may accept as an alternative, the less radical solution provided for in the Constitution of the International Labour Organisation (ILO). Conventions concluded under the auspices of ILO do not enter into force automatically in the territory of member States; rather, the Governments of those States are under an obligation to submit them to their legislatures for ratification within a certain time-limit. An analogous rule could perhaps be adopted with regard to the subject which concerns us here; however, it would to some extent constitute a distortion of

the concept of "common" law, the revival of which is, in our view, a matter of urgency.

11. A State (bound by the basic convention) which rejected or amended a provision of "common" law would have to indicate by what rule of its municipal law that provision was to be replaced. "Indicate what your law is" States would be told; "otherwise, it will be taken to be in accordance with 'common' law".

The purpose of making this proposal is clear. International trade today suffers not only from the diversity of laws relating to it, but also from uncertainty regarding those laws. A judge knows the laws of his State; he does not know the laws of other States and he generally has no sure and practical means of acquainting himself with them. This situation does not appear to be irremediable; it is in the interest of States themselves to find a solution if they wish their own laws, when recognized as being applicable, to be applied correctly by judges in other countries.

That is the object of the present proposal. Considerable progress would be made if, for every provision of the texts of "common" law, it could be indicated in which countries the provision in question had been rejected and by what other provision it had been replaced in each of those countries.

However, the principle thus formulated may well give rise to difficulties and objections. Therefore it should be stressed that this particular suggestion, however desirable its adoption may seem, would not constitute a basic element of the proposed system. It would certainly be regrettable if, when notification was received that a State was rejecting certain provisions of the uniform law, it was not known what rules were to be substituted for those of the uniform law in the legislation of that State. In that respect, however, nothing in the present situation would be changed. An invitation should be addressed to States to comply with the wish reflected in our proposal; the latter should not, however, be seen as anything more than a wish. The countries which did not comply with it would be the losers, for they would thus expose themselves to the danger that their own legislation would not be applied or would be applied incorrectly.

12. The procedures used so far for reaching an agreement have afforded only disappointing results. That of international conventions, taken as a whole, has failed because States, rightly or wrongly, do not wish to commit themselves; that fact must be taken into account, and a procedure must be found which would provide a satisfactory legal system governing international trade regardless of any such commitment. The simple model-law procedure has, on the whole, proved ineffective: States pay little need to the model laws proposed to them, and that indifference must also be taken into account. The concept of "common" law, situated between those two extremes, offers a middle course. It would not be merely a model law: it would be a law which would be applicable in practice, yet would not impose any obligation upon States, which could at any time and on any point uphold a provision of their municipal law which is at variance with it.

International trade law should in principle be declared by an international organization and not by States;

the role of the latter is merely to say whether and to what extent they agree to apply the rules of such law and, by thus expressing reservations, to give direction to its development.

13. It may be useful, in conclusion, to make two observations. The first is that "common" law cannot be made indefinitely binding. Its content is and must be constantly reviewed in the light of technological developments and of the new relationships between nations resulting from the most diverse circumstances. We do not consider derogations by different States to the texts of "common" law to be a weakness. On the contrary, they are an extremely useful instrument for improving the "common" law and keeping it constantly up to date. Owing to its flexibility, "common" law provides a technique which is in many cases superior to that provided by international conventions. The latter may seem to have the defect of "freezing" the law; in our era of rapidly changing social conditions that is perhaps one of the reasons for the often demonstrated reluctance to conclude and ratify them.

The second observation is that the existence of a "common" law of universal scope places no obstacle in the way of the establishment of regional agreements. On the contrary, it is desirable that States should not propose derogating to the texts of "common" law on an individual basis. If the diversity of solutions proposed were as great as the diversity of the States capable of adopting legislation in the world of today, international trade could not accommodate them; nor is such diversity justified by the needs of States. A rule obliging States to communicate their derogating to "common" law to an international body would greatly clarify the situation and would very likely lead to realignments which would make it considerably simpler to understand the law as it applies to international trade.

14. On the basis of the ideas set forth above, the French Government proposes that the United Nations Commission on International Trade Law should prepare a draft international convention.

The object of the convention should be to determine under what conditions certain texts approved by UNCITRAL could be elevated to the status of a *common body of law governing international trade*. The object would also be to specify in what way the texts in question could be rejected or modified by certain States. On the other hand, it would not be the object of the convention to establish UNCITRAL's work programme or to indicate how the texts were to be drawn up and approved by UNCITRAL itself, for it would be essential to retain the greatest flexibility with respect to those two points.

The adoption of a new policy on international trade law is, in the opinion of the French Government, the *sine qua non* for genuine progress in that field. Without it, we fear that UNCITRAL might become an academic assembly devoid of any real effectiveness. The plan which the French Government is submitting to UNCITRAL is assuredly an ambitious one; nevertheless, all things considered, it does no more than assign to UNCITRAL the role to which a body constituted by the United Nations can and must lay claim.