THE CONTRIBUTION OF UNIFORM TRADE LAW TO ECONOMIC DEVELOPMENT AND REGIONAL INTEGRATION IN EAST ASIA AND THE PACIFIC: A VIEW FROM UNCITRAL*

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The United Nations Commission on International Trade Law (UNCITRAL, or “the Commission”) is the core body in the United Nations system for the modernization and harmonization of international trade law.¹ For more than forty years UNCITRAL has been active as a law-making body, preparing texts covering most of the areas relevant to international trade.

UNCITRAL was established on the basis of the consideration that the existence of multiple laws poses an obstacle to legal predictability in international trade, as commercial operators need to take into account several different provisions in the various jurisdictions, with inevitable increase in transaction costs. Those transaction costs have a negative impact on foreign investment and cross-border trade, which are activities traditionally seen as vastly beneficial for economic development.

In order to overcome those obstacles, the United Nations General Assembly tasked UNCITRAL with the mandate of preparing uniform texts, i.e. texts drafted with universal participation so as to take into account all economic and legal needs, and therefore fit for adoption in every jurisdiction. The widespread adoption of uniform law, it was

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assumed, would reduce, if not eliminate, transaction costs deriving from the need to learn about foreign laws, thus facilitating international trade.

However, it became soon apparent that the preparation and adoption of uniform laws would not suffice, and that the uniform interpretation and application of those laws would also be necessary in order to establish a truly uniform legal framework supportive of international trade. The goal of the uniform interpretation and application of uniform trade law texts has been pursued in different manners, including with a particularly careful choice of terminology in uniform texts, with the insertion in those texts of provisions mandating their uniform interpretation in light of their supra-national origin, and the creation of a multilingual case law database, the Case Law on UNCITRAL Texts (CLOUT), managed by the UNCITRAL secretariat.

In more than 40 years of work, UNCITRAL has produced several texts, touching upon almost all stages of the cross-border supply chain, as well as some aspects of international investment law. However, not all UNCITRAL legal texts have been equally successful in terms of adoption and actual use. Moreover, the perspective of UNCITRAL on the types of instruments more useful for pursuing its mandate has changed over the years, as the focus shifted from treaties to softer legal instruments such as model laws and legislative guides. Contractual texts are also featured among the results of the work of UNCITRAL. In any case, all texts produced by UNCITRAL have an enabling nature, while regulatory issues in the trade law field fall under the scope of other bodies such as the World Trade Organization and regional economic integration organizations.

The trend towards expanding the types of uniform texts available may be better appreciated in light of the method of work of UNCITRAL, based on consensus and inclusion. When a topic is chosen by the Commission as deserving work at the Working Group level, the type of text to be expected as a result of that work is often yet undetermined as the level of consensus of the delegations on substantive provisions may not be easily predicted. Thus, if delegations

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4. Delegations may represent States members of the Commission, observerStates and other observers such as inter-governmental and non-governmental organizations.
find consensus on core substantive issues, the outcome of their work may be a treaty; otherwise, the result may consist of a model law or of a legislative guide. Increasingly, and importantly, the various texts prepared over the years harmoniously complement each other, thus providing complete guidance in their field: for instance, the UNCITRAL Model Law on International Commercial Arbitration is conceived as a complement of and support to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the “New York Convention”). That Model Law is, in turn, complemented by the UNCITRAL Arbitration Rules.

**The Role of International Trade Law in East Asia**

In spite of global financial crisis, East Asian economies are performing successfully not only as producers of goods and services but also as innovators. East Asia is currently at the forefront of the implementation of cross-border supply chains, structured and constantly fine-tuned to maximize the benefits of a presence in each country. The efficient management of those supply chains is a priority, and diversity of applicable laws may create uncertainty in the applicable legal framework, thus increasing transaction costs. The fact that the commercial legislation of East Asian countries is not inspired by a common legal tradition, but is rather eclectic, having been influenced by European sources (of common law and of civil law, and, in the civil law, by models as vastly different as the French and the German ones), by US common law, by local sources and, in some cases, by Islamic law further increases the challenges in ascertaining the content of the applicable law from afar.

At the same time, East Asia has not chosen to pursue close regional economic integration, along the lines, for instance, of the European Union. Rather, it seems inspired by a looser harmonization model, possibly similar to that of North and Central America, where free trade agreements are complemented by an enabling legal environment built on the voluntary adoption of global uniform texts by the concerned States. In other words, those States do not transfer

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7. UNCITRAL Arbitration Rules (as revised in 2010), New York, 2011. The UNCITRAL Arbitration Rules had first been adopted in 1976.
law-making competence in the field of international trade law to a formally established regional economic integration organization, as is the case of the European Union. Recent steps of East Asian States towards the formal adoption of uniform texts, sometimes after the use of diagnostics on the status of the legal environment, such as indicators, checklists and similar tools, provide evidence of their interest for this approach.

The involvement of the region in uniform law is not, however, limited to cross-border issues. Indeed, uniform texts may inspire law reform at the national level as well. This was the case, for instance, of the major civil and commercial law reform exercise undertaken by the People’s Republic of China in the context of its “Open up and reform” policy.9

A third aspect of the interest of East Asian States towards international trade law pertains to official development assistance. East Asian countries often consider cross-border economic relations as a part, though an informal one, of their international aid strategies. The role of the People’s Republic of China in promoting its engagement in Africa is a good example of that approach.10 However, Asian States are also very mindful of the principle of non-interference in internal affairs and may be hesitant in sponsoring the adoption of a treaty or of a model law, even when of uniform origin.11 This approach should be reconsidered since it does not take fully into account the fact that, in international trade law, the adoption of uniform texts is the most efficient solution to address the limited legal predictability of foreign texts. Failure to make this argument does not help the cause of trade law harmonization.

8. Thus, the States members to the North American Free Trade Agreement (NAFTA) and to the Dominican Republic - Central America Free Trade Agreement (CAFTA-DR) have de facto adopted certain UNCITRAL texts, such as the New York Convention or the CISG, as their common law for international trade.


THE ACTORS IN INTERNATIONAL TRADE LAW REFORM IN EAST ASIA

A number of organizations are currently active in the field of international trade law reform in East Asia. Some of them pursue law reform as a component of economic integration. Those organizations include the Asia-Pacific Economic Cooperation (APEC) and the Association of Southeast Asian Nations (ASEAN). Others, such as the Asian Development Bank, also promote law reform to achieve economic and social development, but with focus on the national level. Technical assistance may also be delivered by global bodies such as the World Bank or UNCTAD, or by dedicated national agencies such as AusAID or USAID. Finally, several countries have sufficient capacity to carry out legislative efforts autonomously. Therefore, a number of entities are involved in trade law reform, and they do not always operate in a coordinated manner.

In this context, the establishment of the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) is noteworthy. The RCAP, funded for an initial period of five years thanks to the generous support of the city of Incheon, where it is located, and of the Ministry of Justice of the Republic of Korea, officially started its operations on 10 January 2012. It is not surprising that the first regional office of UNCITRAL has been established in East Asia, given the importance of economic matters for that region. The Republic of Korea itself is a remarkable example of ability to move from the condition of a country ravaged by war and recipient of aid to that of economic and technological leader and major international donor. With similar motivations, a proposal for closer partnership with UNCITRAL has been put forward by Singapore, another prominent example of rising Asian economy based on international trade.

The main objectives of the RCAP are to (a) enhance international trade and development in the Asia-Pacific region by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL; (b) provide bilateral and multilateral technical assistance to States with respect to the adoption and uniform interpretation of UNCITRAL texts through workshops and seminars; (c) engage in coordination activities with international and regional organizations active in trade law reform projects in the region; and (d) function as a channel of communication between States in the region and UNCITRAL.
In its first months of operation, the RCAP has already organized or contributed to a number of events in the region. It is also closely monitoring legislative developments and contributing to those processes as appropriate.

**The Status of the Adoption of UNCITRAL Texts in East Asia**

As mentioned above, UNCITRAL has produced texts covering several areas of international trade law, but their success in terms of adoption and actual use has been uneven.

In certain areas, such as arbitration, UNCITRAL texts are definitely the global benchmark. In this field, UNCITRAL benefitted from the conclusion – predating its establishment and actually preconizing it – of the New York Convention, which, at 148 State parties, is by far the most adopted uniform trade law treaty in the world and the one nearest to universal adoption. In fact, when a State decides to open its economy to global trade, the early adoption of the New York Convention is soon identified as a condition for attracting foreign business. Building on that solid block, UNCITRAL prepared very successful texts such as the UNCITRAL Model Law on International Commercial Arbitration, enacted in more than sixty jurisdictions, and the UNCITRAL Arbitration Rules, commonly used not only in ad hoc arbitration but also as a source of inspiration for rules of arbitral institutions. Both texts have been revised and augmented in recent times.

Another area where UNCITRAL can claim success is that of international sale of goods. In this field, UNCITRAL could benefit from the extensive preparatory work done for the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964 (ULF)\(^\text{12}\) and for the Convention relating to a Uniform Law on the International Sale of Goods, 1964 (ULIS).\(^\text{13}\) When the drafting process of those treaties was perceived as not having been sufficiently inclusive, and therefore the compatibility of the resulting texts with all legal traditions was challenged, UNCITRAL, with its universal composition, seemed to be the obvious place for preparing a truly global instrument. The main outcome of that effort was the adoption of the United Nations Convention on Contracts for the International Sale of Goods, 1980

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(“CISG”), currently having 78 States parties representing at least two-thirds of global trade.

The success of the CISG goes beyond its acceptance by States, as the CISG offered, directly or indirectly, major inspiration for all subsequent attempts of restating and modernizing the law for sale of goods both at the international and at the national level. Thus, it seems appropriate to stress the importance of that text as a legislative model. For that reason, it is imperative that new initiatives in the field, especially those aiming at regional legal integration, take fully into account the CISG, promote its further adoption and ensure seamless interaction between global, regional and national legislation on sale of goods. Significant discussion on this point has recently taken place with regard to the recent proposal for a Common European Sales Law.14

The CISG is complemented, and was actually preceded, by the Convention on the Limitation Period in Contracts for the International Sale of Goods (the “Limitation Convention”).15 The Limitation Convention having currently 29 States parties is not as successful as the CISG in terms of treaty participation. However, the reasons seem to be unrelated to the content of the Limitation Convention, but rather point at external factors such as the complexity of the matter vis-à-vis its low visibility on the legislative agenda, as well as potential public policy implications. The Limitation Convention maintains a regional importance, for instance in Central and Eastern Europe and in North and Central America, and continues to attract new States at a regular, albeit slow, pace.

A third area where UNCITRAL can claim success is that of electronic commerce. UNCITRAL engaged itself in that field already in the 1980s, dealing with aspects then prevalent such as electronic payments and electronic data interchange. In particular, the UNCITRAL Model Law on Electronic Commerce, 1996,16 has become a global legal standard, having been adopted in more than 50 jurisdictions from all regions of the world. The technology-neutral

nature of the provisions of that Model Law has greatly contributed to that success. Moreover, the UNCITRAL Model Law on Electronic Commerce introduced the principle of non-discrimination of electronic means, and criteria for the functional equivalence between paper-based documents and electronic records, which proved to be particularly useful to establish legal certainty in electronic transactions. Subsequent texts, namely the Model Law on Electronic Signature, 2001, and the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (the “Electronic Communications Convention”), have attracted significant attention but need further support to be considered widely accepted global standards with respect not only to legal theory but also to business practice.

Those three areas probably represent the fields where UNCITRAL texts have been most successful so far. It is therefore not surprising that those areas have also been the focus of the work of the RCAP.

In the field of arbitration, the New York Convention has been adopted by the vast majority of States in East Asia. As mentioned, when a country wants to open up to international trade, the adoption of the New York Convention is seen as a necessary step to confirm its commitment to trade law reform. This has been, most recently, the case for Myanmar, whose accession to the New York Convention has been strongly advocated and is considered forthcoming. Moreover, several East Asian jurisdictions have adopted the UNCITRAL Model Arbitration Law. Those countries aiming at hosting arbitral centers and proceedings have also been quick in enacting the amendments to that Model Law introduced in 2006 so as to offer the most efficient legal environment for carrying out those proceedings. A similar trend has been witnessed with the revision of the arbitration rules adopted by the various arbitral centers following the revision of the UNCITRAL Arbitration Rules in 2010.

In the field of international sale of goods, the CISG had been

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20. Enacting jurisdictions include Brunei, Cambodia, Japan, Malaysia, the Philippines, the Republic of Korea and Thailand.
21. These include Hong Kong SAR and Singapore.
22. See, for instance, the comments made with respect to Hong Kong (and Viet Nam) by James Kwan and Haig Oghigian, Out with the Old, In with the New, The Asia-Pacific Arbitration Review, 2012, 14-21.
adopted for some time in a limited number of East Asian States, namely, the People's Republic of China, where it was used as a prevailing model also for national legislation, and Singapore. A few years ago, Japan and the Republic of Korea also became parties to the CISG. Those more recent accessions have opened the door to renewed interest towards the adoption of the CISG, in particular, in South-East Asia. Indeed, the CISG could complement well regional and sub-regional trade agreements such as the ASEAN Trade in Goods Act (ATIGA). In fact, the CISG could provide uniform legislation to those commercial exchanges enabled by ATIGA: the two treaties are complementary, as they deal, respectively, with private law and public law aspects of trade. It is therefore not surprising that significant South East Asian trading States, such as Thailand and Viet Nam, have made significant progress in considering the adoption of the CISG.

Finally, the common use of modern technologies in the region explains the great interest towards the law of electronic communications. Most countries in East Asia report implementing the UNCITRAL Model Law on Electronic Commerce, although, in practice, the level of conformity of those provisions with their uniform source may vary significantly. Moreover, judicial interpretation of those provisions may also diverge. It is therefore not surprising that States committed to fully enabling the pervasive use of electronic communications in commercial transactions are supporting the wider adoption of the Electronic Communications Convention. This will allow them, on the one hand, to share a common legislative core, and, on the other hand, to remove obstacles to the operation of older treaties containing formal requirements in conjunction with the use of electronic means. Those States include Singapore, a party to the Electronic Communications Convention, China, the Philippines and


the Republic of Korea, which are signatories to the Convention, Thailand, which has announced its intention to accede to the Convention, and Viet Nam, which has already enacted some provisions of the Convention domestically.

**TRADE LAW REFORM IN CONTEXT: POLICY CONSIDERATIONS**

Currently, developed States are more engaged than developing States in the formulation and adoption of uniform trade law texts. Thus, while the adoption and application of modern trade law texts based on uniform models are a condition necessary, though not sufficient, for promoting international trade and investment, those States more in need of trade law reform do not have the capacity to engage in trade law reform effectively. Trade law reform is usually not prominent on the agenda of international donors. Aid recipients, in turn, may not yet be fully aware of the benefits associated with trade law reform or may have vested interests in preserving the existing system. As a result, the rate of adoption of uniform trade law texts in developing countries is insufficient and, when those texts are adopted, the capacity to support their effective application is limited. Enterprises from developing countries, especially small- and medium-sized ones, are unlikely to have access to qualified commercial law advice, and find themselves in a weaker position when contracting with partners in developed countries. This opens the door to the use of the law of the stronger commercial party, or of a third country. Again, foreign law is likely to be more difficult to access for a party located in a developing State than for a party located in a developed one. As a result, contractual management may not be performed properly, dispute resolution becomes more costly and less effective, and the arguments of the party less familiar with the applicable law are less likely to be heard. This insufficient legal framework ultimately prevents the creation of wealth through private sector development exactly where it would be needed most.

A number of other negative effects arising from the limited participation of developing countries in uniform trade law texts relate to the legislative-drafting process itself. Indeed, regular attendance at sessions of international law-making bodies such as UNCITRAL helps create national expertise and increase familiarity with current trends. That expertise is particularly useful when preparing national legislation. Countries not represented at international meetings may be prevented
from developing the knowledge necessary to take advantage from such benefits.

Finally, at the implementation stage, the guidance available from case law implementing uniform provisions, albeit in other jurisdictions, and from academic writings on those provisions, may prove to be invaluable in countries where legal capacity is limited. However, that guidance is useful only insofar as uniform texts have been enacted.

Despite its evident benefits, trade law reform remains marginalized in the global law reform agenda. This approach seems not to give full weight to a number of significant considerations.

International trade and investment are commonly recognized as engines of economic growth. Therefore, they may play a major role in fighting poverty, given that economic conditions are directly related to social development and, in turn, social development may significantly help in deterring internal and international conflicts. Therefore, trade law reform directly contributes to the broader United Nations agenda fostering global peace and stability. The United Nations, at its highest levels, acknowledges this nexus.27

At the same time, it is necessary to fully take into consideration trade law reform in the discussion on the rule of law given the major potential impact of trade law reform on the quality and efficiency of a legal system.28 In fact, trade law reform could play a central role in both pursuing economic development and strengthening the rule of law. However, the current contribution of international trade law to the global development and governance agenda is far from its potential. It is up to the stakeholders, and firstly to States, to include a trade law reform component in broader law reform projects: this is a responsibility shared between donors and partners. It is encouraging to see that certain East Asian States are beginning to tread this path.

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27. See, lately, United Nations Sixth Committee, Draft resolution, Report of the United Nations Commission on International Trade Law on the work of its forty-fifth session, UN Doc. A/C.6/67/L.8 (25 October 2012): “The General Assembly […] 16. Endorses the conviction of the Commission that the implementation and effective use of modern private law standards on international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger and that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General; […]”.

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THE CONTRIBUTION OF UNIFORM TRADE LAW TO ECONOMIC DEVELOPMENT AND REGIONAL INTEGRATION IN EAST ASIA AND THE PACIFIC: A VIEW FROM UNCITRAL

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The economies of East Asian and Pacific States are increasingly integrated. In particular, complex supply chains are linking them. The legal framework of those supply chains, however, changes with the legal system of each country. This has a negative impact on transaction costs, and therefore on the economic efficiency of those supply chains.

The adoption of uniform legislation based on UNCITRAL texts would foster cross-border trade and investment by decreasing those transaction costs. Progress towards that goal is already being made, especially in the field of arbitration, electronic commerce and sale of goods.

In order to further promote the adoption of uniform texts in the region, as well as their effective uniform application, it is advisable to include trade law reform in broader projects aimed at strengthening the rule of law. This would allow not only to improve the legal environment for international trade, but also to stimulate economic development, with positive effects on social stability and, ultimately, a significant contribution to the fight against war and poverty.

Key words: International trade law, legal harmonization, arbitration, sale of goods, electronic commerce, regional economic integration, technical assistance to law reform, rule of law
[국문 요약]

경제발전과 동아시아 태평양의 지역통합을 위한 통일 무역법제의 기여
- UN국제상거래위원회의 입장에서 -

Luca G. Castellani

동아시아 태평양 국가들의 경제는 갈수록 통합되었다. 특히 복합적 공급망들(complex supply chains)이 그것을 연결하고 있다. 그러나 그들 공급망의 법적 기초는 각국의 법체계에 따라 변화한다. 이것은 거래비용에 부정적인 영향을 끼치고 결국 그러한 공급망의 경제적 효율에도 영향을 미치게 된다.

UN국제상거래위원회의 법규(UNCITRAL texts)에 기초한 통일법제의 채택은 그 거래비용을 감소시킴으로써 대외무역과 투자를 조성한다. 그러한 목적으로 위한 과정은 특히 중재, 전자상거래, 그리고 상품판매 등의 분야에서 이미 진행되고 있다.

더 나아가 지역에서 통일법제의 채택을 고무하고 또 효과적으로 통일된 적용을 하기 위해서, 광범위한 프로젝트에 있어서 법의 지배를 강화하기 위한 무역법제 개혁을 포함하는 것이 바람직할 것이다. 이것은 국제무역에 있어서 법적 환경을 개선할 뿐만 아니라, 사회 안정과 균형적으로 전쟁과 빈곤과의 싸움에 크게 기여하는 등 궁정적인 효과를 가지고 경제발전을 촉진시킬 수 있다.

주제어: 국제무역법, 법적조화, 중재, 상품판매, 전자상거래, 지역경제통합, 법제개혁에의 기술지원, 법의 지배