June 15, 1984

WHY CONGRESS SHOULD BE WARY OF THE U.N. CONVENTION ON THE INTERNATIONAL SALE OF GOODS

INTRODUCTION

Next week the Senate Foreign Relations Committee will consider whether to refer the United Nations Convention on Contracts for the International Sale of Goods (CISG) to the Senate for ratification. The convention was produced by an international conference convened in Vienna in 1980, and was based almost completely on a draft provided by the U.N. Commission on International Trade Law (UNCITRAL). A non-permanent U.N. body, UNCITRAL was established by the U.N. General Assembly in 1966 to promote the "progressive harmonization and unification of the law of international trade."

The Convention's purpose is to simplify contracts for the international sale of goods by subjecting them to a single, uniform law, and to eliminate wrangles over which particular national law should apply to an international contract. The Convention has a history dating back to the 1930s. Its immediate predecessors, the 1964 Hague Conventions governing the international sale of goods, were not signed by the United States and were subject to considerable American criticism. Fifteen years ago, UNCITRAL formed a "Working Group" to study and revise these conventions, which resulted in the current U.N. Convention in 1980. While the negotiations leading to the Vienna diplomatic conference and the conference itself, which produced the Convention, all occurred before the Reagan Administration took office, the promise offered by the CISG of clarity and uniformity in the law of international business transactions has won the support of the White House, State Department, many prominent legal practitioners and scholars, and several major corporations.

There are serious problems with CISG, however, which the Senate should consider before voting on it. The harmonization of

world commercial law is a highly desirable process.[1] But adoption of the Convention's rigid and conceptual approach to codification of international contract rules will not achieve this. While most buyers and sellers in domestic markets today engage in trade with international aspects, the Convention's approach of creating separate legal rules for domestic and international transactions will complicate the lives of businessmen rather than make them more simple or harmonious. From the perspective of small buyers and sellers who are unlikely to have specialized legal counsel, the CISG will complicate matters by presenting them with two basic sets of legal rules where now only one applies.[2]

Another problem with CISG is that it is a consensus document produced by representatives of widely disparate legal, economic and social systems. As such, real problems had to be buried or "fudged" in verbal formulations which are claimed to be "compromises," but in reality perpetuate their essential disagreement.[3] This means that problems of interpretation abound, and courts sitting in the myriad jurisdictions of the world cannot be expected to achieve uniform interpretation of Convention provisions. Even within a single jurisdiction, significant time will elapse before case law--in those countries where case law has any interpretative value--provides a full judicial interpretation of the Convention.

Of further significant concern is the propriety of preempting through U.N. treaty the role of states in regulating international contracts. This is, in effect, what Senate ratification of the CISG would achieve.

The U.S. Senate should not ratify this Convention until all the many significant concerns of the Treaty's critics have been adequately answered.

SEVEN MAJOR CONCERNS WITH CISG

Among the specific concerns raised by international legal experts are:

1) CISG is the first use of the treaty power under the U.S. Constitution to reform U.S. private law. The Senate should consider whether domestic private law reform--in contrast to

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1 Statement by Professor Arthur Rosett, University of California at Los Angeles, Regarding Ratification of the United Nations Convention on Contracts for the International Sale of Goods, Submitted to the United States Senate Committee on Foreign Relations, for hearings on April 4, 1984, p. 1.

2 Ibid.

3 Ibid., p. 2.

public law reform--should be accomplished by the use of a treaty, or, as a political matter, be done only by both houses of Congress. Ratification of this Treaty will allow it to preempt all federal and state law, in particular the Uniform Commercial Code (UCC). The Code is a model law governing, among other matters, the sale of goods between contracting parties. It was adopted by 49 U.S. states, with certain statutory variations, by 1967. Since Article VI of the Constitution provides that treaties are part of the supreme federal law of the U.S., CISG, if ratified, would preempt state contract law and replace the Uniform Commercial Code in governing international sales contracts to which U.S. law applies. There are several areas in which the CISG diverges significantly from the Uniform Commercial Code, particularly in the areas of breach of contract, damages, warranties, material differences of contractual conditions, "good faith," and "excuse/force majeure."[4]

2) Under Article 1 of the CISG, the Convention would be applicable to a sales contract concluded and wholly performed within the United States. The only qualification is that the parties must have places of business in different nations; it is not even required that they be their principal places of business. It seems strange to make a sale of goods that is entirely negotiated and performed in the U.S., with delivery and payment in the U.S., subject to a law other than the law of a state of the United States--simply because the buyer has a place of business--which could be his principal place of business--in Buenos Aires or Paris. It seems even more strange if, as is sometimes the case, the goods remain, and are intended to remain, in the United States.[5]

3) The proposed rules of the U.N. Convention will govern private rights and obligations of U.S. exporters and importers contracting with parties in any country which has also ratified the Convention. Provision is made for the parties to "opt out" of the Convention's legal rules, but only if both parties agree. Since 90 percent of U.S. foreign trade transactions are in the form of non-negotiated contracts, they will be brought under the umbrella of the U.N. Convention. The opportunity to "opt out" will be the exception rather than the rule.

4) The U.N. Convention is designed to harmonize--but not make uniform--some of the rules of sales law in international trade. CISG would fail to do this for two main reasons: first, the

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[4] Responses of Frank A. Orban, III, Esq., International Counsel, Armstrong World Industries, Inc., to Questions on the U.N. Convention on Contracts for the International Sale of Goods, Submitted by the Senate Foreign Relations Committee, May 1984.

[5] Statement of Dr. Harold J. Berman, James Barr Ames Professor of Law, Harvard University, in a memorandum to the United States Senate Committee on Foreign Relations, on Ratification of the United Nations Convention on Contracts for the International Sale of Goods, April 10, 1984.

Convention itself expressly excludes from its coverage various types of international sales contracts and various types of questions that may arise in almost any type of international sales contract; and second, most matters are dealt with in the Convention in very broad terms--as, indeed, they must be, given the nature of the document. Therefore, the courts and arbitration tribunals will not escape the necessity of looking to the "rules of private international law" in order to fill the gaps and resolve the inevitable ambiguities.[6] It seems strange, in a Convention intended to reduce the importance of private international law in the settlement of disputes arising from international sales contracts, that the very applicability of the Convention would require determination of the applicable law. This raises the question of how much the U.S. actually gains by signing the Convention.

5) American private sector participation in the development of the U.N. Convention has been extremely limited. Neither the U.S. Chamber of Commerce, the National Association of Manufacturers nor any other major domestic business organization participated. The directors of the American Corporate Counsel Association (ACC), which has not endorsed the Convention, have voiced concern that the existence of the U.N. Treaty and its effect on international sales is not yet widely known throughout the business community or by corporate counsels representing medium and small companies. One of the current advantages enjoyed by those who wish to rush the Treaty through Senate ratification is that so few businesses or international corporate counsels have familiarized themselves with the provisions of the Convention.

6) Very few of the U.N. officials involved in drafting and editing the Treaty had background in international trade law per se. Almost none had any concept of the impact that such a Convention might have on the international business community. U.S. negotiators at the U.N. Law of the Sea Conference, and in discussions regarding a Code of Conduct for Transnational Corporations, have found that this lack of expertise is not unusual in such U.N.-sponsored negotiations. The U.S. Senate, however, cannot afford to ratify this Convention without taking a much more careful look at its potential impact on international transactions.

7) No mechanisms exist for the fine-tuning or alteration of the Convention. The rules of law contained in the CISG cannot be altered by any sovereign state or even a group of states which is presumably less than the entire body of voting members of the U.N. Commission on International Trade Law (UNCITRAL). The monumental political process involved in changing the Convention's text virtually assures that changes would take many years or even decades and would probably require that the industrialized

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6 Ibid.

countries ask significant concessions from the radicalized Group of 77 of the less-developed countries and from the Communist bloc, who undoubtedly would expect a significant quid pro quo. Any changes would then require another round of ratifications by the various UNCITRAL member-states, which by itself could take many years, even if the UNCITRAL members were to agree to them.[7]

CISG AS A MODEL FOR OTHER U.N. TREATIES

High level United Nations officials in UNCITRAL have virtually admitted that the CISG is a "model case" for a wide range of other treaties which are currently under consideration within UNCITRAL. The U.N. Commission is preparing, for example, a draft treaty on the use of international checks for business transactions. The current draft makes no mention of the widely employed practice of electronic fund transfers, since, when negotiations began, such transfers were only rarely used. While many of these proposed U.N. treaties may deserve U.S. support, others may preempt U.S. law in a way that is not helpful either to the U.S. or its major trading partners. The Senate should instruct the Department of State to inquire what, if any, future treaties the United States may expect from UNCITRAL and similar international bodies that would have similar preemptive effect as the CISG, and would rely on the CISG as a precedent.

CONCLUSION

Most countries are waiting to see what the United States will do before taking action themselves on this convention. Yet already there have been dissenting voices raised by America's allies on the CISG. The West German Federation of Industry and other European industrial groups, for example, are opposed to the Convention. The British Law Society (i.e., Bar Association) has recommended that the British government not ratify the Convention. The position indicated by the Canadian government in 1983, with the support of Canada's legal profession and business community, is that Ottawa will seek to exempt application of the Convention to transactions between the U.S. and Canada, due to the large volume of day-to-day cross-border trade, and to the similarity and satisfactory nature of current U.S. and Canadian sales law, making a third body of law unnecessary.

While the goals and objectives of the U.N. Convention are desirable and worthwhile, and while eventual ratification of this

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[7] For further critique of the CISG, see Harvey Marshall Sonenshine, "Unification and Certainty: the U.N. Convention on Contracts for the International Sale of Goods," Harvard Law Review, Volume 97, Issue 8, June 1984.

Treaty may be a suitable objective of the Senate, those responsible for ratification should first consider whether such a Convention might best be preceded by domestic legislation through which the United States can maintain fundamental control over this critical area of international law. Legislation enacted by both Houses of Congress would still have the "preemptive" effect of the Treaty, but would also importantly provide the U.S. with the ability to amend the legislation, should later changes in the law become necessary.

The Senate should proceed with extreme caution in the ratification process for the U.N. Convention on Contracts for the International Sale of Goods, and should not ratify this Convention until the significant questions that were raised during the Senate hearings on the CISG have been adequately answered.

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APPENDIX

Adverse Practical Implications of the U.N. Convention on Contracts for the International Sale of Goods

An Example

Universal Pipe Inc., a smaller Kansas manufacturer of pipe insulation, attends an international trade fair in New York, where its representative meets Eurobuilders, Ltd., a builder of industrial facilities from Germany (which along with the U.S. has ratified the U.N. Convention on Contracts for the International Sale of Goods--CISG). Euro is interested in Universal's insulation for use in a refinery in Germany, which fact Euro explains to Universal.

A month later, Euro sends Universal a $10,000 purchase order with no fine print on it. The order simply requests Universal's standard product to be bought on an F.O.B. Kansas City plan basis. Universal accepts Euro's order by sending Universal's standard Order Acknowledgement Form, which clearly and conspicuously states on the front that "All warranties, express and implied, of fitness for a particular purpose and merchantability are excluded" (see Uniform Commercial Code Article 2-316). Universal's Acknowledgement Form also states that the sale is governed by the laws of Kansas. Euro makes no further reply; and the goods are shipped one month later.

Under the laws of Germany and Kansas, the contract was formed when Universal accepted Euro's order with the Acknowledgement Form. The law that both Germany and the U.S. would consider applicable to the contract would be the law of Kansas. Euro uses the insulation in the refinery, but later discovers that the insulation corrodes the metal of the refinery piping, which piping is governmentally mandated and customarily used in all such facilities in Europe. A million dollar loss is incurred by Euro.

Euro sues Universal in Kansas City on the grounds that the goods were not fit for the particular purposes (known to Universal) and were not merchantable. Universal has sold its product in the U.S. and Canada and has never had a similar problem, but the type of piping used in North America contains different critical alloys.

Under American law (e.g., the Uniform Commercial Code of Kansas), which Universal knew well, Universal defends itself by saying that it, in full conformity with UCC 2-316, excluded any implied or express warranty of fitness for a particular purpose and merchantability. Such a defense being fully applicable to such a situation had it occurred in the U.S., Euro informs Universal that the sale is not governed by the Kansas Uniform Commercial Code, but by the U.N. Convention on Contracts for the

International Sale of Goods, in particular Articles 19, 35, 36 and 74, among others. CISG has no counterpart to UCC 2-316: Furthermore, CISG Article 19 states that if an acceptance of an offer contains different or new material terms to those in the offer, such terms do not become part of the contract. Article 19(3) specifically states that terms altering the extent of one party's liability to the other are "material." Therefore, the exclusion of the implied warranty liability that Universal thought they had achieved does not exist; and Universal is liable to Euro for massive damages far exceeding the cost of goods and probably not covered by insurance, since standard commercial insurance does not usually cover breach of contract damages (as opposed to product liability or tort damages--here the produce was not "defective," but merely "unsuitable").

This is only one example of the type of very common but disastrous pitfalls that can face a U.S. businessman unfamiliar with CISG's implications.