

CHAPTER 1

FOREWORD

IMPROVING CROSS-BORDER TRADE AND INVESTMENT: MODELS OF COOPERATION AMONG STAKEHOLDERS IN THEORY AND PRACTICE

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It gives me great pleasure to write the foreword of this book which collects remarkable academic contributions, following the successful hosting of the 2014 UNCITRAL Asia Pacific Fall Conference, in Macau, which took place during my chairmanship of the forty-seventh session of UNCITRAL.

Fifteen years ago in 2000, the Millennium Declaration brought the world together in unprecedented optimism. Following the Millennium Summit, eight international developments goals, known as the Millennium Development Goals (MDGs), were established with the target of year 2015. Fifteen years have passed and the international community has engaged in numerous consultations as it is no better time to rethink the goals, to redouble the efforts and to renew the commitment set forth in the MDGs. Yes, we have witnessed major advancements and improvements, but challenges we face remain overwhelming: over a billion people still live in absolute poverty in many countries, millions of children are undernourished or unable to attend school and 780 million people still have no access to clean water.

The General Assembly has been devoting a considerable amount of time and effort on the post-2015 development agenda and will soon formulate a set of sustainable development goals. I was, as the chairperson of the forty-seventh session

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of UNCITRAL, consistently and actively participating in those discussions. One thing I can share is that the promotion of sustained and inclusive economic growth for current and future generations is one of the overarching objectives of this transformative agenda.

It is without doubt that trade and investment play a pivotal role in promoting sustained and inclusive economic growth. To do this, a robust legislative framework for fostering cross-border trade and investment must exist. This is where UNCITRAL comes into the picture. By formulating a fair, stable and predictable legal framework for cross-border commercial transactions and assisting States with the implementation, UNCITRAL provides the necessary platform for States to achieve, among others, economic diversification, financial inclusion and resilience of societies to economic crisis.

Moreover, the world has become so globalised that no country or business stands on its own. Business practices affect the entire globe. An outdated commercial law framework is a major impediment to integration into global economy. In turn, it makes it difficult for countries to efficiently mobilise their resources for sustainable development, whether they be from tax revenues, private investment or development assistance. This exemplifies that international trade, business or commercial law, whatever it is called, is an essential and powerful tool in addressing one of the key sustainable development goals.

Yet, this obvious fact is often neglected. And, therefore, the key message that I constantly stressed as the chairperson of UNCITRAL was that its mandate "to further the progressive harmonization and modernization of international trade law" is highly relevant to the post-2015 sustainable development agenda and that UNCITRAL's work deserves to be considered seriously not only by the States but also other entities within and outside the UN system when promoting the rule of law in commercial relations.

Commercial law is a powerful player in addressing sustainable development challenges. However, it is often neglected at the local and international levels. As a result, States' capacity to continuously engage in commercial law reforms based on international standards slowly deteriorates.

Thus, countries need to continuously monitor commercial activities and the legal framework regulating them so as to assess their economic and social impact and react appropriately. As a result, this necessitates capacity building of States.

I UNCITRAL AND ITS MANDATE

The United Nations Commission on International Trade Law (UNCITRAL) was established in 1966 with a mandate to further the progressive harmonization and

modernization of the law of international trade. It is the core legal body in the UN system in the field of international trade law. UNCITRAL's aim is to remove and reduce legal obstacles to the flow of international trade. By harmonizing and modernizing international trade law, UNCITRAL facilitates diverse types of transactions and reduces associated costs.

Let me give an example of how an UNCITRAL text facilitates trade. Imagine a buyer and a seller located in two different countries. In most cases, the parties would not be familiar with the contract law of the State that the other party is located in. This leads to uncertainties, which in business terms translate to higher risk and additional costs. One concern the parties might have is what would happen if there is a breach of the contract? In such a case, which law would apply? The law of the State in which the buyer is located? The law of State in which the seller is located?

If each party insists on its own State's law, the other party would be reluctant to agree. This could lead to longer negotiations, which again results in increased costs. When there is no agreement on the applicable law, it leads to heightened legal uncertainties and higher cost for dispute resolution. Therefore, it would make sense to have a uniform legal regime for international sale of goods.

The 1980 United Nations Convention on Contracts for the International Sale of Goods, the "CISG", does exactly that. It provides a modern, uniform and fair regime for international contracts. It applies when a contract for sale of goods is concluded between parties with places of business in States that are parties to the Convention. In this way, CISG contributes to increasing legal certainty and decreasing transaction costs. This is of particular benefit to small and medium-sized enterprises, which often do not enjoy the same level of access to legal resources when negotiating a contract. For these reasons, CISG has been hugely successful, with 83 States parties as of last month. It is estimated that CISG covers approximately 70 to 75% of cross-border trade of goods in the world. States from every geographical region, every stage of economic development and every major legal, social and economic system are represented and they all benefit from the heightened legal certainty across the globe.

CISG is only one of the many legal instruments that UNCITRAL has developed since its establishment. UNCITRAL is also active in a diverse range of areas related to international trade, such as arbitration, procurement, insolvency law and secured transactions.

II UNCITRAL'S WORK AND ITS IMPACT ON BUSINESSES

Let me provide an outline of UNCITRAL's current work by illustrating how they relate to everyday business activities.

Let's say one decided to start his or her own business. When starting a company, there are certain rules and regulations to be followed. According to the World Bank Doing Business indicator on starting a business, it takes more than 100 days to start a business in certain countries, compared to only half a day in New Zealand. In Slovenia, there is almost no cost in registering a company, whereas in some countries it could cost more than 100% of the income per capita.

So how would one go about the business registration? Are the incorporation procedures the same for partnerships and sole proprietorships? In this aspect, UNCITRAL's work on MSMEs (micro, small and medium-sized enterprises) aims at reducing legal obstacles that MSMEs face throughout their lifecycle. This is particularly relevant in developing countries, where such enterprises play a key role in the economy.

Now, with the company all set to go, one might need to obtain financing from a bank to cover operation costs. SMEs usually don't have assets to provide as collateral, as banks tend to prefer immovable property. This means that SMEs need to pay a higher interest rate for their loan. But wouldn't it make more sense if the SMEs could provide their inventory, machinery or receivables as collateral? For a tech start-up, couldn't intellectual property, such as a patent, be used to obtain the loan? More questions arise. How does one create a security right? How does one inform third parties of its existence? These questions are being answered by Working Group VI, which has been working on the topic of secured transactions for some time.

So with the loan, the company is now up and running. If one wants to sell its products to foreign buyers, the CISG comes into play. If one is operating a website to sell its merchandise, UNCITRAL's texts on electronic commerce become relevant. For example, can a click in the "I agree" box on the website be considered an acceptance of the contract? Can a PDF-version of the contract be considered an "original"? Could the buyer make payment using an electronic cheque or promissory note? The last question that I posed is being handled by Working Group IV. For example, the Working Group is considering how to transpose the paper-based notion of "possession" into an electronic environment.

In some countries, the government sector is the largest buyer of goods. So one might need to consider how it can supply its products to government or other public entities. In order for this to happen, a sound, objective, fair and transparent procurement system has to be in place. UNCITRAL's efforts to develop the relevant legislative framework come into play.

And, of course, in the ordinary course of business, one would inevitably encounter some disputes. Would this require going to court every time there is such a dispute? According to the World Bank Doing Business report, it takes 150 days to enforce a contract in Singapore, which is the fastest in the world. Yet, in the South Asia region as a whole, the average is 1,075 days, approximately 3 years. In some cases, the cost of litigation is higher than the claim itself. Again, the work of UNCITRAL in arbitration facilitates the use of arbitration and other mechanisms in commercial disputes, leading to a more effective resolution of such disputes.

Dispute resolution can also take place online. Purchasing of items via Amazon.com or eBay does not necessarily have to take place in the formal arbitration setting. The rules which would govern ODR (online dispute resolution) procedures are being considered by UNCITRAL's Working Group III.

And finally, let's consider an admittedly unfortunate situation - when a business goes under. Can creditors of the insolvent company still get paid even if they are located in different jurisdictions? What if the assets of the company are located elsewhere? In the case of multinational enterprise groups, what happens if one of the subsidiaries becomes insolvent? In this aspect, UNCITRAL is actively engaged in developing international legal standards in the field of cross-border insolvency law.

It should be noted that the areas mentioned do not necessarily concern only the interest of businesses. UNCITRAL's work on secured transactions, for example, relates greatly to the interest of banks that provide such loans. Its work on public procurement affects how procuring entities go about their activities. UNCITRAL's work on ODR has an impact on ODR service providers.

III UNCITRAL'S WORKING METHOD AND DEVELOPMENT OF LEGAL STANDARDS

I have provided a very short outline of how UNCITRAL's work relates to our everyday life. I would like to now describe the models of cooperation among various stakeholders in UNCITRAL as it relates to the theme of the segment allocated to me, models of cooperation among stakeholders in theory and practice.

Over the last five decades, UNCITRAL and its Working Groups have developed highly effective working methods. These working methods, in and of themselves, represent models of cooperation between all relevant stakeholders, including not only governments but also intergovernmental and non-governmental organizations and members of the private sector. Let me elaborate.

Although UNCITRAL is an intergovernmental body, where government representatives from around the world gather to develop a legal framework, it is also closely engaged with the private sector. Since each Working Group discusses its respective subject matter in depth with the goal of developing a legal text that is both functional and inclusive, attention is paid to its compatibility and complementarity to actual business practices. Due to this special need, members of the private sector as well as other international and regional organizations with relevant expertise are invited as observers. Through this observer status, members of the private sector can participate and contribute to the same extent as delegates from member State governments. This kind of input is very much welcomed as the discussions are often very technical and highly specialised.

At the same time, UNCITRAL recognises that the interests of public and private sectors can differ at times. In UNCITRAL, as the only global and neutral international law-making body entrusted with legislating on commercial law matters, all relevant stakeholders can participate and contribute to the standard-making process. This maximises the transparency and inclusiveness of the process and ensures scrutiny of legislative proposals by representatives of various economic and social interests, different legal traditions and societies at different levels of development. The possible disconnect between the public and private sectors is therefore minimised and adopted texts ideally reflect the optimal balance between the competing interests. Together with consensus-oriented decision-making, UNCITRAL's working method ensures legislative due process that gives legitimacy to UNCITRAL standards as internationally accepted ones, rather than the product of any given system or country.

Let's take UNCITRAL's work on insolvency law as an example. UNCITRAL's work on cross-border insolvency began in 1993 in response to suggestions made by bankruptcy practitioners themselves, who were concerned with the problem of disharmonious and incompatible insolvency law practices across multiple legal traditions. As a result, in 1994, UNCITRAL and INSOL (International Association of Insolvency Practitioners) held a colloquium to assess the feasibility of work in this area, which eventually led to adoption of the UNCITRAL Model Law on Cross-Border Insolvency. UNCITRAL's work on insolvency law did not stop there. It continually sought to make it better by addressing changes in the actual business world. The World Bank, the IMF, the American Bar Association, INSOL International and the International Insolvency Institute are just a few partners that were involved in this process.

As highlighted above, this type of collaboration between the public and private sectors is desirable as it yields a more practical and updated legal instrument. In order to preserve the transparency and inclusiveness of the procedure and consequently the

legitimacy of the text, the balance between interests of the public and private sectors must be struck. As evident from its work in the area of the cross-border insolvency law, UNCITRAL strives to meet this requirement. In most areas of UNCITRAL's work, it is ideal to have the optimal balance between competing interests. But in certain fields, it is an absolute priority. Work in the areas of public procurement, MSMEs and transparency in investor-State disputes comes to my mind.

IV THE TRANSPARENCY CONVENTION

This year marks my 30 years as a career diplomat for Korea and during that period, I have been confronted with numerous situations where policy decisions had to be made. During such decision-making process, one of the most frustrating moments is when the legal advisor informs you that the policy cannot be implemented, not because it is in violation of the law or contrary to the obligations set out in treaties, but because there is no legal mechanism to implement such policy or it is simply too much of a hassle to design such a mechanism. It gets more frustrating when the legal office does not provide a sensible solution to the problem.

The Transparency Convention (United Nations Convention on Transparency in Treaty-based Investor-State Arbitration), which was approved by the Commission during my chairmanship, tells a different story, a more positive one. In 2013, UNCITRAL adopted the Rules on Transparency (UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration), which provide for transparency in investor-State arbitrations reflecting the increased public interest in such disputes. Nevertheless, the Rules have their limitation. They were to apply only to investment treaties concluded on or after 1 April 2014. Having decided that a level of transparency should be provided for all investment arbitrations, the obvious question that followed was "How can the provisions on transparency apply to investment treaties concluded before April 2014?" A poor legal advisor would have told us that it was simply not possible because States would have to amend each and every agreement they had entered into in the past to achieve this. UNCITRAL proved otherwise and found a sensible solution, using the often used cliché, by thinking outside the box.

Confronted with about 3,000 existing bilateral treaties, the Commission was able to prepare a convention which would provide an efficient and flexible mechanism for States that wished to make the Rules on Transparency applicable to their existing treaties. Till last year, the States had no means to achieve this. Now, they have the Transparency Convention, a powerful instrument to enhance transparency in investor-State dispute settlement.

V IMPLEMENTATION OF UNCITRAL TEXTS

Adoption by States of international legal standards developed by UNCITRAL enhances in the long run the stability of national legislation and builds confidence of the private sector, including foreign investors, in ease of doing business in that State. Moreover, the General Assembly reaffirmed that the progressive modernization and harmonization of international trade law would contribute significantly to universal economic cooperation among all States on a basis of equality, and respect for the rule of law, to the elimination of discrimination in international trade and, thereby, to peace, stability and the well-being of all peoples.

UNCITRAL's work does not end with the finalization and adoption of a text. UNCITRAL also engages in a range of efforts to promote its work. For example, just last week UNCITRAL collaborated with the New York State Bar Association to promote its work to attorneys from Europe and the United States.

These activities complement UNCITRAL's efforts in enhancing cross-border trade, investment and development. At the national level, UNCITRAL provides technical assistance to officials and legislators. Such activities occur on a regional level as well. For example, UNCITRAL regularly collaborates with regional organizations such as ESCAP (Economic and Social Commission for Asia and the Pacific) and APEC (Asia-Pacific Economic Cooperation) in various initiatives. These activities have been further strengthened by the establishment of the Regional Centre for Asia and the Pacific in the Republic of Korea. Of course, UNCITRAL's coordination activities employ a multilateral approach as well. This type of collaboration is efficient because it pools together relevant expertise and avoids different organizations engaging in duplicative efforts.

I hope that this brief overview provides an idea of UNCITRAL's mandate and its work in improving the legal framework in international trade. For over half a century, UNCITRAL has been fully committed to providing an enabling legal environment that promotes and fosters international trade. Not only has UNCITRAL been faithfully pursuing this mandate, it has consistently pushed its limits to do more.

Social and economic equity across the globe is without doubt one of the overarching objectives of the transformative agenda of the coming Sustainable Development Goals. And that is precisely how UNCITRAL can make a lasting and effective contribution. The role of international trade is a pivotal one in promoting sustained and inclusive economic growth around the world. UNCITRAL's work, in my opinion, directly comports with the objectives of the post-2015 development agenda. We have consistently reaffirmed our commitment to developing a fair and equitable legal framework across multiple areas of international trade law.

My efforts to stress the importance of UNCITRAL and its work have been reflected in the draft General Assembly Resolution endorsing the Addis Ababa Action Agenda of the Third International Conference on Financing For Development. Paragraph 89 of Addis Ababa Action Agenda states that the Heads of State and Government and High Representatives, gathered in Addis Ababa from 13 to 16 July 2015 for the Third International Conference on Financing For Development, endorse the efforts and initiatives of UNCITRAL, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and at promoting the rule of law at the national and international levels in this field.

There is a widespread recognition, as evidenced by this and previous General Assembly resolutions, that effective use of modern private law standards in international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger. What is lacking is the effective means of integrating promotion of rule of law in commercial relations into the broader agenda of the United Nations. This need has been repeatedly acknowledged by the General Assembly. The post-2015 development agenda must become a platform where the goals of promoting rule-based commercial relations and achieving sustainable development converge. And UNCITRAL, as the core legal body in the United Nations system in the field of international trade law, can be a key contributor in this respect.

UNCITRAL constantly strives to go beyond and do more than its budgetary constraints allow. It consistently reaches out to other governments, intergovernmental and non-governmental organizations as well as the private sector and endeavours to expand the network of entities who are aware of its work and can assist in achieving its goals. UNCITRAL also seeks and welcomes initiatives and ideas on promoting its work. The ever-increasing importance of international trade and accelerating interdependence of the world economy require UNCITRAL to continue its work, which benefits all States across many industries.

