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EXPANDING WORLD TRADE: FACTS AND PROBLEMS

BY VINCENT D. TRAVAGLINI*

Throughout the world, international trade has been steadily increasing with every passing year. The United States trade, however, has recently been plagued with a balance of payments problem which has necessitated a search for new means to expand the nation's export business. While President Johnson's 1968 New Year's Day report on our balance of payments problem and the highly successful Kennedy Round of tariff cuts indicate concerted assaults on existing barriers to increased trade, Mr. Travaglini concerns himself in this article with the necessity for further progress within the legal and economic framework within which international trade is transacted. He discusses a number of recent trends in this direction: (1) The present efforts toward international standardization of products specifications; (2) The adoption of customs conventions and bilateral treaties, and the development of various commissions to obtain uniformity in international trade law; (3) International arbitration of commercial disputes, including the obvious advantages thereof, and the multilateral conventions dealing with enforcement of agreements and awards in international commercial arbitration; and (4) The recent efforts toward international unification of patent, trademark, and copyright registration and protection procedures, including the recently held and highly successful Stockholm Conference. Mr. Travaglini concludes his article with a listing of realizable goals conducive to the achievement of greater United States trade surpluses.

PRESIDENT Johnson's 1968 New Year's Day message to the nation on the country's balance of payments focused new attention on the need for increased export trade. As the President pointed out, exports are the cornerstone of our balance of payments position. The United States sold abroad \$31 billion worth of goods in 1967 and \$33.8 billion in 1968. However, our overall trade surplus, which averaged \$5.4 billion between 1960 and 1965, has been declining since 1964 and was only \$726 million in 1968. The measures announced by the President include a long-range effort by the Commerce Department to increase United States sales abroad, expansion of Export-Import Bank export financing activities, and creation of a joint export association program to provide direct financial support to business groups to sell overseas.

World trade has shown a spectacular rise in recent years and factors are at work to continue a steady expansion. In 1968, there were lower tariffs abroad for thousands of United States products as the initial duty reductions under the Kennedy Round of tariff negotiations were made. The six countries of the European Common Market reduced their common external tariff by an average of 35

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percent, beginning with a 20 percent cut on July 1, 1968. The full reductions will be achieved in five stages so that, until implementation is completed on January 1, 1972, there will be a continuing stimulus to trade.¹

In addition, the Kennedy Round negotiators reached agreement on an antidumping code and the elimination of certain nontariff restrictions, such as the discriminatory effects of certain European road-use taxes on United States automobiles. These and other factors, such as the success of the European Economic Community and other regional groupings in sustaining generally favorable rates of economic growth, augur well for future market opportunities for our products.

As tariffs are reduced, other barriers to trade assume greater significance. The expression "nontariff trade barriers" (NTB's) is commonly used to describe direct quantitative restrictions and legal or administrative regulations which tend to discriminate against imported products. According to the President's Special Trade Representative, these obstacles, which are often rooted in basic national policies and practices, need to be thoroughly examined as to their scope, their significance, and their intricate workings. An inventory of such restrictions is being prepared.²

Beyond tariffs and NTB's, however, there is need for comparable progress in other areas perhaps even more vital to the continued orderly expansion of world trade. These would encompass a variety of seemingly unrelated subject matter; international standardization, the unification of commercial laws, commercial arbitration, and the protection of industrial property. In essence, these might be designated as the legal and economic framework within which international trade is transacted. It is the purpose of this article to describe generally what is being done in these areas, what needs to be done, and the significance to United States trade and industry.

I. INDUSTRIAL STANDARDS

The Kennedy Round did not address itself to the problem of standards as a potential barrier to international trade.³ However, there is no lack of recognition, either by the United States or other major trading nations, of the importance compatible standards have for the free flow of world trade. It has been said that standards are

¹ ECONOMIC REPORT OF THE PRESIDENT together with the ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS 187 (1968). The 53 nations which participated in the Sixth Round of Multilateral Tariff Negotiations under the auspices of the General Agreement on Tariffs and Trade agreed to tariff concessions affecting \$40 billion of world trade. The concessions apply to almost \$7 billion of our industrial exports. Vargo, *Kennedy Round Cuts Start*, INT'L COMMERCE, Jan. 22, 1968, at 2.

² Roth, *The Future Work Program of GATT*, 58 DEP'T STATE BULL. 14 (1968).

³ Address by Secretary of Commerce A.B. Trowbridge, National Conference on Weights and Measures, Washington, D. C., June 27, 1967.

the language of commerce. Sellers are encouraged to market new products, confident that by meeting accepted standards they will be bought by consumers. Buyers are encouraged to buy because assured of a product that meets required specifications. Standards are vital to profits since producers whose products for domestic sale are compatible with international standards receive all the benefits of mass production; alternatively, incompatibility results in high-cost, low-volume production runs for foreign markets.

Numerous international organizations are engaged directly or indirectly in the formulation of international standards. Three groups, however, predominate. They are: (1) International Organization for Standardization (ISO); (2) International Electrotechnical Commission (IEC); and (3) Pan-American Standards Commission (COPANT).⁴ The United States participates in the work of these groups through the USA Standards Institute (successor to the American Standards Association), which provides total United States dues and direct financial support for international standards activities.

Given the vital importance of standards-making to our international trade interests, it is surprising that United States participation in and support for these organizations has been something less than adequate. The reasons for this situation may be summarized as follows: (1) Lack of understanding of the nature of international standards recommendations and of their present and potential impact on the economic welfare of the country; (2) Participation in standards activities is often predicated solely on *existing* trade in an item rather than on long-range considerations; (3) The number of redundant standardization activities which in certain areas have caused confusion and uncertainty as well as unnecessary expense; and (4) The cost of financing delegations, secretariats, and chairmanships of technical committees, and the lack of arrangements for sharing of such costs by those who would benefit from the activity.⁵

Participation by United States industry in international standardization activities has been strong in some fields, such as photography, electronics, and automatic data processing, while in other fields there has been little support. Industry has responded in a number of instances to preserve foreign markets. For example, when

⁴ The work of these organizations is available to industry through their publications, which have worldwide distribution. In 1966, sales of IEC publications were made in 64 countries. "It is probably true that no large contract in the electrical or electronics industries is nowadays placed without the relevant IEC publications having at least been consulted at some stage of the negotiations." Ruppert & Stanford, *Impact of the IEC's Work on World Trade*, 38 MAGAZINE OF STANDARDS 263 (1967).

⁵ NATIONAL CITIZEN'S COMM'N ON INT'L COOPERATION, REPORT OF THE COMMITTEE ON BUSINESS AND INDUSTRY 27 (1965) (presented at the White House Conference on International Cooperation, Washington, D.C.).

the Swiss adopted a national standard for automobile headlights which excluded sealed beams of the type made in this country, our representation in the ISO prevented a similar standard from being adopted internationally. In other cases — *e.g.*, standards for color television sets, lamp sockets, and lamp bases — differences between European and American standards have acted as barriers to United States exports. In some fields, moreover, United States producers with no direct foreign business of their own are confronted with the task of meeting differing foreign standards when they supply materials and components to a United States equipment or systems maker for installation abroad.⁶

A broad-scale review of domestic and international standards activities was undertaken several years ago by the Panel on Engineering and Commodity Standards of the Commerce Technical Advisory Board which culminated in the issuance in February 1965 of the *LaQue Report*.⁷ One of the Report's principal recommendations pointed to the need for an officially recognized body responsible for representing the interests of the United States in international standardization. The Report called for participation by both government and industry in international standards work to help assure maximum possible compatibility between international standards and those recognized and used in the United States.

Two resulting developments of importance to United States interests in voluntary international commercial standards activities may be noted briefly. First was the establishment in August 1966 of the United States of America Standards Institute (USASI). The major objectives of the Institute are broader participation by all interested groups, increased representation and leadership in the international standards programs, and emphasis on consumer interests. The hundreds of national trade associations and the technical, professional, and scientific societies which develop standards are to be encouraged to extend these principles to their own operations. Under its constitution, USASI is not permitted to develop standards on its own. However, standards which it approves are designated United States Standards, and as such have greater acceptance at international technical meetings.⁸

⁶ Podolsky, *The Name of the Game, or How to Play Standards for Foreign Markets*, 39 MAGAZINE OF STANDARDS 43 (1968).

⁷ U.S. DEP'T OF COMMERCE, REPORT OF THE COMMERCE TECHNICAL ADVISORY BOARD PANEL ON ENGINEERING AND COMMODITY STANDARDS (2 vols., 1965); Clearinghouse for Federal Scientific and Technical Information of the U.S. Dept of Commerce, Pub. Nos. PB 166811-812.

⁸ Legislation (S. 2282) to incorporate USASI is pending. The bill would charter the Institute as the national coordinating body for voluntary standardization. 113 CONG. REC. S 11,460 (daily ed. Aug. 14, 1967) (Remarks of Senator Dirksen).

Second, legislation was requested by the Department of Commerce early in 1967 to support and stimulate United States participation in formulating international standards. As introduced, the bills (S. 997 and H.R. 6278) would authorize the Secretary of Commerce to promote and support United States participation in the international commercial standardization of products, processes, and test methods. They would also authorize a clearinghouse service to collect and disseminate engineering or product standards for the benefit of producers, distributors, users, consumers, and the public. The Secretary would also have the authority to make grants to or contracts with any private nonprofit standards organization to assist in carrying out the functions prescribed by the bills.⁹

These proposals have found much support in business circles, at least insofar as they would promote United States standards-making activity on the international level. Some groups, however, question whether the governmental assistance provided for in the bills might clear the way for excessive government influence over standards development. Others see danger in the possible exclusion of consumer and other interests from the standards-making process.¹⁰

There are already indications of the growth of organized liaison between European industries, including those of the two regional trading groups — the European Economic Community and the European Free Trade Area.¹¹ From this collaboration, United States industry may be excluded, with harmful results to our business interests. The adoption of technical regulations divergent from our own can result in the formation of new trade barriers.

II. UNIFICATION OF COMMERCIAL LAWS

The large and increasing international movement of people, goods, and money continually raises problems involving the application of extremely complex and unfamiliar legal rules, diversity of legal standards, and uncertainty as to applicable law. A bewildering multiplicity of individual national laws and regulatory systems confront the international trader, investor, and licensor. Even in the law of international trade, where noticeable similarity exists

⁹ See generally 113 CONG. REC. S 2032 (daily ed. Feb. 16, 1967) (remarks of Senator Magnuson); 113 CONG. REC. H 1911 (daily ed. Feb. 28, 1967) (Remarks of Representative Miller).

¹⁰ Lawrence, *Proposed U.S. Standards Bill Wins Support*, JOURNAL OF COMMERCE, Feb. 13, 1967, at 1, col. 6. Donald F. Turner, Ass't Attorney General, presents a useful analysis of the problems inherent in standards-making in an address before the N.Y. State Bar Ass'n, Jan. 26, 1967, *Consumer Protection by Private Joint Action*, 113 CONG. REC. A 428 (daily ed. Feb. 2, 1967).

¹¹ *Unique EEC-EFTA Industrial Liaison*, EFTA REPORTER, Nov. 20, 1967, at 5.

among the world's legal systems, many small differences persist with burdensome consequence for the unsophisticated businessman.¹²

Efforts to surmount the problems caused by differing national laws have taken various forms over many years. They include attempts to establish a viable system of arbitrating international commercial disputes and acceptance of international conventions covering wide areas of interest to business. Well-known conventions exist in the fields of labor law,¹³ postal services,¹⁴ and patents, trademarks,¹⁵ and copyrights.¹⁶ The rules relating to bills of lading and to air transport are the common law of most trading nations.¹⁷

A Convention with a Uniform Law on the International Sale of Goods appended was approved at a Diplomatic Conference held at The Hague April 2-25, 1964, culminating the work of a quarter of a century.¹⁸ The Convention and Uniform Law would establish a new substantive law governing international sales contracts entered into by parties with places of business in different countries. In the opinion of some observers, however, the Uniform Law is open to serious objection and could present significant problems to American business interests should it become effective.¹⁹

The Report of the United States Delegation to the 1964 Diplomatic Conference was generally negative. In stressing that the Uniform Law on Sales suffered from "substantial difficulties," the Report stated "it would appear unlikely that the Uniform Law will prove acceptable to America's governmental, commercial and legal organizations because its many unclear and unworkable provisions

¹² "Nevertheless, despite the high degree of universality of basic concepts in the law of international trade, there remain many differences in their detailed application; and this multiplicity of minor differences often presents serious obstacles both to the negotiation of international sales contracts and to the resolution of conflicts arising out of such contracts." Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique*, 30 *LAW & CONTEMP. PROB.* 354 (1965). This issue of *Law and Contemporary Problems* is devoted to an examination of unification of law activities internally and internationally.

¹³ The conventions in this field have been promulgated by the International Labor Organization. The United States has ratified ILO convention nos. 53, 55, 58, 74, and 80, all of which deal with maritime labor.

¹⁴ Constitution and Convention of the Universal Postal Union, [1964] 16 *UST* 1291, T.I.A.S. No. 5881. One hundred twenty-eight countries are members.

¹⁵ International Patent and Trademark Convention (Paris Union) [1962] 13 *UST* 1, T.I.A.S. No. 4931. Eighty-four countries are members.

¹⁶ Universal Copyright Convention, [1952] 6 *UST* 2731, T.I.A.S. No. 3324. Fifty-five countries are members. The Berne Convention of 1886 (with 5 revisions) has 58 members not including the United States.

¹⁷ See Schmitthoff, *The Unification of the Law of International Trade*, 1968 *J. BUS. L.* 110.

¹⁸ Relevant documents are reprinted in 30 *LAW & CONTEMP. PROB.* 425-59 (1965), and 13 *AM. J. COMP. L.* 453-77 (1964).

¹⁹ See Farnsworth, *Some Basic Differences Between the American Law of Sales and the Draft Uniform Law on the International Sale of Goods*, 14 *AM. J. COMP. L.* 227 (1965); Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglia*, 74 *YALE L.J.* 449 (1965); Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 *LAW & CONTEMP. PROB.* 326 (1965). See also Berman, *supra* note 12.

do not meet the current needs of commerce and because it varies so markedly in its approach and content from our Commercial Code."²⁰

At the end of 1968, the necessary ratifications or accessions (five) had not been made so the Convention was not in force. A single country had ratified—the United Kingdom, on August 31, 1967—but subject to a reservation that the Uniform Law should apply only if chosen by the parties to the sale as the law of the contract. It seems likely, therefore, that the provision of the Final Act of the Diplomatic Conference will become effective. This provision stipulates that if the Convention does not enter into force by May 1, 1968, the Rome Institute will establish a committee composed of representatives of governments of interested states to consider further appropriate action to promote the unification of law on the international sale of goods.

International conventions on customs regulation are obviously of key importance in facilitating trade. The principal achievement in this field is the Convention on Nomenclature for the Classification of Goods in Customs Tariffs, which provides a systematic classification of all products in more than 1,000 headings. This nomenclature is used by GATT and other international organizations in order to compare existing tariff levels and to simplify negotiations for tariff reductions.²¹

Five other customs conventions, which become effective for the United States on March 3, 1969, provide multilateral international arrangements for the temporary duty-free importation of a wide variety of items, including professional equipment, commercial samples, and shipping containers.²² Under the conventions, the formalities on

²⁰ *Report of the Delegation of the United States of America to the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods*, in HANDBOOK AND PROCEEDINGS OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 244 (1964). Text of the Convention and Uniform Law appears at 3 AM. SOC. INT. L. PROC. 855 (1964).

²¹ The nomenclature is administered by the Customs Cooperation Council in Brussels, whose aim is to secure the highest degree of harmony and uniformity among national customs systems. See *Valuation for Duty and the Salomon Case*, 1 J. WORLD TRADE L. 117 (1967).

²² The five conventions are:

Customs convention on the temporary importation of professional equipment: Exec. K, 89th Cong., 2d Sess., ratified March 1, 1967. Under this convention, such professional materials as television and radio equipment, typewriters, movie cameras, and scientific devices could be imported duty free provided they were reexported within 6 months.

Customs convention on the ATA carnet for the temporary admission of goods: Exec. L, 89th Cong., 2d Sess., ratified March 1, 1967. Professional materials imported temporarily under provisions of the customs convention on professional materials could be documented under this convention without the need for posting a bond, the administering body to be the U.S. Council of the International Chamber of Commerce.

Customs convention regarding ECS carnets for commercial samples: Exec. M, 89th Cong., 2d Sess., ratified March 1, 1967. The U.S. Council of the International Chamber of Commerce would be the issuing authority for commercial samples and advertising material carnets under this convention.

Customs convention on containers: Exec. J, 89th Cong., 2d Sess., ratified March

entry into the importing country are greatly simplified as compared with the usual bonding or deposit procedures. They have been endorsed by the National Export Expansion Council, and the Department of Commerce has received many expressions of support for them from the business community.

The work of approximating national laws has also been furthered by the worldwide network of bilateral treaties, such as the Friendship, Commerce, and Navigation Treaties which are in force between the United States and many countries with which we have commercial dealings. A similar network of tax treaties exists. The United States has income tax treaties in force with 21 countries.²³ A basis for uniformity concerning tax treaties with developed countries exists in the Model Draft Tax Convention adopted by the Organization for Economic Cooperation and Development (OECD).²⁴ The United States is engaged in an intensive reexamination of existing income tax treaty provisions with a view to bringing them into conformity with the OECD Model, and has formulated a draft appropriate to less developed countries which formed the basis for several such treaties recently negotiated.

Two developments may be noted that offer great promise for achieving a larger measure of uniformity in the legal conditions relating to international transactions. First, in December 1963, Congress enacted legislation providing for participation by the United States in both the International (Rome) Institute for the Unification of Private Law (UNIDROIT) and The Hague Conference on Private International Law.²⁵

A second significant development is the establishment of a United Nations Commission on International Trade Law (UNCITRAL). Resolution 2205 (XXI) of the United Nations General Assembly, adopted unanimously on December 17, 1966, states

1, 1967. This convention provided for duty-free temporary importation, usually for 3 months, of large containers used in international trade.

Customs convention on the international transport of goods under cover of TIR carnets: Exec. N, 89th Cong., 2d Sess., ratified March 1, 1967. Containers used in international trade would be permitted under this convention to transit through a country without inspection.

²³ These include virtually every industrialized country. In addition, nine treaties are in effect with former colonies of the United Kingdom and Belgium.

²⁴ DRAFT DOUBLE TAXATION CONVENTION ON INCOME AND CAPITAL, REPORT OF THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT FISCAL COMMITTEE (OECD Publications, Paris, 1963).

²⁵ 22 U.S.C.A. § 269(g) (1963). See Nadelmann, *The United States Joins The Hague Conference on Private International Law*, 30 LAW & CONTEMP. PROB. 291 (1965). For a broad survey of the work in unification and harmonization of these and other intergovernmental organizations and nongovernmental organizations such as the United Nations' Regional Economic Commissions, Council of Europe, International Chamber of Commerce, and the International Law Association, see *Progressive Development of the Law of International Trade*, Report of the Secretary-General, 21 U.N. GAOR, Agenda Item No. 88, at 1-45, U.N. Doc. A/6396, at 16-56 (1966); Baade, *The Council of Europe: Its Activities Relating to Law*, 15 AM. J. COMP. L. 639 (1967).

UNCITRAL's object to be "the promotion of the progressive harmonization and unification of the law of international trade." The expression, "law of international trade," is defined in the report of the Secretary General as "the body of rules governing commercial relationships of a private law nature involving different countries." Examples of its scope would include the international sale of goods, negotiable instruments, and bankers' commercial credits; laws relating to conduct of business activities pertaining to international trade, insurance, transportation, industrial property and copyright; and international commercial arbitration.

It is apparent that the field of activity of UNCITRAL intersects with the work area of other groups. Indeed, the Report of the Secretary General contains a detailed survey of the work done in harmonizing private international law by organizations both governmental and nongovernmental. However, it points out that there has been insufficient coordination and cooperation among those organizations with the result that their activities have tended to be unrelated and duplicative. One of UNCITRAL's main functions then will be to coordinate the work of existing organizations and act as a kind of international clearinghouse for unification activities. Moreover, since participation by developing countries has heretofore been minimal, those countries would now be able to participate fully in a program administered by a broad-based body such as UNCITRAL.²⁶

The Commission consists of 29 States, elected by the General Assembly for 6-year terms, as follows: seven from African States, five from Asian States, four from Eastern European States, five from Latin American States, and eight from Western European and other States. In selecting States for membership, the General Assembly is directed to have due regard to the adequate representation of the principal economic and legal systems of the world, and of developed and developing countries. The Commission will normally hold one regular session a year. In order to provide the Commission with appropriate staff and facilities, the United Nations Secretariat has established an International Trade Law Branch within the Office of Legal Affairs.²⁷

²⁶ See Stavropoulos, *The United Nations Commission on International Trade*, 4 U.N. MONTHLY CHRONICLE 89 (1967); Carey, *UNCITRAL: Its Origins and Prospects*, 15 AM. J. COMP. L. 626 (1967).

²⁷ See U.N. Commission on International Trade Law, *General Assembly Initiative*, 1 J. WORLD TRADE L. 112 (1967). At the first session of the Commission, held in New York from January 29 to February 26, 1968, a broad program of work was decided on, with priority on international sale of goods, international payments, and international commercial arbitration. Report of the United Nations Commission on International Trade Law on the Work of its First Session 29 January — 26 February 1968, 23 U.N. GAOR Supp. 16, U.N. Doc. A/7216 (1968).

Along with legislation and conventions, trade customs and practices represent a third component of international trade law. These have been formulated and standardized to a great extent by such groups as the International Chamber of Commerce, the United Nations Economic Commission for Europe, and various trade associations.²⁸ The ICC's Uniform Customs and Practices for Commercial Documentary Credits is now used by banks worldwide, and the standard definitions of trade terms provided by the ICC's Incoterms are often included in sales contracts, although the Revised American Foreign Trade Definitions, prepared jointly by the Chamber of Commerce of the United States, the National Council of American Importers, Inc., and the National Foreign Trade Council, Inc., appear to be more widely used by American businessmen. The two sets, however, differ only slightly and both are used in world trade. Neither is enacted into law anywhere, but they have been construed many times by courts in various countries, and it is therefore necessary to take into consideration the constructions and meanings given to the terms.²⁹

Although primarily oriented to the needs of its member countries, the European Common Market is engaged in harmonizing laws and procedures with effects on world trade interests outside of Europe. Several conventions have been drafted under Article 220 of the Rome Treaty — dealing with the approximation of national laws — which mark the Community's first definitive steps in this area. One convention requires mutual recognition by all member countries of the legal capacity of a company established in another member country, including the right to sue, to contract, and to hold property. Others concern the recognition and enforcement of money judgments, the proposed creation of a European patent system, and a projected European corporation law.³⁰ American firms are vitally concerned with the question of application of these measures to nonmember

²⁸ See C. SCHMITTHOFF, *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 15 *et seq.* (1964).

²⁹ Customs developed by international trade transactions may be decisive where there is no applicable law or the law is inadequate. See Ramzaitsev, *The Application of Private International Law in Soviet Foreign Trade Practice*, 1961 J. BUS. L. 343.

³⁰ Summarized in 1967 in *Retrospect*, EUROPEAN COMMUNITY, Feb. 1968, at 9. The draft convention on recognition of judgments has occasioned concern since it provides that a money judgment rendered by a court of a Community member against a non-resident of the EEC could be fully enforced in the other five nation-states, even if jurisdiction rested only on plaintiff's nationality, domicile, or presence of assets in the forum country. Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995 (1967). See also Nadelmann, *Assumption of Bankruptcy Jurisdiction over Non-Residents*, 41 TUL. L. REV. 75 (1966), for a discussion of the draft convention prepared by a group of experts for the EEC concerning the distribution of assets of insolvents who have property in more than one country, which could present problems for the nonresident creditor when local assets of an insolvent may be appropriated by individual domestic creditors.

countries and therefore must pay close attention to further developments.

III. INTERNATIONAL ARBITRATION

Settlement of disputes by arbitration is a prominent feature of the domestic business scene in the United States. Whether through institutional facilities, such as those of the American Arbitration Association and trade associations, or through the appointment of permanent arbitrators, this technique has gained wide acceptance among both business and labor leaders.

The advantages of lower costs, speedier decisions, and informality of procedure inherent in the arbitral process which have led to its widespread use domestically should also commend it for international transactions. However, while arbitration clauses are being used to an increasing extent by American firms in their foreign sales, investments, and licensing dealings, there are inhibiting factors deterring wider use.³¹

One potential weakness concerns the enforcement of awards in countries other than where they were rendered. The United States lacks treaty or other arrangements providing for the efficient enforcement of agreements to arbitrate by unwilling parties or for enforcement of arbitration awards. The standard negotiating form for United States commercial treaties includes references to the mutual recognition of arbitration agreements and awards. This prototype provision, however, as included in most of the modern treaties concluded since World War II, is aimed less at enforcement and more at nondiscrimination. It provides that agreements to arbitrate shall not be deemed unenforceable merely on the ground that the place designated for arbitration is outside the country or that one or more arbitrators is an alien, and that valid awards shall not be denied enforcement merely because the award was rendered outside the country where enforcement is sought.³²

The following four multilateral conventions deal with the

³¹ Because of the jurisdictional, foreign law, conflict of law and enforcement problems encountered in foreign litigation, international commercial arbitration has gained in popularity. Properly employed, it may provide the parties with a relatively speedy, inexpensive and equitable proceeding, whose awards are enforceable in most jurisdictions of the civilized world. However, it is not free from risks, of which the practitioner should be well aware.

Hess, *Litigation and Arbitration in International Trade*, 72 CASE & COM., Jan.-Feb. 1967, at 34, 38.

³² See Walker, *United States Treaty Policy on Commercial Arbitration — 1946-1957*, in INTERNATIONAL TRADE ARBITRATION 51 (M. Domke ed. 1958). "This approach to arbitration is conceptually of a kind with the principle underlying FCN treaties as a whole: namely that the aim and purpose of a treaty is to protect the alien and his interests on a basis of nondiscrimination rather than to attempt the reformation of internal law." *Id.* at 54.

problem of enforcement of agreements and awards in international commercial arbitration:⁸³

(1) Protocol of Geneva on Arbitration Clauses, 1923⁸⁴ — provides for the recognition by contracting parties of the validity of arbitration agreements, whether relating to existing or future differences, between parties residing in different countries, regardless of the jurisdiction in which the arbitration is to take place.

(2) Geneva Convention for the Execution of Foreign Arbitral Awards, 1927⁸⁵ — provides that awards made pursuant to the 1923 Protocol will be enforced, so long as they apply to persons subject to the jurisdiction of member countries and were made in the territory of a member country.

(3) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958⁸⁶ — designed to replace the Geneva Protocol and the Geneva Convention above. Enforcement is considerably simplified, with the burden on the losing party to prove grounds for refusal. The place of arbitration is immaterial, and in general the award may be enforced if the arbitration proceedings were properly conducted in accordance with the will of the parties.

(4) European Convention on International Commercial Arbitration, Geneva, 1961⁸⁷ — sponsored by the United Nations Economic Commission for Europe, has the principal feature of providing machinery to overcome the problem of appointing arbitrators when the parties to an arbitration agreement fail to agree on their choice (the Convention is likely to be useful chiefly in connection with East-West trade transactions).

The Geneva treaties were intended to serve as the basis of a system whereby commercial disputes of an international character which the parties have agreed to arbitrate are excluded from the jurisdiction of the courts. They have not been completely effective, however, since some countries failed to adopt the implementing legislation required by both the Protocol and Convention. Even where both instruments were implemented, the enforcement of agreements and awards was often unsatisfactory because the burden of proof is upon the claimant on nearly every issue.⁸⁸

⁸³ Texts and Commentaries appear in: P. SANDERS, *INTERNATIONAL COMMERCIAL ARBITRATION — A WORLD HANDBOOK* (3 vols., 1965). This work, edited under the auspices of the International Association of Lawyers, contains descriptions of the arbitration laws and practice in almost all European countries, Latin America, and Asia.

⁸⁴ 27 L.N.T.S. 157.

⁸⁵ 92 L.N.T.S. 301.

⁸⁶ 330 U.N.T.S. 3.

⁸⁷ 484 U.N.T.S. 349.

⁸⁸ Marceau, *Commercial Arbitration in International Business*, 22 *BUS. LAW.* 1175, 1182 (1967).

The United Nations Convention of 1958 was designed to improve the system of international recognition and enforcement while maintaining its principal features. As a practical matter, the onus is placed upon the party resisting enforcement of an award to prove that the award has not become binding,³⁹ thus reducing the possibility of obstructionism. It has been ratified by 33 countries including most major trading nations except the United States, the United Kingdom, Australia, and Canada. The United States did not sign or adhere because the Convention raised serious problems from the standpoint of United States domestic law. In the view of the United States delegation to the United Nations Conference on International Arbitration, the Convention, "if accepted on a basis that avoids conflict with State laws and judicial procedures, will confer no meaningful advantages on the United States."⁴⁰

Failure by the two leading trading nations of the world to ratify — the United States and the United Kingdom — has undoubtedly diminished the potential usefulness of the United Nations Convention. In both countries, however, attention has recently been given to this issue by various commentators and interested groups. In this country it has been urged that a reexamination of the possible benefits should be made,⁴¹ and the American Bar Association has recommended in favor of ratification,⁴² subject to suitable amendment of the Federal Arbitration Act.⁴³ Ratification was also recommended by the White House Conference on International Cooperation as a progressive step in the development of international law.⁴⁴

Finally, on April 24, 1968, President Johnson recommended Senate approval of United States accession to the United Nations Convention, subject to two declarations: First, the United States would not be required to apply the Convention to awards made in nations not parties to the Convention or awards made in another nation with respect to matters excluded by that nation or by the United States in its approval of the Convention; and second, the

³⁹ See Domke, *The United Nations Conference on International Commercial Arbitration*, 53 AM. J. INT'L L. 414 (1959).

⁴⁰ Official Report of the United States Delegation, Aug. 15, 1958, at 2. See Czyzak & Sullivan, *American Arbitration Law and the U.N. Convention*, 13 ARB. J. 197 (1958); Sultan, *The United Nations Arbitration Convention and United States Policy*, 53 AM. J. INT'L L. 807 (1959).

⁴¹ Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961).

⁴² ABA INTERNATIONAL AND COMPARATIVE LAW SECTION, REPORT OF COMM. ON INTERNATIONAL UNIFICATION OF PRIVATE LAW (1960).

⁴³ 9 U.S.C. §§ 1-14 (1964). See M. DOMKE, COMMERCIAL ARBITRATION § 4.03 (1968).

⁴⁴ WHITE HOUSE CONFERENCE ON INTERNATIONAL COOPERATION, REPORT OF THE COMMITTEE ON DEVELOPMENT OF INTERNATIONAL LAW 11 (1965). Commercial arbitration was recognized by three different panels at the Conference as a major factor in world trade and peace. See Domke, *International Commercial Arbitration in the International Cooperation Year*, 20 ARB. J. 226 (1965).

United States would limit application of the Convention to commercial transactions, consistent with the policy expressed in the Federal Arbitration Act. Congressional approval on these terms was granted on October 4, 1968. However, changes in the Federal Arbitration Act will be required before the United States becomes a party to the Convention⁴⁵

In the United Kingdom a comprehensive study of the United Nations Convention by the Private International Law Committee concluded favorably.⁴⁶ The Committee found the Convention a considerable improvement over the Geneva treaties in respect to recognition and enforcement of awards. It recommended acceptance of the Convention, however, only if a way could be found to leave British courts with their traditional discretion to decide whether or not to grant a stay of proceedings in purely domestic cases covered by an agreement to arbitrate. This would involve drawing a satisfactory distinction between foreign and domestic agreements, a problem evidently not easily resolved, as indicated by the lack of any further action taken since the Committee made its report.

The European Convention was conceived primarily to facilitate the settlement of disputes arising out of trade or other business arrangements between private firms in Western countries and the state-trading organizations of Eastern Europe. Managers of the state organizations usually refuse to agree to arbitration by privately sponsored institutions such as the International Chamber of Commerce or the American Arbitration Association in preference to the state-run arbitration institutions in their own countries.⁴⁷ The main function of the Convention is to provide a method of determining

⁴⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Message from the President of the United States, Exec. E, 90th Cong., 2d Sess. (1968); 114 CONG. REC. S 12,079 (daily ed. Oct. 4, 1968).

⁴⁶ PRIVATE INTERNATIONAL LAW COMMITTEE, FIFTH REPORT (RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS), Cmnd. 1515 (HMSO, London, 1961). See Editorial, *Accession of the United Kingdom to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958*, 1962 J. BUS. L. 2.

⁴⁷ Each country of the Communist bloc has a foreign trade arbitration commission organized in connection with the Chamber of Commerce. State trading organizations invariably include in their contracts with foreign firms provisions referring all disputes to them, but have occasionally agreed to arbitration in third countries, usually Sweden, Switzerland, Austria, or England. The practice varies, however. The Soviet Union reportedly refused to arbitrate before the International Chamber of Commerce (although in one case it agreed to arbitrate in New York under American Arbitration Association rules), while Rumania apparently has no objection to ICC arbitration. See generally Szasz, *Arbitration of Foreign Trade Transactions in the Popular Democracies*, 13 AM. J. COMP. L. 441 (1964); Jakubowski, *The Settlement of Foreign Trade Disputes in Poland*, 11 INT'L & COMP. L.Q. 806 (1962). Interestingly, Cuba has established a "Foreign Trade Arbitration Court" as an adjunct to the Chamber of Commerce for the purpose of arbitrating international trade disputes. BOARD OF TRADE J., May 20, 1966, at 1157.

both arbitrator and place of arbitration when the parties themselves have been unable to agree.

The Convention entered into force January 7, 1964, and at the end of 1968 had 16 members. It appears not to have had widespread acceptance, possibly because of the rather cumbersome machinery provided for the selection of arbitrators. Although there has been little expression of interest in the Convention by United States traders or investors overseas, it has been reported that they have occasionally been asked in negotiations with state-trading countries to agree to arbitration "under the ECE rules." The principal significance of the Convention may be that it evidences a willingness on the part of Eastern European countries to accept some measure of accommodation with the West in the direction of impartial adjudication of trade disputes.⁴⁸

But even if a suitable treaty basis can be evolved for enforcement purposes, practical measures of an administrative nature would be necessary before commercial arbitration could play its full role in world trade. North America and Europe are well served by the arbitration organizations centered there. However, similar organizations elsewhere, with of course some notable exceptions, often do not possess the facilities and know-how to make arbitration an effective means of dispute settlement.

Recognizing this, the United Nations Conference on International Commercial Arbitration of 1958 adopted a resolution directed to improving the effectiveness of arbitration in the settlement of private law disputes.⁴⁹ This was followed by a resolution of the Economic and Social Council requesting the Secretary General of the United Nations to assist in the improvement of arbitral legislation, practice, and institutions.⁵⁰

The task of translating these benign resolutions into action programs is another matter. Hopefully, a good start is being made and there are some reports of progress. In the Far East, the ECAFE Center for Commercial Arbitration has been established as a part of the International Trade Division of the United Nations Economic Commission for Asia and the Far East (ECAFE).⁵¹ The Center collects and disseminates information, arranges for the services of technical advisers and the training of personnel, and carries out legal

⁴⁸ See Sarre, *European Commercial Arbitration*, 1961 J. BUS. L. 352; Haight, *Adherence to ECE Convention: East Nations Showing Adaptability to Impartial Dispute Adjudication*, JOURNAL OF COMMERCE, Mar. 21, 1966, at 4A, col. 2.

⁴⁹ U.N. Doc. E/Conf. 26/9/Rev. 1 (June 10, 1958).

⁵⁰ ECOSOC Res. 708 (XXVII), 27 U.N. ECOSOC, U.N. Doc. E/3262 (1959).

⁵¹ See Domke, *The Bangkok Conference on Commercial Arbitration*, 17 ARB. J. 23 (1962).

and technical studies relevant to the improvement of arbitration in the ECAFE region. The Center has produced a model set of arbitration rules for inclusion in international trade contracts, but does not itself hear or determine disputes. Three ECAFE countries — Malaysia, Thailand, and the Philippines, comprising the Association of South-east Asia (ASA) — are considering the establishment of an ASA board of commercial arbitration which would provide administrative arbitral machinery.⁵²

In the Western Hemisphere, too, new currents are flowing. Efforts are centered on revitalizing the Inter-American Commercial Arbitration Commission. To this end, meetings were held in Buenos Aires, San Jose, and Rio de Janeiro in 1967, and Mexico City in 1968, resulting in the drafting of a new constitution for IACAC and the adoption of a continuing program of activity designed to improve the inter-American system of arbitration.⁵³ This program would aim at the establishment of national arbitration organizations in each of the American States, each equipped with its own panel of arbitrators. There would also be an education program to inform businessmen, lawyers, and the public about commercial arbitration and to encourage its use.

IV. INDUSTRIAL PROPERTY PROTECTION

There is a close relationship between United States export trade and recent technological advances. Our mixture of export products becomes more and more sophisticated each year, which in turn places more dependency on protection of industrial property rights.⁵⁴ Generally, the patent protection system operates through the International Patent and Trade Mark Convention (Paris Union) and the practices of the individual companies, owners of the valuable industrial rights involved.⁵⁵ However, three recent trends have indicated that a reassessment and improvement in the old international system of protection is absolutely essential: First, there has been an unprecedented expansion of international trade and investment since World War II; second, there has been a rapid acceleration of technological

⁵² ECAFE CENTRE FOR COMMERCIAL ARBITRATION NEWS BULLETIN, June 1967, at 27.

⁵³ IACAC was formed in 1933 but for various reasons had not experienced growth commensurate with that of inter-American trade. With headquarters in New York, it is probably regarded as a foreign instrumentality by businessmen in Latin America. See Straus, *Inter-American Commercial Arbitration: Unicorn or Beast of Burden?*, 21 BUS. LAW. 43 (1965); Norberg, *Inter-American Commercial Arbitration*, 61 AM. J. INT'L L. 1028 (1967).

⁵⁴ See generally Wayman, *Patent Protection in International Business Transactions*, 45 DENVER L.J. 64 (1968).

⁵⁵ SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMM. ON THE JUDICIARY, THE INTERNATIONAL PATENT SYSTEM AND FOREIGN POLICY, STUDY NO. 5, S. DOC. NO. 63, 85th Cong., 1st Sess. 1 (1960).

progress; and third, a large number of newly independent nations want and need the technology so necessary to their economic growth.⁵⁶

An important step toward new norms for international patent protection was the conference held June 11-July 14, 1967, in Stockholm, Sweden, by the United International Bureaux for the Protection of Intellectual Property (BIRPI). BIRPI administers the International Convention and other conventions and treaties in the patent, trademark, and copyright field. The most significant developments of this meeting may be summarized as follows:

(1) Establishment of a new organization — the World Intellectual Property Organization (WIPO) — to assume responsibility for the overall coordination of common administrative activities of the Paris Union (patents and trademarks) and the Berne Union (copyrights), and for the promotion of the protection of intellectual property on a worldwide basis.⁵⁷

(2) Revision of the Berne Copyright Convention, including, *inter alia*, a broadening of the criteria under which a work becomes eligible for Convention protection and the addition of a controversial Protocol aimed at the special needs of developing countries.

(3) Revision of the International Convention to provide for recognition of applications for inventors' certificates of the Soviet Union and certain other Eastern European countries as a basis for establishing a right of priority for patent applications.

(4) Revision of the administrative provisions of the Paris and Berne Unions to modernize administration, including finance and organizational structure.

A major hope for the future is the proposed Patent Cooperation Treaty, a first draft of which was released by BIRPI on May 31, 1967.⁵⁸ Designed to reduce substantially the burden of obtaining worldwide protection of inventions and innovations, the development of this draft treaty is a major step toward the long-range goal of a universal patent system.

The principal innovations of the proposed treaty are a single basic filing and processing of an international patent application and

⁵⁶ Winter, *The International Patent Policy of the United States Government*, INDUSTRIAL PROPERTY (Monthly Review of the United Int'l Bureaux for the Protection of Intellectual Property, Geneva), Mar. 1966, at 70.

⁵⁷ *Convention Establishing the World Intellectual Property Organization*, INDUSTRIAL PROPERTY, July 1967, at 155. A report of Main Committee V of the Conference, which dealt with proposals to establish WIPO, appears in INDUSTRIAL PROPERTY, Aug. 1967, at 185.

⁵⁸ Reprinted in 839 OFFICIAL GAZETTE, U.S. PATENT OFFICE 413 (1967). This draft was examined by a Committee composed of experts from 23 countries most advanced in patent matters and representatives of professional organizations which met in Geneva, Oct. 2-10, 1967, the report of which was reprinted in 846 OFFICIAL GAZETTE, U.S. PATENT OFFICE 5 (1968). As a result of this meeting, a revised draft was prepared for consideration by a second Committee of Experts. See Brenner, *Proposed Patent Treaty Is 'Giant Step Forward'*, INTERNATIONAL COMMERCE, Aug. 5, 1968, at 2.

an international search report which could provide the basis for the issuance of a patent in any member country. The treaty would thus eliminate the multiple filing of patent applications now required to obtain protection for an invention in a number of countries.

The proposed treaty is certainly a bold new approach to the problems which assail American businessmen in connection with their efforts to obtain effective patent protection in world markets. Like any innovation, it was initially received with apprehension and skepticism by some sectors of the patent profession.⁵⁹ However, when analyzed in the proper perspective, it is believed that the proposed treaty represents a substantial procedural advance toward the creation of a framework within which order and reasonable uniformity could be brought to the entire patent structure.⁶⁰

The International Convention applies to trademarks as well as patents. However, unlike the present situation in patents, it is possible to centralize the filing of applications to register trademarks through the vehicle of an "international registration" under a treaty known as the Madrid Arrangement. About 21 countries now belong, although the United States is not included.

Under the Madrid Arrangement, the trademark owner first registers his mark in the member country in which he is domiciled and then applies for an international registration of the same mark. This is communicated by the International Bureau in Geneva to trademark offices in other member countries which then may examine the local deposit in accordance with their own laws.

A United States trademark owner can take advantage of this if he has a bona fide industrial or commercial establishment in a member country. Therefore, an American company with a branch operation established in a Madrid Arrangement country may seek international registrations for its trademarks. Also, marks may be internationally registered in the name of a subsidiary located in a member country of the treaty. United States exporters without a foreign establishment do not possess this advantage, and there are some disadvantages in the delegation of ownership rights in trademarks to subsidiaries for those which do. For these reasons, United States membership in the Madrid Arrangement would appear to be desirable insofar as it would put American exporters on an equal footing with their com-

⁵⁹ Principal features of the treaty are outlined in O'Brien, *A Realistic Appraisal of the Draft Patent Cooperation Treaty*, 11 IDEA 159 (1967). A critical evaluation is given by Meller, *The Patent Cooperation Treaty—Utopia or Millennium*, 49 J. PAT. OFF. SOC'Y 565 (1967).

⁶⁰ Richenberg, *International Cooperation in Patents—Past, Present and Future*, 49 J. PAT. OFF. SOC'Y 734 (1967) views the BIRPI treaty as a realizable prospect for the immediate future. It is not the only approach, however, since regional arrangements, of which the proposed European patent system would be the exemplar, offer practical possibilities for countries at various stages of economic development. A "world patent office" issuing universal patents is still several light-years away.

petitors abroad in obtaining international registrations for their trademarks.⁶¹

By Executive Order and regulations issued under the Banking Law, a mandatory limit has been placed on direct investments by United States companies in foreign affiliates.⁶² A byproduct of this action is likely to be increased emphasis on licensing United States-owned patents, trademarks, and know-how abroad, since the opportunity to participate in the development and profits of a foreign business without making a direct investment is one of the principal advantages of licensing.⁶³ Furthermore, earnings from this source make a significant contribution to our balance of payments. However, the willingness of American businessmen to enter into licensing arrangements is dependent on the availability of legal safeguards. Progress toward an improved international system of industrial property protection is therefore vital if the full potential of foreign licensing is to be realized.

CONCLUSION

From the foregoing it will be clear that much has been done to eliminate the obstacles which hinder American industry from a larger role in world trade. I have dealt in this article with some of the "nuts and bolts" of exporting and tried to suggest little more than some tightening and readjustments. Projects of more ambitious scope and drastic impact have been avoided, such as the formulation of an International Companies Act,⁶⁴ or international rules for mergers,⁶⁵ or a code for the protection of foreign property.⁶⁶ These represent basic improvements for the long run. For the immediate future, however, I would propose the following as a practical listing of realizable goals conducive to achieving a trade surplus adequate to our balance of payments needs:

(1) Greater support and participation by United States companies in international standardization efforts, whether they export

⁶¹ See generally *Symposium—Should the United States Adhere to the Madrid Agreement?*, 56 TRADEMARK REP. 290 (1966).

⁶² Exec. Order No. 11,387, 33 Fed. Reg. 47 (1968); Foreign Direct Investment Regulations, 33 Fed. Reg. 49 (1968); Dep't of Commerce Order 184-A, Establishment of Office of Foreign Direct Investments, 33 Fed. Reg. 54 (1968).

⁶³ NATIONAL INDUSTRIAL CONFERENCE BOARD, INC., STUDIES IN BUSINESS POLICY, FOREIGN LICENSING AGREEMENTS, I. EVALUATION AND PLANNING, No. 86, at 7 (1958).

⁶⁴ See Ball, *Cosmocorp: The Importance of Being Stateless*, 2 COLUM. J. OF WORLD BUS. 25 (1967).

⁶⁵ See Speech by Hauge, 54th National Foreign Trade Convention, Oct. 30-Nov. 1, 1967 (reprinted in 113 CONG. REC. H 15,447 (daily ed. Nov. 16, 1967)).

⁶⁶ See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, DRAFT CONVENTION ON THE PROTECTION OF FOREIGN PROPERTY AND RESOLUTION OF THE COUNCIL OF THE OECD ON THE DRAFT CONVENTION (Paris 1967).

directly, manufacture abroad, or enter markets through licensing arrangements.

(2) Prompt notification to the Department of Commerce of the existence of standards which bar access to foreign markets for United States products.

(3) Completion of implementing action on the five Customs Conventions which were ratified by the Senate on March 1, 1967, so that the facilities they provide can be made available to United States business as soon as possible.

(4) Intensification of United States participation in organizations engaged in the unification of international trade law.

(5) Unification and modernization of commercial arbitration procedures in the interest of providing speedy and inexpensive resolutions of international business disputes and prompt enactment of legislation to permit accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

(6) Harmonization of the patent and trademark laws and systems of different countries by international agreements eventually leading to the establishment of both an international patent system and an international trademark system.