United Nations A/CN.9/WG.IV/WP.89

General Assembly

Distr.: Limited
20 December 2000
English
Original: French

United Nations Commission on International Trade Law
Working Group on Electronic Commerce
Thirty-eighth session
New York, 12-23 March 2001

Legal aspects of electronic commerce

Legal barriers to the development of electronic commerce in international instruments relating to international trade: ways of overcoming them

Note by the Secretariat

1. At the thirty-second session of the Commission, in 1999, various suggestions were made with respect to future work in the field of electronic commerce, for possible consideration by the Commission and the Working Group after completion of the uniform rules on electronic signatures. It was recalled that, at the close of the thirty-second session of the Working Group, a proposal had been made that the Working Group might wish to give preliminary consideration to undertaking the preparation of an international convention based on relevant provisions of the UNCITRAL Model Law on Electronic Commerce and of the draft uniform rules (A/CN.9/446, para. 212).[1] The Commission was informed that interest had been expressed in a number of countries in the preparation of such an instrument.

2. The attention of the Commission was drawn to a recommendation adopted on 15 March 1999 by the Centre for the Facilitation of Procedures and Practices for Administration, Commerce and Transport (CEFACT) of the United Nations Economic Commission for Europe (ECE).[2] That text recommended that UNCITRAL consider the actions necessary to ensure that references to "writing", "signature" and "document" in conventions and agreements relating to international

[1] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 209.

[2] The text of the recommendation to UNCITRAL is contained in document TRADE/CEFACT/1999/CRP.7. Its adoption by CEFACT is stated in the report of CEFACT on the work of its fiftieth session (TRADE/CEFACT/1999/19, para. 60).

V.00-60330 (E) 100101 170101

trade allowed for electronic equivalents. Support was expressed for the preparation of an omnibus protocol to amend multilateral treaty regimes to facilitate the increased use of electronic commerce.

3. Other items suggested for future work included: electronic transactional and contract law; electronic transfer of rights in tangible goods; electronic transfer of intangible rights; rights in electronic data and software (possibly in cooperation with the World Intellectual Property Organization (WIPO)); standard terms for electronic contracting (possibly in cooperation with the International Chamber of Commerce (ICC) and the Internet Law and Policy Forum (ILPF)); applicable law and jurisdiction (possibly in cooperation with the Hague Conference on Private International Law); and on-line dispute settlement systems.[3]

4. The Commission took note of the above proposals. It was decided that, upon completing its current task, namely, the preparation of draft uniform rules on electronic signatures, the Working Group would be expected, in the context of its general advisory function regarding the issues of electronic commerce, to examine some or all of the above-mentioned items, as well as any additional items, with a view to making more specific proposals for future work by the Commission.[4]

5. At its thirty-third session, the Commission held a preliminary exchange of views regarding future work in the field of electronic commerce. Three topics were suggested as indicating possible areas where work by the Commission would be desirable and feasible. The first dealt with electronic contracting, considered from the perspective of the United Nations Sales Convention, which was generally felt to constitute a readily acceptable framework for on-line contracts dealing with the sale of goods. It was pointed out that, for example, additional studies might need to be undertaken to determine the extent to which uniform rules could be extrapolated from the United Nations Sales Convention to govern dealings in services or "virtual goods", that is, items (such as software) that might be purchased and delivered in cyberspace. It was widely felt that, in undertaking such studies, careful attention would need to be given to the work of other international organizations such as WIPO and the World Trade Organization.

6. The second topic was dispute settlement. It was noted that the Working Group on Arbitration had already begun discussing ways in which current legal instruments of a statutory nature might need to be amended or interpreted to authorize the use of electronic documentation and, in particular, to do away with existing requirements regarding the written form of arbitration agreements. It was generally agreed that further work might be undertaken to determine whether specific rules were needed to facilitate the increased use of on-line dispute settlement mechanisms. In that context, it was suggested that special attention might be given to the ways in which dispute settlement techniques such as arbitration and conciliation might be made available to both commercial parties and consumers. It was widely felt that the increased use of electronic commerce tended to blur the distinction between consumers and commercial parties. However, it was recalled that, in a number of countries, the use of arbitration for the settlement of consumer disputes was restricted for reasons involving public policy considerations and might not easily lend itself to harmonization by international organizations. It was also felt that

---

[3] Ibid., *Fifty-second Session, Supplement No. 17* (A/52/17), para. 251, and ibid., *Fifty-third Session, Supplement No. 17* (A/53/17), para. 211.

[4] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 315-318.

attention should be paid to the work undertaken in that area by other organizations, such as ICC, the Hague Conference on Private International Law and WIPO, which was heavily involved in dispute settlement regarding domain names on the Internet.

7. The third topic was dematerialization of documents of title, in particular in the transport industry. It was suggested that work might be undertaken to assess the desirability and feasibility of establishing a uniform statutory framework to support the development of contractual schemes currently being set up to replace traditional paper-based bills of lading by electronic messages. It was widely felt that such work should not be restricted to maritime bills of lading, but should also envisage other modes of transportation. In addition, outside the sphere of transport law, such a study might also deal with issues of dematerialized securities. It was pointed out that the work of other international organizations on those topics should also be monitored.

8. After discussion, the Commission welcomed the proposal to undertake studies on the three topics. While no decision as to the scope of future work could be made until further discussion had taken place in the Working Group on Electronic Commerce, the Commission generally agreed that, upon completing its current task, namely, the preparation of draft uniform rules on electronic signatures, the Working Group would be expected, in the context of its general advisory function regarding the issues of electronic commerce, to examine, at its first meeting in 2001, some or all of the above-mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by the Commission. It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.

9. Particular emphasis was placed by the Commission on the need to ensure coordination of work among the various international organizations concerned. In view of the rapid development of electronic commerce, a considerable number of projects with possible impact on electronic commerce were being planned or undertaken. The Secretariat was requested to carry out appropriate monitoring and to report to the Commission as to how the function of coordination was fulfilled to avoid duplication of work and ensure harmony in the development of the various projects. The area of electronic commerce was generally regarded as one in which the coordination mandate given to UNCITRAL by the General Assembly could be exercised with particular benefit to the global community and deserved corresponding attention from the Working Group and the Secretariat.[5]

10. Concerning the measures to be taken in response to the recommendation adopted by CEFACT on 15 March 1999, the Secretariat decided to examine the public international law issues that would be raised by the actions necessary to ensure that references to “writing”, “signature” and “document” in conventions and agreements relating to international trade allowed for electronic equivalents (see above, para. 2). To that end, it sought the assistance of Ms. Geneviève Burdeau, Professor at the University of Paris I—Panthéon Sorbonne, Associate of the International Law Institute and Secretary-General of The Hague Academy of International Law. The text of the advisory opinion prepared by Ms. Burdeau at the request of the Secretariat is reproduced as an annex to this note.

---

[5] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), paras. 384-388.

Annex

Adaptation of the evidentiary provisions of international legal instruments relating to international trade to the specific requirements of electronic commerce

Public international law study by Geneviève Burdeau, Professor at the University of Paris I—Panthéon Sorbonne, prepared at the request of the UNCITRAL Secretariat

1. The need to adapt the provisions of domestic and international legal instruments to the specific requirements of electronic commerce has been emerging for some 15 years both at the national level and at the international level. That need has not escaped the attention of UNCITRAL, which has played a pioneering role in this respect through the issue, as early as 1985, of a recommendation on the legal value of computer records and the subsequent adoption, in 1996, of a Model Law on Electronic Commerce with Guide to Enactment. At the same time as UNCITRAL was endeavouring, with the support of the General Assembly of the United Nations, to encourage States to adapt their domestic law provisions concerning rules of evidence, the United Nations Economic Commission for Europe (ECE) was also addressing the need to adapt the many international conventions containing references to writings, written documents and the requirement of a handwritten signature and to provide for electronic equivalents. A survey conducted by ECE, published on 22 July 1994 (TRADE/WP.4/R.1096), which carried out an inventory of various conventions and other instruments relating to international trade affected by these definitions as well as a review of the relevant clauses, was the subject of a revision published on 25 February 1999 (TRADE/CEFACT/1999/CRP.2).

2. That study provides an overview of the existing situation and indicates the avenues that might be explored with a view to adapting all these international instruments to the requirements involved in developing the use of computer technology and the Internet in international trade. Every possible effort should be made to avoid undertaking a vast number of specific procedures for revising the conventions in question, as such procedures would frequently prove laborious and in some cases be of uncertain outcome and would not necessarily offer any guarantee of the hoped-for standardization of the definitions.

3. In a recommendation adopted on 15 March 1999 (TRADE/CEFACT/1999/CRP.7 and TRADE/CEFACT/1999/19, para. 60), the Centre for the Facilitation of Procedures and Practices for Administration, Commerce and Transport (CEFACT), established by ECE, stressed the fact that, under the rules set out in some international conventions, electronic messages were unacceptable as forms of evidence, a situation which constituted a barrier to the development of electronic commerce and a disadvantage in relation to traditional commercial practices. CEFACT accordingly urged UNCITRAL to pursue measures in order to ensure that references to “writing”, “signature” and “document” in international agreements and conventions would also allow for their electronic equivalents.

I. Legal analysis of the existing situation

4. It would be appropriate to start from the facts that can be established by reading the above-mentioned CEFACT survey (TRADE/CEFACT/1999/CRP.2) on conventions relating to international trade or transport. Two types of clauses form the subject of the inventory: the clauses contained in the substantive parts of the various conventions that refer to "writing", "signature" or "document" and the final clauses of those same conventions that relate to the amendment or revision of the conventions concerned.

5. Those treaty provisions are not, however, the only clauses to be taken into account. It is also necessary to consider the scope of new provisions introduced by States into domestic law in recent years, whether on their own initiative or in response to the General Assembly's recommendation that they incorporate the UNCITRAL Model Law or for the purpose of conforming to a particular regional legal instrument on statutory harmonization (for example, the European Union directive of 13 December 1999 on a "Community framework for electronic signatures", Official Journal of the European Communities, 19 January 2000, L13, p. 12).

6. Consideration should also be given to how the rules concerning formalities and evidence currently laid down by the international conventions might be viewed in relation to the law of the World Trade Organization (WTO) and consequently to the relevance of certain rules of that law.

A. Related substantive provisions

7. It can be seen from the inventory carried out in the aforementioned surveys of 1994 and 1999 (see above, para. 1) that the wording of the clauses concerning formalities and evidence reveals an extremely diversified situation.

8. In several cases, recently established instruments refer directly to forms of evidence that are specific to electronic commerce and may be regarded as wholly or only partly satisfactory. Conversely, some long-standing instruments have been drafted in such a way that they necessarily entail references to a paper-based signature, writing or document. Also, a number of instruments that were drawn up in a context where the focus was on the requirement of written evidence or of evidence authenticated in paper form might, by dint of a "constructive" interpretation, be regarded as applying also to electronic documents, writings and signatures. This last assumption would presuppose that legal interpretations are made to that effect, which is uncertain and risky and does not offer satisfactory answers to the specific questions of international commercial operators, who need to have clear, pre-established rules guaranteeing the legal certainty of their operations and their international recognition.

9. Without examining in detail the different provisions concerned with signatures, writings or documents, it is clear that there is an urgent need to update a number of inventoried instruments. It goes without saying that, if a case-by-case adaptation of the instruments were feasible, it would nevertheless be desirable, for the above-mentioned reasons of legal certainty, for the new definitions of the terms "signature", "writing" and "document" to be unified and for the same type of

definition to be adopted in the case of each of the instruments in question by using, for example, the definitions appearing in the UNCITRAL Model Law. The unification work undertaken would thus be completed and it would be possible to avoid the risk of inconsistencies between international and domestic instruments and the resulting uncertainties.

B. Relevant rules of revision

10. The above-mentioned CEFACT survey provides a quantitative indication of the magnitude of the problem. No less than some thirty conventions, multilateral agreements, uniform model laws or standard rules relating to international commercial dealings or international carriage are involved. The extreme diversity of the legal situations and clauses in question is striking and calls for a number of observations.

1. Legal regime and status of the instruments involved

11. The legal status of these different instruments, which are all intended to serve as a guide to the legal aspects of the practice of international commercial operators, is extremely diverse since they include both multilateral conventions having the nature of treaties as well as recommendations or standard rules established by international organizations (or their bodies), in most instances intergovernmental organizations, such as UNCITRAL or the International Civil Aviation Organization (ICAO), but also non-governmental organizations (the International Chamber of Commerce (ICC), the International Air Transport Association (IATA) or the International Federation of Freight Forwarders' Associations (FIATA)), and even rules derived from previously existing conventions.

12. In the first place, the legal effects of these instruments differ: mandatory legal force solely for the parties in the case of treaties, mandatory force for all members of the organization concerned in the case of the ICAO regulations, professional commitment in the case of the IATA rules, international trade practices, recommendations having no binding legal force and standard provisions proposed to States or operators.

13. The legal regime applicable to these instruments is also varied. In some cases, the rules of public international law relating to treaties have to be consulted and implemented, while in other cases the rules specific to a particular international organization will be concerned. Sometimes, an actual treaty revision will be involved, with its uncertainties regarding, for example, the effects of an amendment, as will be seen below. Other cases will entail the amendment of a unilateral instrument of an international organization.

2. Status of the international conventions

14. In the case of actual international conventions, not all are yet in force. With regard to the conventions already in force, the possible question of their amendment or revision would arise. Several situations can be noted in this respect.

15. Some of these conventions contain clauses relating to their amendment, which would in principle have to be observed if the conventions are to be amended for the

purpose of inserting uniform provisions concerning the new definitions of "signature", "writing" and "document". There are few conventions that set out a full or extensive amendment procedure (but see the Convention concerning International Carriage by Rail (COTIF) of 1980).

16. Other conventions contain amendment or revision clauses that lay down special requirements concerning only certain specific aspects of the procedure, for example with regard to calling a review conference, for which purpose several instruments stipulate that a single State party may do so (see, for example, the International Convention for the Unification of Certain Rules relating to Bills of Lading, Brussels, 1924; the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Warsaw, 1929; and the Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 1956) or that one third of the States parties must do so (United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules)).

17. In most cases, the revision clauses are thus either non-existent or inadequate, which necessarily gives rise to the application of the customary rules of international law concerning the amendment or modification of treaties. These rules have been codified in article 40 of the Vienna Convention on the Law of Treaties, concluded on 23 May 1969. The relatively flexible provisions of that article can probably be regarded at the present time as actually expressing the customary rule in this regard and not as purely treaty rules introduced as part of the progressive development of international law.

18. In article 40 of the Vienna Convention on the Law of Treaties, a number of rules concerned with the procedure for amending multilateral treaties are set out that are of a supplementary nature and, in addition, are not comprehensive. It will be noted that those provisions do not conflict with the revision clauses referred to above that can be found in some of the conventions examined in the aforementioned CEFACT survey. The text of the Vienna Convention provides as follows in this respect:

> "1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.
>
> "2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:
>
> (a) The decision as to the action to be taken in regard to such proposal;
>
> (b) The negotiation and conclusion of any agreement for the amendment of the treaty.
>
> "3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended."

19. That article also lays down rules concerning the effects of amendments to treaties that duly respect the will of States and the principle of contract privity but have the effect of disrupting the unity of application of the treaty provisions and of introducing a certain inconsistency in the obligations under the treaties depending on whether States have agreed to the amendments or not. The text of article 40 continues as follows:

"4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such States.[6]

"5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(a) Be considered as a party to the treaty as amended; and

(b) Be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

20. As can be seen, the effect of an amendment to a multilateral convention is conditional upon its acceptance by the States parties to the original treaty. An amended treaty will thus be effective between States that have ratified the amendment but the treaty will continue to apply in its original wording not only between States that have not ratified the amendment but also between both groups of States. Apart from the fact that the Vienna Convention does not indicate either the majority by which, unless stated in the final clauses, the text of an amendment may be deemed adopted or the conditions under which it may be deemed in force (are two ratifications sufficient?), a situation which could well give rise to possible procedural questions, the latter paragraphs of article 40 do not meet the desired objective of standardization. Indeed, article 40 is concerned only with international conventions, for which it does not provide any guarantee at all that this objective will be easily attained. The amendment approach in fact requires that a vast number of inevitably lengthy and uncertain revision procedures be conducted in parallel in order to produce an effect that is conditional upon the completion of national ratification processes, whose finalization by all the States parties to the conventions could well take some considerable time.

3. The specific case of conventions not yet in force

21. The revision procedure would appear to be unusable with regard to conventions not yet in force.

22. In accordance with the law of treaties, the act of signing denotes in principle the end of the negotiations and at the same time authenticates the text of the treaty that is the outcome of the negotiations. Under international law, there is in theory nothing to prevent the States in question from reopening the negotiations. This sometimes happens in the case of bilateral treaties. The issue is more difficult in the case of multilateral treaties, especially where some States have already ratified the original instrument and are thus bound on the basis of its initial wording. Such a situation did, however, occur with regard to the United Nations Convention on the Law of the Sea of 10 December 1982, the Montego Bay convention. Given the time and difficulty involved in collecting the sixty ratifications required for the entry into force of the convention, some of whose provisions were encountering persistent

[6] Article 30, paragraph 4 (b): "As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

opposition from a number of industrialized countries,[7] the need arose for the text of the convention to be adapted. It was out of the question to reopen the negotiations on the entire text of the Montego Bay convention, whose preparation had taken approximately ten years. The solution was found in an "Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea" adopted on 29 July 1994 and implemented provisionally even before the required number of ratifications had been obtained for its entry into force on 28 July 1996. Through its annex, that "agreement", under the guise of a simple "interpretation", actually amended several provisions of the convention. Such a method of revision, albeit unusual, might possibly serve as guidance in the matter now under examination.

4. Non-treaty instruments

23. In the case of non-treaty instruments, reference should be made to the relevant provisions of their issuing organizations. It would at first sight seem that their revision depends primarily on political will, since the procedures are relatively flexible. In several instances, as already emphasized, the instruments in question have no legally binding force but constitute reference texts of practical importance.

C. The risk of undermining the effect of the UNCITRAL Model Law on Electronic Commerce

24. To conclude this examination of the existing legal situation, attention should be drawn to the risk of the UNCITRAL Model Law on Electronic Commerce being rendered ineffective unless the texts of the international conventions undergo a parallel adaptation. In many States, it is in fact considered that international treaties rank above laws and should prevail in the event of conflict, even if the conflicting law is subsequent to the treaty. It could thus happen that, in a State where a national law that conforms to the UNCITRAL Model Law on Electronic Commerce has been adopted, its provisions are rejected by a court in favour of provisions of old conventions that require paper-based documents or handwritten signatures. The initiative undertaken to unify the law through the dissemination of this model legislation in the different States cannot therefore be regarded as entirely satisfactory and constitutes only a necessary but inadequate stage.

D. Emergence of a barrier to the development of electronic commerce

25. The idea that the incompatibility of the definitions of the terms "signature", "writing" and "document" with the specific requirements of trade via the Internet could constitute a barrier to the development of electronic commerce and cause discrimination between such commerce and traditional commerce is quite clearly apparent from the above-mentioned recommendation adopted by CEFACT on 15 March 1999, which states the following: "Being aware of the need to avoid

---

[7] The requisite number of ratifications (60) was about to be reached in the early 1990s but the non-participation of a sufficient number of industrialized States would probably have jeopardized the establishment of the International Seabed Authority, whose financing was in danger of becoming problematical.

disadvantage to electronic commerce and support efforts to achieve global parity in law between manual and electronic commerce" (TRADE/CEFACT/1999/CRP.7).

26. To date, this idea appears not to have been developed to any great extent at WTO even though that organization is monitoring the issue of the development of electronic commerce. The discernible discrimination between these two forms of commerce does not at first sight seem to come within the ambit of the two major legal principles laid down by the General Agreement on Tariffs and Trade (GATT) to guarantee non-discrimination: the most-favoured-nation clause (article I) and the national treatment principle (article III). In principle it transcends them but could under certain circumstances be seen as disguising a national preference.

27. It is more likely that a restriction to paper-based forms of evidence and the resulting exclusion of forms of evidence that are specific to electronic commerce could appear either as a new kind of non-tariff barrier or as a limitation on market access.

II. Considerations regarding avenues to be explored

28. The above analysis of the existing situation appears to indicate several avenues for consideration that might help determine the actions necessary to ensure that the scope of the new definitions of the terms "signature", "writing" and "document" encompasses the legal relations established in the international instruments inventoried in the above-mentioned ECE surveys of 1994 and 1999. However, it would seem from the findings of this examination that UNCITRAL might possibly not confine its objective to a reworking of the existing instruments (in the hope that future international instruments will conform to the definitions set out in the Model Law) but could seek to develop on a broader basis an international reference instrument, as a counterpart, on the international level, to the Model Law, that all States would be encouraged to implement. Thus, both for reasons of legal policy and for strictly technical reasons, efforts might be focused on a general text rather than on a series of specific revisions.

29. Concerning the choice of the type of instrument to be envisaged, thought might be given to the respective advantages of a treaty approach and of a non-treaty (i.e. resolution, recommendation) approach.

30. One question which naturally arises, given the possible reluctance, lack of information or simple apathy of some States, is that of the best way to ensure the widest geographical coverage of the new definitions of forms of evidence.

31. This question has to be viewed in the light of the analysis that can be made of the rules relating to electronic forms of evidence. From the viewpoint of international commercial operators, the question is considered in its traditional private law aspect: evidential rules are of key importance in contractual matters and in the settlement of disputes between commercial parties. It is in this context that UNCITRAL's work has to date been essentially carried out, in line with its mandate of increasing legal security for international commercial operators. Without questioning this traditional approach, which remains fundamental, it would be possible also to take in a more macroeconomic view by referring to the requirements arising under WTO law. From that perspective, might one not in fact regard

restrictions on the use of forms of evidence that are specific to electronic commerce as constituting obvious barriers to the development of this type of commerce?

1. Inappropriateness of a specific revision of each international instrument

32. The above analysis of the methods for revising the various instruments affected by the terms "writing", "signature" and "document" clearly shows that an undertaking involving a case-by-case revision approach would be particularly time-consuming, laborious and of uncertain outcome both as regards the content (since it cannot be fully guaranteed that the new definitions adopted in each instance would necessarily be identical) and as regards the *ratione personae* effect of the revisions thus carried out.

33. It is of course quite possible to envisage revisions being undertaken, within the context of each convention or each international organization concerned, for the purpose of progressively incorporating new definitions to replace the old ones but, if the desired outcome is relatively speedy unification, then the revision approach is probably not the most appropriate.

34. Under such circumstances, the desired goal would appear to be a triple one: firstly to arrive at a single definition of the terms in question, which would thereafter constitute a kind of mandatory reference intended not only to supplement the traditional definitions but also to be incorporated in a virtually automatic manner into future instruments; secondly to ensure that this definition is inserted in the existing instruments, irrespective of the nature of those instruments (treaty, subordinate legislation, recommendation); and thirdly to have these definitions apply to the largest possible number of States and, in any case, to all those bound by any of the international instruments inventoried in the above-mentioned CEFACT survey.

2. Preparation of a single instrument: possible options

35. The preparation of a single text, containing a standardized definition of "signature", "writing" and "document", that would ensure a comprehensive revision of all the inventoried international instruments (but without thereby excluding other texts) and give the forms of evidence specific to electronic commerce a status equal to that accorded in traditional commerce thus appears desirable. At this stage, there are several options, each presenting various advantages and drawbacks.

(a) A treaty or non-treaty instrument?

36. The first option is basic. It involves deciding whether it would be preferable to have a treaty instrument, such as an interpretative agreement, a supplementary agreement or a protocol, or alternatively to have a non-treaty instrument, such as guidelines or a recommendation on interpretation. As is known, the advantage of the first of these arrangements is that it would mean the emergence of a prescriptive legal instrument having a mandatory scope of application and thus a status equal to that of the already existing treaty instruments. Its drawback lies in the fact that an agreement, in line with established principles of international law, has binding force only as between the States that are parties to it. By contrast, a non-treaty instrument, provided that a sufficiently broad forum is chosen for its preparation (for example, the General Assembly of the United Nations or UNCITRAL), would have, albeit

only as a recommendatory document, a wider scope since it is aimed at virtually all member States of the international community.

(b) A new convention or an interpretative agreement?

37. If the treaty approach is the desired course of action, it should be recalled at this point that an amendment to an international treaty may be undertaken through a procedure other than the customary revision procedure, as already considered, conducted in conformity with the provisions of the previously existing treaty or in accordance with the rules set out in article 40 of the Vienna Convention. It has always been accepted that States could amend an existing agreement by a subsequent agreement. The effects of such an agreement are simple in the case of two successive bilateral treaties or in circumstances where all the parties to the previous treaty are also parties to the subsequent treaty. The Vienna Convention, in its article 59, in fact provides as follows for the eventuality of a conflicting subsequent agreement:

> "1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
>
> (a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
>
> (b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time."

38. What is being envisaged in the case under examination is obviously not a conflicting subsequent agreement but rather a simple amending agreement that would be concerned solely with defining the concepts of writing, signature, original and other forms of evidence. The question of the application of successive treaties relating to the same subject-matter is provided for under the Vienna Convention in paragraphs 3 and 4 of its article 30, which read as follows:

> "3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> "4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) As between States parties to both treaties the same rule applies as in paragraph 3;
>
> (b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

39. It is thus clearly possible to envisage a single agreement that would deal with the new definitions of the terms "signature", "writing" and "document" and would in a way supplement the corresponding provisions of all the previously existing conventions. It may be envisaged that this single agreement would also specify that it is intended to bind the States parties in the implementation of non-treaty instruments involving these definitions.

40. It would be possible to avoid giving this single instrument what could be the formal nature of a "revision" of earlier instruments and to envisage the more bland alternative of an interpretative agreement, since in most instances there is no question of any conflict with previously existing instruments but, as shown above, there is a need in some cases to specify the meaning of terms that are capable of a somewhat restrictive interpretation and in others to give the terms "signature", "writing" and "document" a meaning that could clearly not have been envisaged when the instruments in question were drawn up. International courts regularly interpret the terms of international conventions in the light of developments that these concepts may have undergone, taking account, in particular, of technological developments.[8] It would thus be a question of setting out, in an international agreement, the "authentic" interpretation—i.e. the parties' own interpretation—of the provisions contained in the different instruments that bind them, irrespective of their legal status (international treaty, subordinate legislation, recommendation). With such a single interpretative agreement in simple form that would be common to all the international instruments regardless of their legal force, the standardization goal would appear to be quite easily achievable and it would thereby be possible to avoid directly raising either the question of the actual "amendment" of existing instruments, which in any case is not the desired aim, or the question of the regularity of the revision procedure. Furthermore, the nature of an interpretative agreement would make it possible to counter any criticism as to whether the normal procedure for revising conventions should have been followed.

(c) Forum for drawing up such an instrument

41. Provided that the chosen approach is an interpretative agreement rather than an actual amending instrument, UNCITRAL would clearly appear to be the appropriate forum for its preparation since this task comes precisely within its mandate of "promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade."[9] Such an arrangement would make it possible to avoid the issue of the competing suitability of other forums (conferences of the parties to previously existing conventions, international organizations, non-governmental organizations) where the different inventoried instruments were drawn up. It would also have the merit of presenting judges and arbitrators with a single reference. The standard procedure for the agreement's adoption by an intergovernmental conference open to all States could then enable the agreement to be legally formalized.

---

[8] Cf., for example, in recent decisions of WTO's Appellate Body: "The words in Article XX (g), 'exhaustible natural resources', were actually crafted more than 50 years ago. They must be read (...) in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. (...) the generic term 'natural resources', in Article XX (g), is not 'static' in its content or reference but is rather 'by definition evolutionary'". United States. Import prohibition of certain shrimp and shrimp products. Report of the Appellate Body, 12 October 1998, WT/DS 58/AB/R, paras. 129 and 130.

[9] General Assembly resolution 2205 (XXI), section II, para. 8 (reproduced in the UNCITRAL Yearbook 1968-1970, part one, chap. II, sect. E).

(d) Form of interpretative agreement

42. Since an interpretative agreement is generally regarded as being intended not to amend a previously existing treaty but simply to precisely define its terms in order to avoid difficulties of implementation by individuals or judges, States could probably without too much difficulty be satisfied with the alternative of the simplified form of agreement, which is in fact common practice in this field. The major advantage of such an alternative would naturally be simplicity and speed of implementation since the simple signature of the States' representatives would be sufficient. That could take place upon finalization of the interpretative agreement and would avoid the uncertainties and slowness involved in the domestic constitutional procedures that accompany treaty ratifications, not to mention the effects of the frequent failure on the part of national administrations to follow up ratification procedures, which is due more often to inaction rather than to actual substantive objections.

43. Nothing would appear to stand in the way of this solution. Signature is even the first of the means of expressing consent set out in article 11 of the Vienna Convention on the Law of Treaties, which does not establish any hierarchy or differentiation between treaties based on this criterion. The legal literature expresses the unanimous view that an agreement in simplified form is not inferior to a formal treaty and that there is no matter of a nature that could be regarded under international law as barring the use of the simplified form of agreement.[10] The example of GATT 1947 provides an outstanding demonstration of this. In bilateral dealings, simplified interpretative agreements in the form of exchanges of letters or exchanges of notes abound. Although less common in multilateral relations, they do not appear to present any serious legal problems but the most appropriate form of drafting would probably be that of the standard agreement.

44. While States usually prefer to adhere to the traditional procedure of concluding treaties in cases involving instruments whose normative content is substantial and concerned with matters which from a domestic constitutional viewpoint entail a parliamentary examination, since this is a question of respecting parliaments' areas of competence, the situation can be assumed to be different in the case of a simple interpretative agreement whose purpose is not to amend the substantive obligations arising under international conventions but simply to specify the meaning of certain terms or to adapt definitions in line with technological developments.

45. With regard to domestic law, provided that the publication formalities most frequently laid down are observed, national courts have for a long time agreed as a general rule to treat the simplified form of agreement on the same level as a solemn form of agreement, even in States whose constitutions, such as the constitution of the United States of America, do not expressly empower the executive to sign such agreements.[11]

46. The simplified form of agreement should not normally give rise to any particular reluctance on the part of States in the case of an interpretative agreement.

---

[10] Cf., for example, Daillier and Pellet, *Droit international public*, 6th edition, LGDJ Paris, 1999, No. 84; Combacau and Sur, *Droit international public*, 4th edition, Montchrestien, Paris, 1999, p. 118; L. Wildhaber, Executive agreements, in R. Bernhardt, ed., *Encyclopaedia of Public International Law*, volume II, 1995, p. 316.

[11] See, on this point, L. Wildhaber, op. cit. and the above-mentioned judicial decisions.

If, however, objections are raised by some States owing to specific aspects of their national constitutional rules, it would be quite possible to provide for a dual system whereby the final clauses of the interpretative agreement would enter into force with respect to a State either upon signature, if the State indicates that its signature has the effect of binding it, or following notification to the treaty depositary of the completion of the formalities required under the State's domestic law for indicating its consent to being bound by the agreement. Public international law is in fact very flexible in this respect and dual arrangements of this kind are not exceptional in contemporary practice.

3. How can the universal application of the instrument introducing the new definitions be ensured?

47. Even if an interpretative agreement is less formal in nature than an amending agreement and if, as suggested above, the use of the simplified form of agreement would make it possible from the outset to expect broad participation by States and immediate entry into force, there is no doubt that it will retain the character of a treaty and that the principles of international law which are concerned with respect for the will of States, in particular the principle of contract privity, will apply in that regard. It cannot therefore be ruled out that some States, for various reasons, will not sign the interpretative agreement straightaway or will feel that it calls for further examination by the national authorities. In such circumstances, the "omnibus" effect being sought through the choice of the alternative of an agreement in simplified form might not be achieved. It is important that the largest possible number of States should be bound by the interpretative agreement not only in order to ensure the development of electronic commerce on an equal footing with traditional commerce but also because, as has been seen, the environments of the States that are bound by the instruments to be revised are extremely diverse and the desired goal is through this single interpretative agreement to encompass all those instruments which contain the terms "signature", "writing" and "document", regardless of the list of States affected by each of these instruments.

(a) Supplementary involvement of the General Assembly

48. It would accordingly appear desirable to consider attempting to widen the reach of the interpretative agreement by making use of the universal impact of recommendations of the General Assembly. Consideration might in fact be given to the possible adoption of a resolution by the General Assembly recommending all members to sign the interpretative agreement. If necessary, with a view to making the resolution more forceful, a standard reporting system could be envisaged in order to require States to indicate the measures taken by them to sign the interpretative agreement. It would also be possible to envisage that the United Nations Conference on Trade and Development might lend its support to developing countries' signing of the interpretative agreement through the adoption of a parallel resolution.

(b) Cooperation with other international organizations

49. While UNCITRAL's work on forms of evidence that can be used in electronic commerce has already reached a practical legislative stage with the adoption of the Model Law, other international organizations have been looking into the prospects opened up by electronic commerce in the context of trade liberalization, in particular the Organisation for Economic Cooperation and Development (OECD), which adopted an action plan at the ministerial conference which was held in Ottawa, in 1998, on the theme "A borderless world: realizing the potential of global electronic commerce", and WTO, which, following the 1998 Ministerial declaration on global electronic commerce, initiated a work programme directed jointly by the Council for Trade in Goods, the Council for Trade-Related Aspects of Intellectual Property Rights, the Council for Trade in Services and the Committee on Trade and Development. The work of those two organizations reflects the desire for cooperation with other international organizations. It is thus conceivable that OECD and, more especially, WTO might offer their assistance in encouraging States to sign the interpretative agreement.

50. The cooperation of ICAO, with regard to the instruments which involve it, and of IATA should also be sought.

4. Linkage of the envisaged revision with WTO law

51. As can be seen from the foregoing, the idea that the incompatibility of the definitions of "signature", "writing" and "document" with the particular features of electronic commerce may constitute a barrier to the development of this type of commerce and place it on an inferior level to conventional commerce has been put forward within the United Nations. However, as indicated above, the conflict of this inconsistency with WTO law is not glaringly obvious. Indeed, the concern of WTO law is primarily to avoid discrimination in the treatment of the member States' trade. However, the distinction between traditional commerce and electronic commerce does not come within the ambit of any such discrimination. It would be fruitless to look for provisions addressing that concern in the General Agreement on Trade in Services or in the Agreement on Technical Obstacles to Trade. Similarly, the inadequacy of evidentiary definitions cannot really be regarded as involving a set of administrative formalities. However, there is no doubt that any restraints arising in this area constitute barriers to the development of a certain form of international trade. Therefore, it would probably not be difficult to persuade the WTO General Council to take up a position on this matter by issuing a recommendation and to encourage the adoption of definitions of the terms "signature", "writing" and "document" that are compatible with the development of electronic commerce. Such support would be particularly useful given the broad composition of WTO and its training role in the field of international law for the benefit of developing member States.

III. Conclusion

52. In conclusion, the most efficient technique for updating, under optimum conditions of speed and coverage, the definitions contained in all the different instruments inventoried in the survey conducted by CEFACT would appear to be the

conclusion, at the initiative of UNCITRAL, of an interpretative agreement in simplified form for the purpose of specifying and supplementing the definitions of the terms “signature”, “writing” and “document” in all existing and future international instruments, irrespective of their legal status. The effectiveness of such an agreement and its widest possible coverage could be encouraged through a General Assembly resolution and through recommendations issued, in particular, by OECD and the WTO General Council.

14 December 2000

Geneviève Burdeau

Professor at the University of Paris I—Panthéon Sorbonne

Associate of the International Law Institute

Secretary-General of The Hague Academy of International Law