CONGRESS AND THE 1980 INTERNATIONAL SALES CONVENTION

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On October 9, 1986 the Senate gave its advice and consent to ratification[1] of the 1980 United Nations Convention on Contracts for the International Sale of Goods (Convention, Sales Convention, or Vienna Sales Convention).[2] The following remarks are therefore a retrospective look at some of the questions raised — or which might have been raised — about the appropriate role of Congress in the negotiation and review of the Convention before and after ratification. Readers interested in the general context in which these remarks are made should read the article by Mr. Pfund and Mr. Taft which appears elsewhere in this symposium.[3] This Article illustrates some points those authors make, but my remarks also should demonstrate how difficult it is to generalize about the role of Congress with respect to private international law conventions. While these conventions obviously raise similar issues, the diversity of their subject matter and their form requires one to consider each convention separately to determine the appropriate role of Congress.

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[1] S15773-74 (daily ed. Oct. 9, 1986) (rollcall vote No. 339 — Treaty Doc. No. 98-9). The United States deposited its instrument of ratification with the United Nations Secretary-General on December 11, 1986. Memorandum from Peter H. Pfund, Assistant Legal Adviser for Private International Law, Department of State, to Members of Secretary of State's Advisory Committee on Private International Law (Jan. 2, 1987) (on file in the offices of the *Georgia Journal of International and Comparative Law*).

[2] The official text of the U.N. Sales Convention appears in Annex I of the Final Act of the 1980 conference. U.N. Doc. A/CONF.97/18 (1980), *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 178-190 (1981). The text in the six official United Nations languages (Arabic, Chinese, English, French, Russian, and Spanish) is available from the Treaty Section of the Office of Legal Affairs at the United Nations headquarters in New York. The English text is reprinted unofficially in the following sources: [1980] XI Y.B. UNCITRAL 151-164; S. TREATY DOC. No. 9, 98th Cong., 1st Sess. 22-43 (1983); *reprinted in* 19 I.L.M. 668-699 (1980). Citations to the Convention in the footnotes will be to CISG.

[3] Pfund & Taft, *Congress' Role in the International Unification of Private Law*, 16 GA. J. INT'L & COMP. L. 671 (1986).

My brief remarks on one such convention fall into five parts. The first part provides some background information about the U.N. Sales Convention. The next three parts examine the role of Congress in the negotiation of the Convention, in the review of the Convention before ratification, and in the review of the Convention after ratification. The final part is less a conclusion than a personal retrospective look at the events leading up to United States ratification.

A. Background

The United Nations Convention on Contracts for the International Sale of Goods was adopted at a diplomatic conference convened in Vienna in 1980.[4] After fifty years of study by various international bodies and five weeks of intense debate in Vienna, the conference unanimously adopted a Final Act, an Annex of which sets out the Convention text. Twenty-one states signed the Convention before the September 30, 1981 deadline set by article 91 to determine international interest.[5] A state that signed by this deadline must ratify its signature pursuant to domestic constitutional rules in order to be a Contracting Party; a state that did not sign by this deadline may nevertheless accede to the Convention at any time. As of December 31, 1986, eleven states had ratified or acceded to the Convention: Argentina, Egypt, France, Hungary, Italy, Lesotho, Peoples' Republic of China, Syria, United States, Yugoslavia, and Zambia.[6] The simultaneous deposit of instruments by Italy, China, and the United States on December 11, 1986, brought the number of Contracting States to more than ten and consequently the Convention comes into force on January 1, 1988.[7]

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[4] For additional reading on the convention's background, see J. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION ch. 1 (1982); WINSHIP, *The Scope of the Vienna Convention on International Sales Contracts*, in INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS § 1.01 (N. Galston & H. Smit eds. 1984); Secretariat, *Historical Introduction*, A/CONF.97/5 (March 14, 1979), *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, *Official Records* 3-5 (1981).

[5] CISG art. 91. The 21 states are: Austria, Chile, Czechoslovakia, Denmark, Finland, the Federal Republic of Germany, France, Italy, Lesotho, the Netherlands, Norway, the Peoples' Republic of China, Poland, Singapore, Sweden, the United States of America, Venezuela, and Yugoslavia.

[6] The Secretary-General of the United Nations is the designated depositary for the Convention. CISG art. 89. Official information about the current status of ratifications and accessions may be obtained from the Treaty Section of the Office of Legal Affairs at the United Nations headquarters in New York.

[7] CISG art. 99(1).

The United States delegation to the 1980 Vienna conference signed the Final Act, and on August 31, 1981 the United States signed the Convention itself in accordance with article 91 of the Convention. Neither signature constituted ratification by the United States. The signatures did, however, imply a good faith attempt to obtain ratification in accordance with domestic constitutional procedures.[8] In the United States these procedures usually require the President to seek the advice and consent of the Senate to ratification.[9] Acting on the advice of Secretary of State Shultz, President Reagan sent the Convention to the Senate on September 21, 1983 with the recommendation that it give its consent to ratification.[10] The Senate Committee on Foreign Relations held hearings on the Convention on April 4, 1984 and again on June 11, 1986.[11] At a business meeting on September 9, 1986 the full committee approved the Sales Convention, together with three other private international law conventions, and agreed to report them to the full Senate for action.[12] The Senate gave its advice and consent by a unanimous roll call vote of 98-0 on October 10, 1986. Acting on this advice, the United States deposited its instrument of ratification on December 11, 1986.

When the Convention enters into force on January 1, 1988, two bodies of sales law will be applicable in the United States: the Uniform Commercial Code and the Vienna Sales Convention. Both laws allow parties to vary by contract the effect of the laws' provisions, with the Convention allowing parties to exclude its application altogether.[13]

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[8] *See* Vienna Convention on the Law of Treaties, art. 18, A/CONF.39/27 (1969) (obligation not to defeat the object and purpose of a treaty prior to its entry into force); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 312(3) (Tent. Draft No. 6, 1985).

[9] U.S. CONST. art. II, § 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur"); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (Tent. Draft No. 6, 1985).

[10] 129 CONG. REC. S12655 (daily ed. Sept. 21, 1983) *reprinted in* S. TREATY DOC. No. 9, 98th Cong., 1st Sess., iii (1983).

[11] The proceedings of the April 4, 1984 hearing have been published. *International Sale of Goods: Hearing on Treaty Doc. No. 98-9 Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 39 (1984) [hereinafter Hearing]. The proceedings of the June 11, 1986 hearing, which also considered three other private international law conventions, have not yet been published as of December 1986.

[12] SENATE COMMITTEE ON FOREIGN RELATIONS, EXEC. REP. 99-20, 99th Cong., 2d Sess. (1986).

[13] U.C.C. § 1-102(3) (1978); CISG art. 6 ("The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions").

If the parties do not expressly exclude application of the Convention in the contract, the Convention will govern those sales transactions which fall within its sphere.[14] Application of the Convention will not necessarily displace the Uniform Commercial Code because the Code does not apply to an international transaction unless choice-of-law rules lead to application of United States, rather than foreign, sales law.

B. Negotiation

Draft texts of the sales Convention were prepared within the United Nations Commission on International Trade (UNCITRAL). The United States was a member of both the Commission and the Commission's Working Group charged with preparing the draft Sales Convention. When developing the official United States position with respect to the draft text, the United States Department of State followed the established procedures outlined by Mr. Pfund and Mr. Taft in their Article.[15] With the advice of private sector advisory committees, United States representatives actively participated in the UNCITRAL Working Group.[16] Although publication was frequently delayed, drafts of the text were published formally in the UNCITRAL *Yearbooks* and thus were available in the United States through United Nations bookstores and at depositary libraries.[17]

After adopting a draft text in 1978, UNCITRAL circulated the draft to governments and interested international organizations for comment. This 1978 draft was published informally in both the

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[14] CISG arts. 1-6. For analysis of these scope provisions, see Winship, *supra* note 4, at § 1.02. Because the United States exercised its right to make a reservation declaring that it will not be bound by article 1(1)(b), the Convention will not displace the Uniform Commercial Code as much as a first reading of the text would suggest. CISG art. 95. For reasons why the United States adopted this reservation, see Appendix B of the Legal Analysis of the United Nations Convention on Contracts for the International Sale of Goods (1980), S. TREATY DOC. No. 9, 98th Cong., 1st Sess. 21-22 (1983).

[15] *See* Pfund & Taft, *supra* note 3.

[16] *See* Landau, *Background to U.S. Participation in United Nations Convention on Contracts for the International Sale of Goods*, 18 INT'L LAW. 29 (1984) (comments by participant in private sector advisory committee); Speidel, Book Review, 5 Nw. J. INT'L L. & BUS. 432 (1983) (comments by United States representative to one UNCITRAL Working Group session). As Mr. Landau points out, the study group included representatives of international businesses, lawyers whose clients are engaged in international trade, and law professors who specialize in commercial law.

[17] For citations to these early drafts, see *UNCITRAL Documents: Research Sources, Style, Citation*, 27 AM. J. COMP. L. 217, 219 (1979).

American Journal of Comparative Law and *International Legal Materials*,[18] and a symposium issue with extensive commentary on the draft text was published in the *American Journal of Comparative Law*.[19] After receiving comments from governments, including the United States, the Commission presented the draft text with these comments to the 1980 Vienna conference convened by the United Nations General Assembly.

When preparing its comments on the draft UNCITRAL text and instructing the delegates to the Vienna conference, the Department of State sought the advice of the Secretary of State's Advisory Committee on Private International Law,[20] the private sector advisory group, and individual experts. Acting on these instructions, the United States delegation to the Vienna conference introduced several relatively minor amendments while successfully warding off numerous other attempts to amend the draft text.[21]

As this review of the drafting history suggests, Congress played no role in the process leading up to the adoption of the final text of the Vienna Sales Convention. This non-involvement is not surprising since it is generally accepted that the Executive, rather than Congress, is to conduct treaty negotiations.[22] Two points, however, are worth developing: (1) whether Congress was called upon to approve participation by the United States in the work of UNCITRAL; and (2) whether Congress should lay down general rules governing the procedures to be used in formulating the government's negotiating position. The former question was not an issue, but the latter question was raised by several critics of the Vienna Sales Convention.

Unlike the case of United States membership in the International Institute for the Unification of Private Law (UNIDROIT) and the

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[18] 27 AM. J. COMP. L. 325 (1979); 18 I.L.M. 639 (1979).

[19] *Unification of International Trade Law: UNCITRAL's First Decade, International Sale of Goods*, 27 AM. J. COMP. L. 223 (1979).

[20] *See generally* Pfund, *U.S. Participation in International Unification of Private Law*, 19 INT'L LAW. 505 (1985) (describing the role of the Secretary of State's Advisory Committee on Private International Law).

[21] *See* Report of the United States Delegation to the United Nations Conference on Contracts for the International Sale of Goods at Vienna, Austria, March 10 to April 11, 1980, Submitted to the Secretary of State, Prepared by John O. Honnold, Co-Chairman of the Delegation (n.d. [1980]).

[22] *See* J. JACKSON & W. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 113 (2d ed. 1986) ("the generally accepted viewpoint is that the President or his officers can negotiate on any subject at any time"); Consumers Union of United States, Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

Hague Conference on Private International Law,[23] United States membership in UNCITRAL did not require Congressional approval. The United Nations General Assembly established the Commission in 1966 as a subsidiary organ, and the United States, by virtue of its membership in the United Nations, is eligible to serve on the Commission.[24] The General Assembly elects the members of the Commission according to an elaborate geographic formula, and the Commission in turn elects from among its membership those members who are to serve on working groups.[25]

One might argue that not requiring Congress' approval of membership in UNCITRAL works to the disadvantage of conventions UNCITRAL produces. A campaign for congressional approval would have publicized the structure and objectives of UNCITRAL, just as the campaign in 1963 for membership in UNIDROIT and the Hague Conference mustered the support of leading legal and political figures.[26] It must be noted, however, that the subsequent history of United States interest in the work of UNIDROIT and the Hague Conference suggests skepticism about any alleged political advantages of the 1963 campaign. The United States has not ratified any work product of these two institutions; members of Congress and persons in the legal community who participated in the 1963 campaign passed on to other, more important issues. Furthermore, the two major organizations which led the campaign, the American Bar Association and the National Conference of Commissioners on Uniform State Laws, have either moved private international law issues to a lower priority or have virtually ended their active interest in these issues.[27]

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[23] 22 U.S.C. §§ 269g, 269g-1 (1982). *See* Pfund & Taft, *supra* note 3, at ____.

[24] The General Assembly established UNCITRAL by Resolution 2205 (XXI) of 17 December 1966. Thus, UNCITRAL is a "subsidiary organ" of the General Assembly created in accordance with article 22 of the United Nations Charter, rather than a "specialized agency" created by a separate charter.

[25] Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 201, 207-211 (1979).

[26] *See* Pfund & Taft, *supra* note 3.

[27] The National Conference of Commissioners on Uniform State Laws discharged its committee on international unification of private law in 1982. 1982 HANDBOOK OF THE NATIONAL COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 100 (1984). The American Bar Association Section of Corporation, Banking and Business Law had an ad hoc committee on the work of UNCITRAL in the early 1980s, but it has since been disbanded. The Private International Law Committee of the Comparative Law Division of the American Bar Association Section of International Law and Practice has continued to be active but its membership has been low and the turnover in the committee has been fairly rapid. For a description of the steps

Additionally, the lapse of time between debate about membership and debate about the work product is too long for there to be a significant carry over of knowledge and enthusiasm. In the case of UNCITRAL, for example, the Commission was established in 1966 and there was no official text of the Sales Convention, the first UNCITRAL product to be sent to Congress, until 1980.

Whether Congress should regulate the process by which international policy is formulated is a far more important question. Several critics of the Vienna Sales Convention raised this issue.[28] In a prepared statement submitted to the Senate Committee on Foreign Relations, Mr. Frank A. Orban III called attention to what he described as "the pressing need for [the Senate Committee] to consider the process and procedures by which international private law reform is to be undertaken by the United States Government." Mr. Orban recommended that final convention texts should be published in the *Federal Register* and comments solicited; that notice of United States participation in negotiations also should be published, with a draft text when available; that educational programs be developed to inform the public about these conventions; and that "formal mechanisms should be established for soliciting active public input at the developmental stage."[29]

This issue was referred to the Secretary of State's Advisory Committee on Private International Law at its annual meetings in 1984 and 1985.[30] Mr. Pfund, the Assistant Legal Adviser for Private International Law, expressed willingness to take steps to ensure that

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taken by the American Bar Association with respect to the Vienna Sales Convention, see Winship, *Introduction to Symposium on International Sale of Goods*, 18 INT'L LAW. 3 (1984).

[28] Hearings, *supra* note 11, 39 (testimony of Frank A. Orban III). This theme was replayed in a Heritage Foundation *Backgrounder* published as part of a United Nations Assessment Project Study. Brooks, *Why Congress Should Be Wary of the U.N. Convention on the International Sales of Goods*, 4 (June 15, 1984) (on file in the offices of the *Georgia Journal of International and Comparative Law*). At the time of these comments the Senate Committee on Foreign Relations had published a favorable report on the International Organizations Public Procedures Act of 1983. S. REP. No. 535, 98th Cong., 2d Sess. (1984). The bill, S. 1910, was not passed by the 98th Congress. Its sponsor, Senator Pressler from South Dakota, had been an assistant legal adviser in the United States Department of State before his election to the Senate.

[29] Hearings, *supra* note 11, 39 (testimony of Frank A. Orban III). For Mr. Orban's oral comments at the hearing, see *id.* at 38.

[30] Secretary of State's Advisory Committee on Private International Law 37th Meeting, *Summary Minutes* (April 27, 1984); 38th Meeting, *Summary Minutes* (May 3, 1985).

the public was informed, but called attention to his office's limited staff and budget. Some members of the advisory committee suggested making texts available informally by publication in journals, such as the *International Legal Materials* published by the American Society of International Law. Other members, however, questioned whether such publication would increase public awareness. As one member noted, "[G]iven the paper flow, people tend to learn about new things only when they had to, at the eleventh hour."[31] The advisory committee recommended, however, that the Office of the Legal Adviser publish conventions and accompanying documents once they had been referred to the Senate for its advice and consent to ratification. A proposal at the same meeting that there should be earlier publication to allow the public to participate in formulating the United States negotiating position was not approved.[32]

The history of the evolution of the UNCITRAL draft Sales Convention suggests that its critics' hopes for active participation by the public may be too sanguine. Although there was more public participation in the evolution of the Sales Convention than these critics suggest, there were no lobbyists, no continuing legal education programs on the draft convention, and few law review articles on the subject. In addition to the Department of State's formal consultation procedures outlined at the beginning of this section, the American Bar Association appointed a committee to monitor the progress of the draft text during the 1970s.[33] Despite the formal consultation

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[31] Secretary of State's Advisory Committee on Private International Law 38th Meeting, *Summary Minutes*, 3 (May 3, 1985). The Legal Adviser's office has taken steps to increase public awareness of private international law developments. Notices published in the Federal Register announcing meetings contain more information about the topics to be discussed. Mr. Pfund has agreed to prepare an annual report of the activities of his office to be published in the *International Lawyer*, a publication of the American Bar Association's Section of International Law & Practice. *See* Pfund, *International Unification of Private Law: A Report on United States Participation, 1985-86*, 20 INT'L LAW. 623 (1986).

[32] The proposal was made by Mr. Reed R. Kathrein who chairs the Committee on Private International Law in the Division of Comparative Law of the A.B.A. Section of International Law and Practice. He had prepared a draft resolution and report on the matter for submission to the American Bar Association, but the Council of the Section of International Law and Practice did not act upon the resolution following the meeting of the Secretary of State's Advisory Committee. *See* Memorandum of Mar. 20, 1985 from Mr. Kathrein to Council Members, (on file in the offices of the *Georgia Journal of International and Comparative Law*). The proposal was in the form of a request from the American Bar Association to the Department of State rather than a request for congressional action.

[33] *See* Winship, *supra* note 27.

procedures and the work of the bar committee, it must be admitted that there was little public interest.

Even following final adoption of the Convention in 1980, attempts to publicize the Convention through public meetings were not always successful.[34] Readers familiar with the history of the Uniform Commercial Code will not be surprised. Article 2 (Sales), for example, was in some ways the most innovative of the Code articles. Nonetheless, it received far less attention and criticism than the other articles from members of the bar, most of whom were interested in the details of bank collection and secured transactions. The reason for this is that the basic sales contract does not have an identifiable lobby group, whereas rules governing payment systems and security are followed closely by representatives of financial institutions.

The failure of the Sales Convention to attract lobby groups does not mean that other private international law initiatives will have a similar fate. The liability of terminal operators, for example, clearly has an impact on shippers and carriers as well as terminal operators. Therefore, with regard to the liability of terminal operators, one can anticipate that debate over the draft UNCITRAL Convention will be more lively. Additionally, the Department of State can more easily identify representatives of these various interests because formal associations of shippers, carriers, and terminal operators exist.[35] It is difficult to conceive of a statutory formula that would determine how the Department of State is to proceed in these varying cases, however, unless the formula provided the Department with considerable discretion.

Moreover, one could argue that preliminary public discussion of the United States negotiating position decreases the leverage that United States representatives will have at the negotiating table. In

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[34] For example, an attempt by Professor Curtis Reitz to organize a panel discussion in New York City in 1984 failed for lack of interest even though it was to be sponsored by the American Bar Association. Several earlier programs on the Sales Convention had been successfully held, most notably at the A.B.A.'s 1983 annual meeting in Atlanta and at Columbia Law School in October, 1983. More recently, the Convention has usually been only one of several topics discussed by a panel. *See, e.g.*, Fourth Annual Symposium on International Business and Taxation: Export Trade, held Feb., 1985 at the Hastings College of Law in San Francisco.

[35] *See Liability of Operators of Transport Terminals: Note by the Secretariat, Draft articles of uniform rules on the liability of operators of transport terminals and comments thereon*, A/CN.9/WG.II/WP.56 (Nov. 12, 1985). The Department of State has appointed a study group to monitor the progress of this draft. *See* Pfund & Taft, *supra* note 3, at 678.

the context of private international law issues, this lack of leverage may be of no great importance. Nonetheless, compromises have been necessary, and it is difficult to compromise when your position is known to the public. On balance, congressional intervention, by laying down the equivalent of an Administrative Procedure Act in this area, appears to be neither necessary nor desirable at this time.

C. Congressional Review of the Sales Convention

Turning from the drafting and negotiation of the Sales Convention to ratification, one finds that two issues have been raised with respect to the appropriate role of Congress. The first is whether the Convention should become the law of the United States by exercise of the treaty power. Assuming this threshold question is resolved affirmatively, the second issue is to what extent the Convention's substance is subject to congressional review. In particular, a question exists as to what reservations are both appropriate and possible.

1. Constitutional Power and Propriety

The final text of the Vienna Sales Convention consists of four parts. The first three are addressed to the parties to an international sales contract, while the last is addressed to states. By combining these provisions in one document, UNCITRAL followed the example of its earlier draft conventions rather than the two 1964 Hague sales conventions,[36] although these latter two conventions were the starting point for UNCITRAL's consideration of international sales contracts.[37] Each of these 1964 conventions includes an annex containing

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[36] Convention relating to a Uniform Law on the International Sale of Goods, Aug. 18, 1972, 834 U.N.T.S. 107; Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, Aug. 23, 1972, 834 U.N.T.S. 169. Only nine states have become parties to these conventions: Belgium, The Gambia (prior to its merger with Senegal), the Federal Republic of Germany, Israel, Italy, the Netherlands, San Marino, and the United Kingdom.

[37] The decision to integrate the substance of the uniform laws into the Convention was made by UNCITRAL with very little debate. The Commission's Working Group on the International Sale of Goods recommended this integration. The summary records of the Commission meeting state that Mr. Loewe of Austria spoke in favor of the integration, which he called "an important proposal by the Working Group," because it would make a substantial shortening of the text. Mr. Loewe earlier had made the proposal to the Working Group that they integrate. *See Report of the United Nations Commission on International Trade Law on the work of its eighth session*, A/10017, 12(a) (1975), *reprinted in* [1975] VI Y.B. UNCITRAL 9, 10-11; *Text of comments and proposals of representatives on the revised text of a uniform law on the international sale of goods as approved or deferred for further consid-*

a uniform law. A state that becomes a party to the Hague conventions undertakes to enact the uniform law in its national language. Thus, when the Federal Republic of Germany became a party, it translated the conventions' offical English and French texts into German and enacted the uniform law as the law of Germany. In ratifying the 1980 Sales Convention, however, a state assumes an immediate obligation to apply the substantive provisions of the first three parts to contracts falling within its sphere of application.

Ratification of the treaty in the United States would make the Convention's provisions part of "the supreme Law of the Land"[38] without the need for implementing legislation. Several critics of the Sales Convention have questioned the propriety of having the Convention become the law of the land pursuant to the treaty power.[39] Except for a passing reference to the tenth amendment,[40] these critics do not question the *power* of Congress to act.[41] As Professor Rosett

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eration by the Working Group at its first five sessions, A/CN.9/100, annex II, *reprinted in* [1975] VI Y.B. UNCITRAL 70. *See also Summary Records of meetings of the eighth session*, SR. 151 at 9 (July 16, 1975). The precedent for an integrated convention had been set by UNCITRAL's first convention, the Convention on the Limitation Period in the International Sale of Goods, U.N. Doc. A/CONF.63/15 (1974).

[38] U.S. CONST. art. VI states, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

[39] These critics include Brooks, *supra* note 28, at 2-3; Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265 (1984); Hearings, *supra* note 11, at 36-38, 50 (testimony of Frank A. Orban III).

Responses to the "constitutional" issues raised by these critics are found in Honnold, *Uniform Law for International Sales: Responses to Queries and Objections to the 1980 Convention* [n.d. (1984)] (on file in the offices of the *Georgia Journal of International and Comparative Law*); Kaskell & Honnold, *Uniform Law for International Sales — A Reply to a Heritage Foundation "Backgrounder"* [n.d. (1984)] (on file in the offices of the *Georgia Journal of International and Comparative Law). See generally* Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323 (1954); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 (Tent. Draft No. 6, 1985).

[40] Rosett, *supra* note 39, at 300-01.

[41] *Id.* at 300 ("The modern understanding of the commerce power certainly provides a flexible basis for federal legislative activity. The possibility also exists in the minds of the fearful that with the advice and consent of two-thirds of the Senate, the President of the United States can make treaties that eliminate virtually all domestic legislation").

During the testimony of Mr. Orban before the Senate Committee on Foreign Relations, the following colloquy took place:

Senator Mathias: Now, you have also raised questions about the con-

states, "[t]oo often, constitutional allocation of governmental functions is treated exclusively as a question of power."[42] Professor Rosett relies instead on the wisdom and prudence of the traditional allocation of power between the states and the federal government, an allocation which can be traced to the constitutional framework. In this context, implementation of the Sales Convention raises two distinct issues for Professor Rosett: (1) the "reallocation of legislative competence" between the states and the federal government, and (2) the use of the treaty power, which requires consultation only with the Senate, rather than use of implementing legislation, which requires concurrence of both houses of Congress.[43]

(a) Allocating power between state and federal governments

Appeals to the wisdom of tradition are as compelling as evidence of that tradition. Professor Rosett appeals to two centuries of experience in which the organs of state law (presumably he means both the state legislatures and the state judges) have shown themselves to be better qualified as to commercial matters.[44] The history, however, is much more divergent than Professor Rosett suggests. At various times during the 200 years he refers to, political and legal leaders have urged enactment of federal commercial legislation, applauding the doctrine of federal commercial common law identified with Justice Story's opinion in *Swift v. Tyson*.[45]

For purposes of this Article, one example of responsible and popular demand for federal commercial action will suffice.[46] The Uniform

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stitutionality of this?

Mr. Orban: I believe this treaty can certainly meet constitutional standards. It is certainly within the foreign and interstate commerce of the United States, so the area can be federalized . . . .

Senator Mathias: You are not questioning, then, the power of the United States to go forward with ratification?

Mr. Orban: No. . . . It is a question of whether this is the appropriate mechanism. . . .

Hearings, *supra* note 11, at 50.

[42] Rosett, *supra* note 11, at 50.

[43] *Id.*

[44] *Id.* at 301. *See also* Hearings, *supra* note 11, at 73-74 (statement of Arthur Rosett).

[45] *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

[46] *See e.g.*, Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 100, 101-04 (1951); Conant, *The Commerce Clause, the Supremacy Clause and the Law Merchant: Swift v. Tyson and the Unity of Commercial Law*, 15 J. MAR. L. & COM. 153 (1984).

Sales Act was adopted by the National Conference of Commissioners on Uniform State Laws in 1906. The Act, however, was not adopted by states as quickly or as widely as the earlier Negotiable Instruments Law. As a result, the Committee on Commerce, Trade & Commercial Law of the American Bar Association recommended that there be a "United States Sales Act." In 1920 the chairman of that committee enthusiastically reported that "[t]he Pomerene Act on Bills of Lading in Interstate and Foreign Commerce was the first step in the great work of ultimately obtaining a federal commercial code on subjects pertaining to interstate and foreign commerce."[47] The following year the committee reported that "[c]ommerce and trade are asking that a Federal Sales Act should embody therein provisions clearly defining certain trade terms for the purpose of minimizing disputes and furnishing clear and uniform guides."[48] With the help of Professor Williston, the draftsman of the Uniform Sales Act, the committee presented a completed draft United States Sales Act which the A.B.A. House of Delegates approved in 1922.[49]

Subsequent A.B.A. reports mark the progress of this Act both in Congress and in mercantile opinion. The bill was introduced in the 67th Congress, but Congress failed to act because the term was shortened.[50] In the 68th Congress the Senate Judiciary Committee subcommittee reported the bill favorably, but the equivalent House subcommittee did not have time to act.[51] During this time the Kiwanis Club International and the New York Chamber of Commerce warmly endorsed the bill.[52]

In 1925 the A.B.A. House of Delegate resolution to seek resubmission of the bill to Congress stated:

> In brief, one of the things it does is to put the merchants of this country on an equal footing with the merchants of England in foreign commerce . . . . As it stands today, the merchants in this country dealing with a country other than England, or with English

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[47] 45 A.B.A. REP. 429 (1920). The Pomerene Act referred to is the Federal Bills of Lading Act, which is substantially similar to the Uniform Bills of Lading Act prepared by the National Conference of Commissioners on Uniform State Laws. 49 U.S.C. app. §§ 81-124 (1982).

[48] 46 A.B.A. REP. 332 (1921).

[49] 47 A.B.A. REP. 289 (1922). The bill itself appears as Appendix A of the committee's report. *Id.* at 296.

[50] 48 A.B.A. REP. 285 (1923).

[51] 49 A.B.A. REP. 52, 284 (1924).

[52] *Id.* at 52, 304-06.

> merchants, has [sic] to deal under the Sales Acts as they exist in the 48 states.[53]

Although Congress failed to complete consideration of the bill, the A.B.A. persisted throughout the 1920s and early 1930s. The association's reports for this period reprint with approval an excerpt from a letter written by a member to Senator Wagner urging approval of the bill:

> With the federal control of foreign and interstate commerce it is illogical and inconsistent that there should not long ago have been enacted a Federal Sales Act making the law of sales and contracts to sell in foreign commerce, a unity throughout the jurisdiction of the U.S. Constitution. I am in full sympathy and accord with the idea against increasing federal power and interference with private and local matters, but sales and contracts of sale of chattels, goods, wares and merchandise touches alike every individual from the highest to the lowest within and under the jurisdiction of the federal government and any of the states.[54]

In 1936 Walter Chandler of Tennessee was persuaded to introduce the bill into the House. Mr. Chandler's initiative was called to the attention of the Merchants Association of New York, which suggested a number of amendments, and to the National Conference of Commissioners on Uniform States Laws, which referred it to a committee chaired by Professor Karl Llewellyn. Subsequently, the bill was turned into first a Uniform Revised Sales Act and then a part of the Uniform Commercial Code.[55]

The Uniform Commercial Code, in other words, began with an initiative to enact federal commercial law. Indeed, until the very last stages, the Code contained alternate provisions for section 1-105 choice-of-law rules, one for use by states and one for use by Congress. Both alternatives in this section were controversial, but the focus of attention on the federal version was on the appropriate language to describe the scope of federal coverage instead of the more fundamental issue as to whether federal enactment should be contemplated at all.[56] Additionally, there is some suggestion that federal enactment was

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[53] 50 A.B.A. REP. 86 (1925).

[54] 55 A.B.A. REP. 328 (1930).

[55] *See A Symposium: The Proposed Federal Sales Act*, 26 VA. L. REV. 537-686 (1940); Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 477-92 (1987).

[56] *See* Braucher, *supra* note 46, at 104-08.

designed to supplement rather than displace state enactment.[57] Although it is conceivable, as Professor Rosett suggests,[58] that many felt Congress would be incapable of dealing with the technical details of commercial law, there is no evidence of this in the literature, nor any suggestion that state legislatures would be better qualified. Moreover, many commentators stressed the desirability of uniformity, which, given the spotty history of adoption of the uniform commercial laws, could be ensured only by federal enactment. These commentators also emphasized the magnitude of the proposed Code project. State legislatures had no precedents, whereas Congress had wrestled with such lengthy and technical legislation when it enacted the Bankruptcy Act.

In sum, the allocation of authority between state and national governments is far more complex than Professor Rosett's suggestion that there has been a continuous deference to state competence in the area of commercial law.

b) Promulgation by treaty ratification or by legislation

In submitting the Sales Convention to Congress, President Reagan did not request implementing legislation. When questioned about this by the Senate Committee on Foreign Relations, the Department of State responded that implementing legislation was not called for by the Convention and was not necessary to clarify procedural matters nor to provide for administration of the treaty.[59]

Critics of the Sales Convention nevertheless argue that the Convention should become the law in the United States by legislation passed by both houses rather than by Senate advice and consent to ratification as a treaty.[60] Professor Rosett, for example, suggests that simultaneous ratification and adoption of a statute has three practical advantages: (1) if both houses have hearings there would be greater review of the substance, and improvements might be made; (2) legislation in the English language would eliminate the need to have

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[57] Malcolm, *The Proposed Commercial Code*, 6 BUS. LAW 113 (1951) As was stated, "[s]trong objection has been raised to the attempt on the part of the sponsors to introduce the Code into Congress before it has been enacted by a substantial number of states, including at least several of the larger commercial states." *Id.* at 115.

[58] Rosett, *supra* note 39, at 295. Professor Rosett provides no evidence in support of his conjecture.

[59] Hearings, *supra* note 11, at 59 (State Department's Responses to Questions).

[60] Brooks, *supra* note 28, at 2-3; Rosett, *supra* note 39, at 301, 304; Hearings, *supra* note 11, at 38 (testimony of Frank A. Orban III).

recourse to the Convention's five other official languages; and (3) it would be possible to amend the statute without convening an international conference.[61]

Even if one agreed with these objectives, one would still not be able to achieve through legislation what can be achieved by ratification of the Convention.[62] Assume for the moment that the Convention does not exist and that the United States enacts federal sales legislation purporting to govern international sales contracts within the Convention's sphere of application.[63] If disputes governed by this legislation are brought before courts in the United States, the legislator could be fairly certain that the law will be applied. The legislator, however, could not be sure that a foreign forum would recognize the legislation as governing when considering whether to enforce a United States judgment. Conversely, if the same dispute was originally brought before a foreign tribunal, no guarantee exists that the United States legislation would be applied since the forum's choice-of-law rules may lead to application of another state's law. States that ratify or accede to the Convention, however, are assured that the Convention will be enforced not only by their own courts, but by courts in other states which have become parties to the Convention. Although there is no guarantee that courts and tribunals will always interpret the Convention in the same manner, no written text could provide such a guarantee.[64]

Additionally, domestic legislation passed simultaneously with ratification could not achieve all that Professor Rosett hopes and at the same time maintain effectiveness of the ratification. After providing for specific, relatively narrow reservations that a Contracting

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[61] Rosett, *supra* note 39, at 301. Mr. Orban adds the argument that implementing legislation which merely incorporated the Convention text would provide a useful vehicle for educating the public. Mr. Orban's Responses to Additional Questions Submitted for the Record, Hearings, *supra* note 11, at 71 (responses of Frank A. Orban III).

[62] This argument is stated more eloquently in Honnold, *supra* note 39, at 6-10.

[63] CISG arts. 1-6. For analysis of these scope provisions, see J. HONNOLD, *supra* note 4, at 57-60, 75-112; Winship, *supra* note 4, at § 1.02.

[64] At least one commentator has critized the Convention for not providing certainty. Note, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 HARV. L. REV. 1984 (1984). A more appropriate test, however, is whether the Convention provides more certainty than the present situation in which non-uniform choice-of-law rules may dictate application of any number of difficult to prove foreign domestic sales laws. Even if the Convention introduced more uncertainty, other benefits and costs also should be taken into account.

State may make, the Convention states that no other reservations are permitted.[65] Legislation which purports to change the text of the Convention's first three parts would either make the ratification ineffective or would be a violation of the United States international legal obligations. Thus, although review by both houses of Congress might have been more likely to provide for a fuller review of the Convention's provisions, it would not have allowed for "improvements." Furthermore, enactment in English to the exclusion of other official languages would have been an impermissible reservation.[66]

Congressional power to modify the Convention by subsequent legislation already exists as a matter of domestic constitutional law. Exercise of this power, however, would be a violation of the international obligation undertaken by ratification.[67] Although incorporation of the Convention text into legislation without amendment would call wider public attention to the text, Congress, because of its inability to amend, would undoubtedly have placed a low priority upon hearings and enactment.

If Congress had been required to draft legislation, attention might have focused on the issue of jurisdiction to hear disputes arising out of contracts governed by the Convention. Under the present language of the Convention and absent special legislation, federal and state courts will have concurrent jurisdiction. In most instances, federal district courts will have jurisdiction under their "federal question" jurisdiction.[68] Although it may be argued that a contract dispute does not "aris[e] under . . . a treaty" since it is the contract which defines the parties' rights and obligations, this argument is unpersuasive. The Convention, not the contract, determines whether an enforceable contract exists and, if so, what remedies are available. In most cases this argument will be academic since federal courts will be able to exercise jurisdiction by virtue of the diversity of citizenship of the disputing parties.[69] In any event, the parties will have the alternative

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[65] CISG art. 98.

[66] CISG art. 101.

[67] RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 135(2) (Tent. Draft No. 1, 1980). According to the Restatement, subsequent domestic legislation supersedes "if the purpose of Congress to supersede the earlier provision is clearly expressed or if the act and the earlier provision cannot be reconciled." *Id.*

[68] 28 U.S.C. § 1331 (1982): "The district courts shall have original jurisdiction of all civil actions *arising under* the Constitution, laws, or *treaties* of the United States." (Emphasis added).

[69] 28 U.S.C. § 1332 (1982). For the courts to have jurisdiction under this section,

of bringing the dispute before state courts. Given this concurrent jurisdiction of state and federal courts, it is unlikely that Congress would have changed the existing jurisdictional scheme.

In sum, the case for legislation is not compelling. It is not needed to bring the Convention into force.

2. *Substantive Review - Reservations*

Upon submitting the Sales Convention to the Senate, President Reagan asked for its advice and consent to ratification. The Senate was asked to determine whether the United States should ratify the Convention and to recommend which of the permitted reservations the United States should assert. Since the Convention permits only a limited number of reservations, the Senate was forced to make an assessment that, on balance, the substantive provisions were an improvement over the present situation even if each provision itself was not the best possible improvement. When making this assessment, the Senate properly relied on the views of interested business and legal associations, which had themselves established procedures for reviewing the details of the convention.[70] This method of proceeding is no different from the legislative review of many other proposals that are not front-page news.

Concerning matters for which the Convention permits reservations,[71] however, the Senate has a duty to inquire more closely into the relevant policies. Upon transmitting the Convention to the Senate, President Reagan recommended that the United States ratify the Convention with the reservation permitted by article 95. In making this recommendation President Reagan acted on the advice of the Department of State, which in turn had consulted with the Secretary of State's Advisory Committee on Private International Law and the

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the subject matter of the dispute must exceed $10,000, a requirement not found in the federal question section. Diversity jurisdiction will be all the more likely since the United States ratification contains the declaration authorized by the Convention which limits application of the Convention to contracts where the parties' places of business are in different contracting states. CISG art. 95. *See supra* note 14.

[70] For a description of the procedures of the American Bar Association, see Winship, *supra* note 27.

[71] CISG arts. 92-96. For analysis of these permitted reservations and declarations, see SENATE COMMITTEE ON FOREIGN RELATIONS, LEGAL ANALYSIS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980), S. TREATY DOC. NO. 9, 98th Cong., 1st Sess. 17 (1983); Winship, *supra* note 4, at § 1.03[4].

American Bar Association.[72] Neither President Reagan nor the Department of State recommended any other reservation or declaration.

The printed hearings of the Senate Committee on Foreign Relations include some analysis of the permitted reservations.[73] There was no opposition to the article 95 reservation, which limits the Convention's sphere of application.[74] Moreover, there was some discussion of article 94, which authorizes a state to declare that the Convention will not apply to contracts between its traders and traders in a state with "the same or closely related legal rules on matters governed by [the] Convention."[75] It was suggested that such a declaration, which can be made at any time, should be made with respect to United States-Canada trade, but neither the Committee nor the full Senate pursued this issue.[76] Passing reference to the article 96 reservation with respect to the writing requirement also was not pursued.[77]

Given the constitutional objections raised by some critics, it is surprising that the "federal state" reservation permitted by article 93 did not become the focus of attention. Under this provision a federal state may become a Contracting Party if the Convention will be in force in at least one territorial unit pursuant to domestic constitutional procedures.[78] Mr. Orban responded to a written ques-

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[72] Letter of Submittal from Mr. Shultz to the President (Aug. 30, 1983), *reprinted in* S. TREATY DOC. NO. 9, 98th Cong., 1st Sess. v, vi (1983).

[73] The Senate Committee touched on five of the six permitted reservations. The sixth, authorized by article 92, gives states the option of not adopting either Part 2 (contract formation) or Part 3 (substantive sales rules).

[74] *See supra* note 14.

[75] CISG art. 94(1), (2).

[76] Hearings, *supra* note 11, at 49 (testimony of Frank A. Orban III); *Id.* at 79 (statement of the American Association of Exporters and Importers). If the United States should later decide to make such a declaration, the President would presumably have to seek the advice and consent of the Senate.

[77] In response to a question about this article 96 reservation, it was pointed out that the reservation was introduced for the benefit of the Soviet Union, and that a declaration would merely refer one to non-uniform choice-of-law rules as to what country's legislation or written formalities are applicable. Hearings, *supra* note 11, at 64. When Mr. Orban was asked about this reservation, he wrote that he saw no reason not to make the reservation. *Id.* at 68.

[78] Article 93 states:

> (1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of the signature, ratification, acceptance, approval, or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
> (2) These declarations are to be notified to the depositary and are to state

tion about the reservation from the Senate Committee by suggesting that such an action would considerably delay adoption of the Convention in the United States and would, therefore, be an inefficient way to implement the Convention.[79] This viewpoint was stressed also by proponents of the Convention.[80] The matter, however, was not pursued by the Senate Committee or the full Senate.

Although some commentators recommended making other reservations, the Senate did not actively consider these proposals. The most notable of these is the proposal of Professor Berman that the Convention only be applicable if parties to an international sales contract expressly chose to make it applicable.[81] This provision, which is found in the 1964 Hague sales conventions, had been expressly rejected at the 1980 Vienna conference as a particularly serious undercutting of the effort to make the uniform law effective.[82] To foreclose this and similar reservations, article 98 of the Sales Convention does not authorize reservations other than those expressly provided by the Convention. The Senate could not, therefore, adopt Professor Berman's proposal if it wanted to give its consent to ratification of the Convention.

The distinction between reservations and declarations (or "understandings") was not explored by the Senate in its consideration of the Sales Convention. Arguably, a declaration which gave a ratifying state's interpretation of the text would not amount to an impermissible reservation.[83] Therefore, one possible declaration could have been

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expressly the territorial units to which the Convention extends.

(3) If, by virtue, of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

CISG art. 93.

[79] Hearings, *supra* note 11, at 71. Professor Rosett also suggests, but without elaboration, use of the article 93 reservation. Rosett, *supra* note 39, at 304.

[80] Hearings, *supra* note 11, at 17 (testimony of Peter Pfund); *id.* at 62 (Dept. of State's response to additional written questions); *id.* at 66 (joint response of Messrs. Honnold, Kaskell and Joelson).

[81] *Id.* at 82 (statement of Harold J. Berman). Professor Berman also suggests a reservation excluding all transactions formed and performed wholly within the United States. *Id.* This reservation was not possible for the reasons given in the text.

[82] *See* Winship, *supra* note 4, at § 1.03[5].

[83] For discussion of this distinction, see RESTATEMENT (REVISED) OF FOREIGN RE-

that when contracting parties selected the law of a certain state of the Union as the law governing their contract, the relevant law would be state *domestic* law, to the exclusion of the Convention. This and other declarations were suggested but not pursued by Congress.[84]

D. Congressional Review After Ratification

After ratification of the Sales Convention, Congress has a limited role to play. If it expressly passes legislation which contradicts the Sales Convention, Congress may effectively nullify the Convention. If Congress should pass such legislation, however, the United States would be responsible for breaching an international obligation.[85] The Senate may be called upon to give its advice and consent to later reservations, where these are permitted.[86] Informally, of course, Congress can call upon the Executive to denounce the Convention pursuant to article 101.[87]

Critics have noted that the Convention does not include a mechanism for revising the text in light of further experience.[88] This question was put to the Convention's proponents during the course of the Senate Committee hearing. The written response stressed the presence in the Convention of general principles, the deference to the contract of the parties which might vary the effect of any of the Convention's provisions, the effect that is given to usages of trade and course of dealing, and the possibility of amending by a diplomatic protocol.[89] The question of revision also was referred to the Secretary of State's Advisory Committee on Private International Law at its

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LATIONS LAW OF THE UNITED STATES ch. 2, Introductory Note (Tent. Draft No. 1, 1980). The Restatement concludes that such a declaration might be treated as effective by like-minded states, but could be treated as an impermissible reservation by those states which disagreed. In United States courts a declaration by the Executive, concurred in by the Senate, might be given more weight than a declaration made solely by the Executive, but this weight would not be conclusive. *See id.* at § 132(3).

[84] Hearings, *supra* note 11, at 82; *id.* at 79 (statement of the American Association of Exporters and Importers proposing that written offer excluding Convention should be effective).

[85] *See supra* note 67.

[86] The only two reservations which can be made at any time are those set out in articles 94 (closely-related legal systems) and 96 (formal requirements).

[87] As to whether Congress must participate in the decision to denounce the Convention, see Goldwater v. Carter, 444 U.S. 996 (1979); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 339 (Tent. Draft No. 6, 1985).

[88] Rosett, *supra* note 39, at 271-73, 293-302; Hearings, *supra* note 11, at 36-38 (statement of Frank A. Orban III). *See also* Winship, *supra* note 4, at § 1.03[5].

[89] Hearings, *supra* note 11, at 63, 65-66 (responses of Messrs. Honnold, Kaskell and Joelson).

April, 1986 meeting where the issue was thoroughly discussed.[90] The Committee noted that although UNCITRAL could not itself make amendments, it planned to monitor the implementation and interpretation of the Sales Convention. A number of speakers emphasized that binding uniform law should not be undermined by an overly easy amendment process.

Whether the law would be "frozen" by adhering to the Convention was an appropriate question for the Senate to consider at the time of ratification. The Senate apparently concluded that the risk of freezing the law was not so great that the Convention should not be ratified.

The question as to whether Congress could or should have provided by statute for some body or procedure to monitor the Convention's implementation was never broached. First, to establish a body in the United States similar to the Permanent Editorial Board of the Uniform Commercial Code, which proposes official amendments and submits *amicus* briefs on troublesome questions of interpretation, would not work in a situation where the United States is only one of many states party to the Convention. Second, Congress does not have the power to unilaterally create an international body with membership from different states and effective power to amend the Convention.

E. Concluding Thoughts

As I review what I have written, I am struck by the fragility of the process by which the United Nations Convention on Contracts for the International Sale of Goods becomes the law of the United States. Unfortunately, few resources are allocated to the study of private international law questions. In the case of the Sales Convention, the number of people involved in the drafting, the consulting, and the committee hearings has not been great. Even within the associations that endorsed the Sales Convention, the number of persons actively studying and critiquing the text was small, although distinguished. The Department of State understaffs and underfunds an office which must handle a variety of substantive legal matters. Although proponents may be able to take a proposed convention quite far in this process with relatively little consultation or widespread awareness, ultimate success depends upon catching the attention of someone in Congress and avoiding controversy.

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[90] Secretary of State's Advisory Committee on Private International Law 39th Meeting, *Summary Minutes*, 4-5 (Apr. 25, 1986).

In sum, private international law conventions will be approved by the process only if there is little opposition. In the case of the Sales Convention, opposition by an attorney, several law professors, and a fellow at the Heritage Foundation was sufficient to create controversy and delay ratification. This does not imply that the opposition was without merit; rather, it suggests that opposition parties in this process have a considerable degree of power. In our society it is assumed such power is coupled with a corresponding obligation to act responsibly and for the public good.

Although ratification of the Sales Convention will not stop nuclear war, bring international economic stability, or even revolutionize international trade, there are long-term benefits which flow from the Convention which the haphazard nature of the process put in jeopardy. The international sales contract regulates both the basic trading transaction and the specialized contracts of carriage, insurance, payment, and security which are ancillary to the contract of sale. If the Sales Convention enters into force, conventions or model laws harmonizing the rules governing these ancillary contracts also may be adopted. Removing even modest barriers to international trade increases the public welfare, and providing a common body of law creates a common trading language. The final question then is whether or not the political process sufficiently values these benefits.