

**AMERICAN BAR ASSOCIATION**  
**Section of Business Law**

**2004 Midwinter Council Meeting**

***“The Business Lawyer and International Law”***  
***Reflections on the Lawyer’s Role with Respect to Teaching of International***  
***Law, the Global Compact and International Trade Law***

**Address**

**by**

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**Santa Barbara, California**

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Mr. Chairman,  
Dear colleagues,

Let me start by saying that I was very glad to receive the invitation to address the Section on Business Law of the American Bar Association at its 2004 Midwinter Council Meeting.

As a matter of fact, I should have addressed the International Bar Association in San Francisco in September last year. However, this did not come true because of matters relating to the situation in Iraq. On that occasion, it would have been my intention to speak about the Secretary-General's Global Compact. This will therefore be one of the topics of my presentation today, in particular since it is on your agenda.

In discussing my address with Steven Weise and Mike Sigal, we came to the conclusion that I would focus on a three issues in my address. But we would leave ample time for questions on any other topic of interest to you related to the work of the United Nations.

The three of us thought that I should focus on: teaching of international law; the Global Compact; and the work of the United Nations Commission on International Trade Law (UNCITRAL).

#### Teaching of international law

Some years ago, I discovered that not all law schools include international law in their curricula. I was very concerned since, in my view, international law today is a topic that is a must for any person who graduates from Law School.

This led me to the conclusion that there might be something that I could do to draw attention to this fact. On 6 June 2000, I circulated an Appeal to Deans of Law Schools Worldwide.<sup>1</sup> The point of departure was that international law has become an ever more important ingredient in the finely spun web that connects us all, both within countries and across borders. In particular, reference was made to the new dimensions that are being created through cyberspace and the Internet.

It is true that most lawyers who graduate from Law School take up positions at the national level and focus mainly on national law. However, today, it is very difficult to practice national law without at least a basic knowledge of international law.

My appeal was directed, as I said, to Deans of Law Schools. However, in later discussions, I have discovered that Law Schools are not keen on introducing obligatory topics in their curricula. This was made clear to me, in particular, in a discussion organized by the American Society of International Law a couple of years ago.

On that occasion, I participated in a Panel on International Law in the American Law School. My point of departure was a question: “A Law Degree without International Law?” I answered this question by addressing four other questions, namely: Why is teaching international law so important? How should international law be taught? What should be the contents of the teaching? and How does the United Nations contribute to the teaching of international law?<sup>2</sup>

However, in the ensuing discussion I was informed that it would be difficult to include international law in the Law School curricula as an obligatory element. It is clear that there is a dilemma here. But then someone informed me that a decisive factor in the decision-making among the Deans of Law Schools is the contents of the Bar Examinations. It then struck me that the American Bar Association, and in particular its Business Council, is a very influential actor in this context.

If business lawyers are convinced that international law is an indispensable element in their profession, then they may be able to convince those who establish the rules relating to the Bar Examinations that international law should be an important element in such examinations.

I have circulated my Appeal to the Deans of Law Schools before this Council Meeting, and today I also circulated my remarks on the Panel that I just referred to. Therefore, there is no point in reiterating the arguments forwarded in those documents. Let me only draw your attention to one particular element in the Appeal to the Deans: it is sometimes argued that in business you do not have to focus on international law. I suggested then and maintain today that this is definitely not so. I trust you agree.

In the business community there is certainly a growing understanding of the necessity of being familiar with international law, and, in particular, how this law interrelates with other topics that are traditionally taught at Law Schools. My firm conviction is that lawyers who work in the business community and have an understanding of international law – in addition to their other competencies – have a tremendous advantage over colleagues who are not familiar with this discipline.

May I therefore use this opportunity to appeal to you to make every effort to convince those who organize the Bar Examinations that international law should become a significant element in those examinations. This would, in turn, influence the Law Schools and their curricula.

### The Global Compact

Let me now turn to the Global Compact.

As I am sure you know, the Compact was launched by Secretary-General Kofi Annan in an address to the World Economic Forum in Davos on 31 January 1999.<sup>3</sup> On this occasion, the Secretary-General challenged business leaders to join in this international initiative, which would bring together companies with UN agencies, labour

and civil society. The purpose was to support nine principles in the areas of human rights, labour and environment.

The nine principles are taken from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work and the Rio Declaration on Environment and Development.

The nine principles are:

#### Human Rights

- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence; and
- Principle 2: make sure that they are not complicit in human rights abuses.

#### Labour Standards

- Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: the elimination of all forms of forced and compulsory labour;
- Principle 5: the effective abolition of child labour; and
- Principle 6: eliminate discrimination in respect of employment and occupation.

#### Environment

- Principle 7: Businesses should support a precautionary approach to environmental challenges;
- Principle 8: undertake initiatives to promote greater environmental responsibility; and
- Principle 9: encourage the development and diffusion of environmentally friendly technologies

It is very important to point out that the Global Compact is not legally binding. It is a voluntary initiative. It has no resources to police or enforce the behaviour or actions of companies and it is not meant to be monitored in that way either. Its purpose is to stimulate change and to promote good corporate citizenship and also to encourage innovative solutions and partnerships.

This has been criticized by some, who claim that the Compact is too weak. Further work has been undertaken by the United Nations Sub-commission on the Promotion and Protection of Human Rights, but this initiative needs further discussion and refinement. Some have voiced concern that both approaches lack balance; while the Compact is too weak, the ideas of the Sub-commission are too intrusive.<sup>4</sup>

It is always important to listen to constructive criticism. But one should not be mistaken here: the initiative of the Secretary-General was simply to take a new approach.

We should not forget that it is only recently that human rights have been discussed in the context of business.<sup>5</sup> I suggest that you follow this debate with great attention, since it is inevitable that these are matters that business lawyers must engage in.

The Global Compact has grown rapidly since its launch nearly four years ago. Today, more than 1,200 companies around the world have committed to the nine principles, including increasing numbers of U.S. companies. While there are numerous local and regional initiatives related to corporate responsibility, the Global Compact has established itself as the world's only truly global corporate citizenship initiative, with networks and activities in more than 70 countries. In this sense, it is helping to bridge the North and South and, in the process, helping companies address many of the most complex issues they face in the global marketplace.

One question that is often asked is why a company that has already established its own code of conduct should participate in the Global Compact. The answer is very simple: such codes are extremely important. And companies that have demonstrated leadership and made changes in their policies should be commended. However, such codes are typically quite narrow in focus, often leaving out important issues such as human rights. The purpose of the global compact is however different: it seeks to add new dimensions to good corporate citizenship by creating a platform – based on universally accepted principles – to encourage innovation, in particular, through new initiatives and partnerships with civil society and other organizations.

So, in short, the Global Compact is a voluntary corporate citizenship initiative. It has two objectives: to mainstream the nine principles in business activities around the world and to catalyze actions in support of United Nations goals. There is a very useful website to assist you in case you need to present the matter e.g. to a corporate board,<sup>6</sup> including a PowerPoint presentation that you can use for the purpose.<sup>7</sup> The initiative is administered by the Executive Office of the Secretary-General, and the person in charge is Mr. Georg Kell.<sup>8</sup>

The next major activity related to the Global Compact is a Policy Dialogue on Transparency and the Fight against Corruption to be held in Paris on 26-27 January 2004.<sup>9</sup>

You may ask: what is the role of the corporate counsel in relation to the Compact? Let me take human rights as a point of departure even if the argument could be made equally for labour and environment. Lawyers have a special responsibility in society.<sup>10</sup> It is of particular importance that they are familiar with the international obligations that their country has undertaken at the international level, i.e. vis-à-vis other states, and contribute to the fulfillment of such obligations.

You will of course counter and maintain that your main responsibility is to your client. This is correct, but the two responsibilities may not necessarily be in conflict with each other. On the contrary! The matters that the Compact focuses on are often given prominent attention in the media and public discussion. Ultimately, companies will be

assessed by public opinion, and as we know the agenda for the debate is here often set by non-governmental organizations. It is therefore important that companies are proactive in this field also in their own interest.

It is said that corporate lawyers are concerned that by joining the Global Compact, companies might be held accountable if they do not meet the standards. I do not believe that this is so, since the Compact is not a legally binding instrument. Rather, the principles are aspirational in nature. We should also remember that human rights protection is an obligation mainly for governments vis-à-vis their citizens and those who reside in their countries.

This has given rise to a debate where some argue that you cannot raise human rights issues if you are a transnational company because that would have detrimental effects on the possibilities of your company to do business in the country in question. This is of course an argument that cannot be swept aside completely. But surely there are ways to address this dilemma also. We should remember that there are multinational companies that have been severely criticized, and probably also suffered economically, because of lack of observation of human rights, labour and environmental standards.

Another concern expressed by corporate lawyers is that companies might be held liable for the behaviour of their contractors and subcontractors. In my view this is not so, at least not because of the Global Compact. Furthermore, and more importantly, there should be means of dealing also with this problem. In particular, I cannot see why one cannot stipulate in the contracts (where appropriate also with reference to subcontractors) standards that the companies engaged must honour. Indeed, more and more companies are considering their supply chains in the broadest sense, and asking their business partners to uphold similar principles.

I know that during this meeting you will discuss the formulation of a letter in which companies express support for the Global Compact and its principles. I wish you success in this important endeavour and hope that you will bear in mind that this communication must be formulated in terms that do not derogate from the ideals of this important initiative.

The Global Compact should be recognized for what it is: an effort to make a change. One of the main purposes of the United Nations is to work for international peace and security. There are very close connections between peace and security, on the one hand, and the way in which the peoples of the world live, on the other. The Millennium Development Goals formulated by the United Nations testify to the fact that all these issues are inseparable.<sup>11</sup>

In the past, conflicts were often solved by the use of force. Unfortunately, this happens also in contemporary society. The United Nations is trying to contribute to peaceful settlement of disputes in order to avoid such tragic consequences. In that perspective, it is impossible to separate interstate relations from civil society and the conditions of ordinary people. If you examine the roots of any armed conflict anywhere

on the globe, you will find the same thing, namely violation of human rights. Since business is omnipresent and has an impact of tremendous importance on any society, business is better placed than most in civil society to contribute to creating an environment where people can lead their lives in dignity and with their human rights respected.

In this context, it is interesting to note that the Council of Bars and Law Societies of the European Union (CCBE), representing over 500,000 European lawyers through their national Bars and Law Societies, has elaborated guidelines for European lawyers on Corporate Social Responsibility (CSR). The guidelines explain what this responsibility is, and highlight the reasons why lawyers should be involved in advising companies in this field. In their view, advising on CSR issues should become an everyday matter for corporate lawyers, since lawyers have ready access to all European Union boardrooms and have legal privilege.

When the guidelines were published on 28 August 2003, the CCBE President Helge Kolrud said that “Corporate Social Responsibility is widely accepted today as a vital part of corporate life. The CCBE intends to play a leading role in the promotion of Corporate Social Responsibility in ensuring that lawyers understand its importance when advising clients. We believe that the guidelines are a good starting point towards achieving this.”

Time does not allow that I go into detail with respect to these guidelines. Instead, I refer to the internet, where they are readily available.<sup>12</sup>

The obvious conclusion is that those who advise companies and in particular transnational companies must have a clear understanding of these interrelationships and that the business community has an important role to play here.

### The role of UNCITRAL

We have now come to the third issue for this morning: the work of UNCITRAL.

Steven Weise and Mike Sigal had wanted me to say a few words about micro credit. However, since I am not so familiar with this important tool for development, we agreed that the focus should instead be on another topic which my department is involved in, namely good governance, sustainable development and business law. I include this topic in my remarks to demonstrate among other things the complex linkage between sustainable development and the environment.

A commonly held view in days past regarded the promotion of welfare essentially as a function of the right development strategy and the necessary capital investment. Sadly, the 20th century saw many hopes of lasting prosperity postponed because the development strategy chosen was not sustainable. The lesson to be learned was that sustainable economic and social development is the result of a complex balance of a large number of factors, one of which is the respect for the rule of law. Law reform has therefore become an essential component of modernization programmes in most

developing and transition countries. The role of judges in this context is of paramount importance.

As the Secretary-General wrote in an article published in the International Herald Tribune at the time of the International Conference on Financing for Development, held from 18-22 March 2002 in Monterrey, Mexico:

“There is a new global deal on the table: When developing countries fight corruption, strengthen their institutions, adopt market-oriented policies, respect human rights and the rule of law, and spend more on the needs of the poor, rich countries can support them with trade, aid, investment and debt relief.”<sup>13</sup>

One activity of the United Nations which is intimately related to the establishment of a legal foundation for sustainable economic and social development is the work of the United Nations Commission on International Trade Law (UNCITRAL), which is serviced by the United Nations Office of Legal Affairs.

UNCITRAL was established as a subsidiary organ of the General Assembly in 1966 in view of the fact that disparities in national laws governing international trade created obstacles to the flow of trade. UNCITRAL was thus given the general mandate to further the progressive harmonization and unification of the law of international trade. The Commission has since come to be the core legal body of the United Nations system in the field of international trade law. The result of its more than thirty years of intensive work represents a significant contribution to the modernization of national laws facilitating a number of economic activities that form the basis of an orderly functioning open economy, thus helping developing countries to create the conditions to participate in the benefits of the global marketplace.

Among the various instruments that have been prepared by UNCITRAL we count such well-known landmark texts as the United Nations Convention on Contracts for the International Sale of Goods, which has been ratified by States representing some two-thirds of the world trade in goods, the UNCITRAL Model Law on International Commercial Arbitration, with a geographic coverage of approximately one third of the world's territory, and innovative instruments, such as the UNCITRAL Model Law on Electronic Commerce. Currently, UNCITRAL is preparing legislative texts designed to assist countries to modernize their laws in areas such as insolvency law, secured transactions, public procurement, carriage of goods and commercial dispute settlement. Information about completed texts and current work is available on UNCITRAL's website.<sup>14</sup>

Lawyers sometimes think of trade law harmonization as a luxury that makes sense only for wealthy countries, and which can only be afforded by them. This unfortunately widespread misconception ignores the direct relationship between sustainable development and business law reform.



Laws that are outdated and that are not based on harmonized or transparent standards pose a major obstacle to economic growth and sustainable development. They increase commercial risks and transaction costs and may seriously hamper the activities of commercial entities and their participation in international trade. In such a legal environment, small and medium-sized enterprises with limited experience and access to legal advice often encounter particular difficulty in penetrating new markets, establishing new trade relations and resolving disagreements in a predictable and efficient manner. In addition, investment can be severely hampered or may not take place at all.

May I suggest that the economic development that results from countries modernizing and harmonizing their trade laws pays direct dividends to all segments of a developing country's population. Allow me to give you just one example.

Electronic commerce has become a nearly indispensable tool for developing countries to reduce transaction costs and facilitate penetration of new markets. Electronic commerce benefits all, but is of particular benefit to small and family enterprises. Empirical information on the use of electronic commerce has demonstrated its unique potential for generating wealth by securing the access of traders in even the most remote regions to foreign markets. However, electronic commerce and, in particular, foreign confidence in trading points in developing countries, cannot prosper without the adaptation of national as well as international laws, which were largely written against the background of paper-based commercial communications.

Such adaptation of laws should be based on the harmonized, balanced standards elaborated by the United Nations. The UNCITRAL Model Law on Electronic Commerce, adopted in 1996, has already been enacted in various jurisdictions from both developed and developing countries and is widely regarded as the most authoritative set of international legal standards for electronic commerce. Implementation of the Model Law by developing States fosters the confidence of business entities established in those States as well as their partners abroad in e-commerce, thus helping them keep pace with the globalization of international trade.

In order to strengthen the ability of the United Nations to assist states, in particular developing states, to implement texts elaborated by UNCITRAL, the Secretary-General recently proposed to strengthen the Commission's secretariat, located in Vienna but still part of my Office. On 23 December last year, the General Assembly agreed, and we are now engaged in implementing that reform.

My vision is that as many states as possible could be assisted. The UNCITRAL secretariat will be better equipped to develop a "toolbox" that could be used to elaborate the necessary legislative instruments at the national level so that these can be brought before the competent organs for adoption. This is a crucial matter for many developing States, and this work should not be seen as an element in the field of commercial law only. As it appears from what I said a few moments ago, this is a matter that belongs to the sphere of international peace and security. Our goal should be that all countries can participate in international trade on an equal legal footing in this era of globalization.

The American Bar Association has played – and plays – a significant role in this field of law, as an active non-governmental observer at UNCITRAL meetings, through the members of the Association who participate in the US delegation to UNCITRAL and through the assistance ABA and its members give to colleagues in other states, often *pro bono*. Please continue – and intensify – this work in our common interest!

Mr. Chairman,

I have come to the end of this brief presentation and look forward to our discussion. Let me close by stressing again that the ABA and its members, of whom many are assisting the business community, has an important role to play in all the three fields that were the focus of my presentation: teaching of international law; the Global Compact; and the work of UNCITRAL. I hope that our discussion this morning will inspire further action in all these areas.

Thank you for your attention!

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- <sup>1</sup> “An Appeal to the Deans of Law Schools Worldwide” at <http://www.un.org/law/counsel/appeal.htm>
- <sup>2</sup> “A Law Degree without international Law?” at [http://www.un.org/law/counsel/english/asil\\_7apr01.pdf](http://www.un.org/law/counsel/english/asil_7apr01.pdf)
- <sup>3</sup> at <http://www.un.org/News/Press/docs/1999/19990201.sgsm6881.html>
- <sup>4</sup> See e.g. Daniel Litvin in *Foreign Policy*, November/December 2003.
- <sup>5</sup> See e.g. The 1998 Tällberg Workshop: Human Rights and the Free Market - Is the Business of Human Rights also the Business of Business? “*The Meaning and Role of the Universal Declaration of Human Rights*” at [http://www.un.org/law/counsel/english/address\\_06\\_26\\_98.pdf](http://www.un.org/law/counsel/english/address_06_26_98.pdf)
- <sup>6</sup> <http://www.unglobalcompact.org/Portal/>
- <sup>7</sup> at [http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/ungc\\_html\\_content/Public\\_Documents/gc\\_powerpt.pdf](http://www.unglobalcompact.org/irj/servlet/prt/portal/prtroot/com.sapportals.km.docs/ungc_html_content/Public_Documents/gc_powerpt.pdf)
- <sup>8</sup> The Global Compact Office, United Nations, Room S-1881, New York, N.Y. 10017, USA. Email: [globalcompact@un.org](mailto:globalcompact@un.org).
- <sup>9</sup> See <http://www.unglobalcompact.org/content/Dialogue/transcor.htm> see also in relation to corruption my appeal to judges worldwide at [http://www.un.org/law/counsel/english/corruption\\_appeal.pdf](http://www.un.org/law/counsel/english/corruption_appeal.pdf)
- <sup>10</sup> *The United Nations and the Legal Community in the Promotion of Human Rights*. In: Fordham International Law Journal, Vol. 21 December 1997: 519-530
- <sup>11</sup> See <http://www.un.org/millenniumgoals/index.html>
- <sup>12</sup> See <http://www.ccbe.org>
- <sup>13</sup> “Help by Rewarding Good Governance”, International Herald Tribune, Wednesday, 20 March 2002, p. 8.
- <sup>14</sup> See <http://www.uncitral.org/>