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The UNIDROIT Principles and NAFTA

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THE UNIDROIT PRINCIPLES AND NAFTA

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While NAFTA has set the public-policy stage for free trade, it still lacks a non-national law with which to resolve disputes arising from international contracts. The author points out that among the challenges involved in developing an international law on contracts is a merging of the Common Law and Roman Law traditions. He examines the Principles of International Commercial Contracts, published in 1994 by the International Institute for the Unification of Private Law (UNIDROIT), and finds in them the most promising available starting point for building the needed theory and corpus of international contact law. The author also sees a major role in accomplishing this task for university-based legal scholars as well as practicing lawyers, arbitrators and judges.

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I. INTRODUCTION

Free trade is not only a matter of public policies. It implies the harmonization of some public policies on tariffs, customs, foreign investment, immigration, intellectual property and other matters. But the public policies are not the real trade. They are only means to facilitate the exchanges of goods and services between private persons and enterprises. We can say that the public policies about free trade, which are the main contents of the international free trade agreements, are like the stage set on which private actors are going to play. Free trade becomes a fact by means of international contracts, sales of goods, leases of services, joint ventures, franchise agreements, construction contracts, distribution contracts, agency agreements and any other contract related to commercial transactions. Therefore, the promotion of free trade requires the making of private contracts.

Private contracts are not only a private concern. Their very existence is in the interest of a country, as they are an indispensable way to develop and increase the public wealth. It is in the public interest that private contracts be honored. That is why they are enforceable by law. They are intended for the benefit of all the parties who are bound by them, and so the law governs them. It is also in the interest of a free trade area that private contracts be governed and enforceable by law. But as a free trade area comprehends two countries or more, the question is this: Which law is going to govern and enforce international contracts within a free trade area, such as that established by the North American Free Trade Agreement (NAFTA)?

The answer in the world of nation-states was very simple: International contracts were to be governed by the national laws of one of the parties involved. There was of course the problem of deciding whether it would be the law of this party, or that; but at least there was an applicable national law by which contacts would be governed. However, because both parties to a contact could agree on whose national law was to apply, it was common practice for the party which had the

greater power to impose its law and judges on the other. That placed the weaker party at a great disadvantage. Because it could not count on a fair trial, it often preferred the loss of its interest in the contract to subjecting itself to a trial involving foreign laws, lawyers and judges. Further, the party whose national law governed the contracts was more likely to breach it, knowing that the other party would be reluctant to take legal action. Also, because it was more familiar with the procedures and had better chances of winning, and with lower costs, the party whose national law governed was more likely to sue the other for minor breaches. The resulting situation was not, and is not compatible with the goal of a free trade area to benefit all the countries involved.

The development of free trade requires non-national law that can govern international contracts and serve as the basis for resolving disputes arising from them. In fact, two things are needed at the same time. One is non-national law, the other, non-national jurisdiction. The Principles of International Commercial Contracts, drafted by the International Institute for the Unification of Private Law (UNIDROIT) and published in 1994, represents one step toward the creation of the needed non-national contract law.[1]

The modern search for a non-national law on contracts began after the First World War and has gathered momentum since World War II. Significant progress has been achieved, mainly thanks to the work of UNIDROIT, the International Chamber of Commerce, and the United Nations Commission for International Trade Law (UNCITRAL). Most notable among their accomplishments are the Rules for the Interpretation of International Commercial Terms (INCOTERMS), the UN Convention for the Enforcement of Commercial Arbitration

1. The official publication is UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 256 (1994) [hereinafter UNIDROIT Principles]. The complete work contains rules and comments. There is also an official version in Spanish of the whole work: UNIDROIT PRINCIPIOS SOBRE LOS CONTRATOS COMERCIALES INTERNACIONALES (1994). There is also an official publication on the rules only, with authorized texts in English, French, German, Italian and Spanish: UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (official texts of the black letter rules in English, French, German, Italian and Spanish) (1996).

Awards, the Model Law for International Commercial Arbitration, the UN Convention on the International Sale of Goods (CISG), the UN Convention for the Carriage of Goods by Sea, and the UNIDROIT Convention on International Leasing, among others. These conventions, together with international trade usages, the *lex mercatoria*, decisions on international commercial cases, whether by judges or arbitrators, and the opinions of experts are forming what is now called "international business law".[2]

This paper reflects on the role that the UNIDROIT Principles will play in the development of international contract law and, especially, on the service they can render in the North American Free Trade Area.[3]

II. WHAT ARE THE UNIDROIT PRINCIPLES?

They are not a model law, nor an international convention or agreement, nor an international trade usage. They are only a *corpus* of rules of law that are considered by the jurists of many nations and by the experts on international trade organizations who participated in their elaboration, as fair rules for international contracts.[4] The rules were not created *ex nihilo*, but were derived from legal practice in regard to international contracts, international commercial arbitration, some international conventions in private law, including mainly the conventions on the international sale of goods, and most of the more modern codifications of commercial law, such as the

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2. *See* FILIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA 361 (1992).

3. There is a Commission on European Contract Law, whose Chairman is Professor Ole Lando, appointed by the Member States of the European Union, which is preparing a similar set of rules to be applied in Europe for international contracts within the European States. The Commission has published the first part of its work, which includes rules about performance, non-performance and remedies. COMMISSION ON EUROPEAN CONTRACT LAW, THE PRINCIPLES OF EUROPEAN CONTRACT LAW 268 (1995).

4. *See Introduction*, in UNIDROIT Principles, *supra* note 1, which states that it seems better to look for the unification of the law by other means than legislation.

Uniform Commercial Code and the Restatement (Second) of Contracts.[5]

The UNIDROIT Principles do not have the official status and value of an international convention or a well-known trade usage that judges must take into account. They are now just a private document which contains good rules for international contracts and which may influence international commercial law in several different ways: They can become the law governing a contract if the parties so agree; they can motivate the passage of legislation in regard to international contracts; and they can serve as rules to which judges and arbitrators can turn as a kind of subsidiary law.

The UNIDROIT Principles contain a preamble and seven chapters, with 119 articles. The preamble only expresses the purpose of the *Principles*, namely, to provide a set of general rules for international commercial contracts. Chapter one contains ten "General Provisions," including those which establish the principle of good faith and fair dealing as the main rule for contracts,[6] the freedom of contract, the value of usages and practices, and the rules for interpretation of the UNIDROIT Principles.

Chapter two deals with the difficult issue of formation of contracts. It has 22 articles. It makes use of the categories of offer and acceptance. The rules are similar to those in the CISG, but with additional rules regarding common problems in international contracts, such as liability of a party which breaks off negotiations in bad faith; the duty of confidentiality whether or not a contract is concluded; the value of specific types of clauses, such as merger clauses, written modification clauses, or standard terms; and rules to solve the common problem known as the battle of forms.

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5. For a general examination of the sources of the UNIDROIT Principles *see* MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW 41-44 (1994).

6. The principle of good faith is regarded as a mandatory rule from which the parties cannot deviate. *See* art. 1.7(2), UNIDROIT Principles, *supra* note 1.

Chapter three concerns the validity of contracts. Its twenty articles describe the bases for invalidating a contract: mistake, fraud, threat and gross disparity in bargaining power. However, it does not cover lack of capacity, lack of authority, immorality or illegality, which are questions to be solved according to national law. Finally, chapter three also governs the effects of avoidance between the parties and third persons, and the way to exercise the right of avoidance by notification to the other party.

Chapter four contains eight articles related to the interpretation of contracts. The main rule is that a contract shall be interpreted according to the common intention of the parties, but regard shall be had to all circumstances, including preliminary negotiations, the conduct of the parties subsequent to the conclusion of the contract, and the nature and purposes of the contract. It expressly provides that the tribunal may supply an omitted term which is important for the determination of the rights and duties of the parties.

The fifth chapter has eight articles devoted to contract content. It recognizes that the obligations generated by a contract may be expressed or implied. It distinguishes between the obligations to achieve a specific result and making best efforts. It fixes rules to determine the quality of performance and the price when parties omit to do so.

Chapter six deals with performance. It is divided into two sections. Section one contains seven articles on performance in general. It has rules on the time, place and order of performance, and on payments. Payment may be made by check or any other instrument used in the ordinary course of business at the place for payment; it settles the difficult question of the currency of payment, stating that the obligor may pay his debt in the currency of the place for payment, unless the parties have agreed that payment should be made only in the currency in which the monetary obligation is expressed. Chapter six also has rules on the imputation of payments, on who is charged with asking for public permission when the formation or performance of the contract requested it, and on how the parties should bear the consequences of delay

or refusal of public permission. Section two's three articles deal with hardship, which is defined as an event which alters the equilibrium of the contract. In certain circumstances, hardship gives the aggrieved party the right to request renegotiation of the contract and even to resort to a court which may adapt or terminate the contract.

The last chapter (chapter seven) is the longest. It deals with non-performance and is divided into four sections. Section one contains seven articles on non-performance in general. Section one defines non-performance, the situation in which the parties may withhold their performances, the right to cure a defective performance, the settlement of an additional period of performance, the value and effect of clauses which limit or exclude one party's liability, and excused non-performance due to the occurrence of an event beyond the control of the obligor (*force majeure*). Section two's five articles refer to the right to performance. A distinction is drawn between monetary and non-monetary obligations: the former are those performed by payment, which is always possible; the non-monetary obligations, on the other hand, give the creditor the right to require specific performance in certain circumstances (which implies repair or replacement of defective performance). Section two of chapter seven also encourages the use of a judicial monetary penalty, that is, a penalty imposed by the judge or arbitrator on a party that fails to comply with an order. Section three contains six articles on termination of contract. It establishes that a party has a right to terminate the contract when the other has committed a fundamental non-performance of the contract, thus limiting the cases of termination to those non-performances which result in a great loss for the aggrieved party. Section three also contains rules that protect a party which forecasts that the other is not going to fulfill its duties, and also details the right to terminate and the consequence of termination (including restitution). Section four's thirteen articles deal with damages. The aggrieved party has a right to damages either exclusively or in conjunction with other remedies. The aggrieved party is entitled to full compensation for harm, which includes both any loss suffered and any gain of which it is deprived. Further provisions limit the amount of compensation to damages that were foreseen or

foreseeable at the moment when the contract was made, damages that occur without the interference of the aggrieved party, and damages that the aggrieved party could not avoid. Finally, section four of chapter seven offers some rules about the way to pay the sum of money fixed as compensation for damages.

The style of the UNIDROIT Principles is like the style of the American Restatements. It states the rule in bold letters, followed by a comment with some cases illustrating the rule.[7]

III. PRIVATE CONTROVERSIES IN NAFTA[8]

The North American Free Trade Agreement is a commercial agreement between states. It contains no rules for the settlement of disputes arising from private contracts, but it does provide that the states will promote private arbitration and other alternative means for the resolution of private disputes.[9] It recommends that the parties to the agreement adopt appropriate legislation to facilitate the enforcement of international awards in accordance with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) or with the

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7. For more information about the UNIDROIT Principles *see* Luis Olavo Baptista, *The UNIDROIT Principles for International Commercial Law Project*, 69 TULANE L. REV. 1209-1224 (1995); BONELL, *supra* note 5; *The UNIDROIT Principles of International Commercial Contracts: why?, what?, how?* 69 TULANE L. REV. 1121-1147 (1995); Furmston, *UNIDROIT General Principles for International Commercial Contracts*, 10 J. CONTRACT LAW 11-20 (1996); Alejandro Garro, *The Gap Filling Role of the UNIDROIT Principles in the International Sales Law*, 69 TULANE L. REV. 1149-1207 (1995); Friedrich Juenger, *Listening to Law Professors Talk About Good Faith: Some Afterthoughts*, 69 TULANE L. REV. 1253-1279 (1995); Ole Lando, *Assessing the Role of the UNIDROIT Principles in the Harmonization of Arbitration Law*, 3 TULANE J. INT'L AND COMP. L. 129-143 (1995); Hernany Veytia, *The Requirements of Justice and Equity on Contracts*, 69 TULANE L. REV. 1191-1207 (1995).

8. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 296, 605 [hereinafter NAFTA]; *see* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 1993 U.S.C.C.A.N. (107 Stat.) 2057 (1993) (codified at 19 U.S.C. § 3301 (Supp. 1993)).

9. NAFTA, *supra* note 8, art. 2022(1): "Each party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area." There is a similar disposition (art. 707) regarding commercial disputes on agricultural goods.

Interamerican Panama Convention.[10] It also establishes a special committee with the task of making recommendations on the subject to the Free Trade Commission.[11]

NAFTA thus promotes international commercial arbitration as a specialized jurisdiction over commercial disputes in the North American Free Trade Area. This is a sound policy, entirely in accord with the goal of free trade as a means for the development of all the member countries. But while arbitration is thus looked to as a familiar type of jurisdiction, the arbitrators are not invested with judicial power. If the essence of jurisdiction is the final and authoritative resolution of disputes, private arbitrators are able to pronounce such a final award. The public power is needed not for the resolution of the disputes but for the enforcement of the award. In order to have a specialized jurisdiction over disputes arising from international contracts, there is no need to create an international judicial power; the judicial power of each country can enforce the awards, and the procedural rules for the enforcement of awards are in fact harmonized by means of the New York Convention and the Panama Convention. What is needed is a group of arbitrators, a set of rules for the arbitral procedure and a set of rules for the international contracts.

NAFTA provides a role for arbitrators or panelists for the resolution of disputes between the member states arising from the application of the antidumping laws of each country[12] and from the application or interpretation of the treaty itself.[13] It also provides a role for arbitrators to solve disputes that arise between private persons or corporations and a state because of the application of the state's foreign investment laws.[14] For disputes among member states (chapters XIX and XX), it looks

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10. Canada, Mexico and the United States are already members of the New York Convention; Mexico and the United States are also members of the Panama Convention.

11. The Committee was established in October 1994. Since its establishment, the Committee has held four meetings: November 14, 1994 in Mexico City; June 19-20, 1995 in Vancouver, British Columbia; February 12-13, 1996 in Phoenix, Arizona; November 14-15, 1996 in Guadalajara, Jalisco.

12. NAFTA, *supra* note 8, Chapter XIX, *Annex* 1901.2.

13. NAFTA, *supra* note 8, Chapter XX, art. 2009.

14. NAFTA, *supra* note 8, Chapter XI, art. 1124(4).

to a set of procedural rules, which is to be developed by later agreements.[15] For disputes among investors and states it does not have its own set of rules[16] but refers to the procedural rules contained in the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules) or the rules of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention).[17] But NAFTA does not provide for a role for arbitrators in the settlement of private disputes nor a set of procedural rules.

As regards the arbitrators, there are already some international institutions functioning in the area, such as the arbitration commission of the International Chamber of Commerce and the international commission of the American Arbitration Association. There are also numerous national institutions, such as the arbitration commission of the Camara Nacional de Comercio (CANACO). They have their own roles for arbitrators and their own sets of procedural rules. Time and experience are going to distribute the arbitrations among them, but there remains a need to provide arbitration at less cost for the medium and small enterprise.

The procedural rules established in the law of each country, which will govern arbitration if the parties have not chosen any other procedural rules, are homogenous and consistent with the UNCITRAL Model Law on International Commercial Arbitration.[18]

In view of these facts, the NAFTA Advisory Committee on Private Commercial Disputes concluded in its November 1996

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15. For the controversies about unfair competition, *see* NAFTA, *supra* note 8, art. 1903 (and *Annex* 1903.2), art. 1904 (and *Annex* 1904.13) and art. 1905 (and *Annex* 1905.6). For the controversies on the application or interpretation of the Agreement, *see* art. 2012.

16. NAFTA, *supra* note 8, arts. 1119-1130.

17. NAFTA, *supra* note 8, art. 1120.

18. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, U.N. Doc. No. A/40/17, *adopted by* UNCITRAL on June 21, 1985, 1985 I.L.M. 1302. The legislation enacted by the Canadian Federation and all Canadian Provinces and Territories, by the American state legislators of California, Connecticut and Texas, and by the Federal Congress of Mexico, are all based on this model law.

session that there is no need to promote or fund the creation of any new arbitral institution or to amend existing legislation in this field.[19]

There is, however, a big difference among the three NAFTA member states' substantives rules on contracts, which derives from the different juridical traditions of common law and civil law. If international contracts in the North American Free Trade Area were to be governed by one or another of the national laws, there would be no chance of a fair and predictable resolution[20] of private disputes. Each problem could be solved in at least three different ways, according to the substantive rules of each country. What is needed to fill this gap is a set of substantive rules for international contracts, which could be different from the rules for national contracts. Each country could keep and continue its own traditions regarding national contracts, and at the same time promote the adoption of common rules for international contracts.

IV. THE ROLE OF THE UNIDROIT PRINCIPLES IN NAFTA

Actually, there already exist a number of juridical documents which contain substantive rules of law that can be applied to international contracts in the North American Free Trade Area. The most important is the United Nations Convention on Contracts for the International Sale of Goods (CISG), which is in force in all three NAFTA member states, and is therefore the law which will govern this kind of contract between NAFTA traders, unless the parties have agreed on another law. There are also some international conventions about the carriage of goods by sea, which are in force in all three countries.[21] But

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19. REPORT OF THE NAFTA ADVISORY COMMITTEE ON PRIVATE COMMERCIAL DISPUTES TO THE NAFTA FREE TRADE COMMISSION at 5 (November 1996).

20. Predictability is one characteristic of fairness.

21. INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO BILLS OF LADING (Brussels, August 25, 1924) (Hague Rules), as amended by art. 5 of the PROTOCOL (Visby, February 23, 1968) (Hague-Visby Rules); UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA (Hamburg, May 30, 1978) (Hamburg Rules). The Hamburg Rules, although in force in more than twenty countries, have not been ratified by any of the North American countries; but there is a discussion in Mexico about it which might lead to its ratification in the near future.

there are no common rules regarding other kinds of international contracts,[22] such as franchise agreements,[23] construction contracts, distribution or agency contracts, joint ventures, or contracts for the rendering of professional services.

The UNIDROIT Principles may offer a set of general rules for all these contracts. They do not cover all aspects of these contracts, but as a set of general rules, they provide principles from which the solution to many problems could be inferred. For example, the UNIDROIT Principles on interpretation of contracts could be a key for resolving many issues regarding elaborate and complex written international distribution contracts, while the Principles on invalidity of contracts could be applied to international franchise agreements as well as joint ventures.

It is a tested truth that the contract itself, notwithstanding how complete or well-drawn-up it is, does not have all the solutions for the possible conflicts which can arise from it. The contract has to be read in light of an entire contract law. The CISG, for example, expressly recognizes that there are some aspects of the contract of sale, like those of validity, that have to be solved according to the national law, that is, according to a body or *corpus* of law. The UNIDROIT Principles may be the body of law that can be applied to international contracts in NAFTA. The question, then, is whether they are suitable for that role.

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22. This article considers only commercial contracts, and does not consider contracts with banks or other kind of financial institutions. There are some common rules already in force for these relations, such as the UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, the UNIFORM RULES ON COLLECTION, the UNIFORM RULES ON DOCUMENTARY GUARANTEES, prepared by the International Chamber of Commerce (ICC), and the conventions on international leasing and international factoring, prepared by UNIDROIT.

23. There are many international conventions about intellectual property, and NAFTA itself has some rules about it, but these conventions are concerned with the recognition and protection of the intellectual property and not with the contracts.

V. THE UNIDROIT PRINCIPLES AND THE COMMON LAW AND CIVIL LAW TRADITIONS

The answer necessitates a comparative study of the UNIDROIT Principles with the common law and the civil law traditions. This article undertakes a limited comparison that focuses on topics pertinent to the question about the ability of the UNIDROIT Principles to serve as the law of contracts in the North American Free Trade Area. So I am comparing the rules of the UNIDROIT Principles with two sets of rules that can be taken as a sample of the contract law of both traditions. These are the Restatement (Second) of Contracts, and the rules of the Mexican *Codigo Civil Para el Distrito Federal* (Civil Code).

I tried to compare each article of the UNIDROIT Principles with its correlated articles in the Restatement and the Civil Code. But I soon realized that this method would give me a very broad and unclear comparison since each article might have one, four or five different statements that deserve analysis. So I began to do a comparative analysis of each one of the statements[24] contained in each one of the articles of the UNIDROIT Principles. The first step is to identify the statements that are subject to analysis. The next is to relate them to comparable statements of the Restatement and the Civil Code. Then comes the comparison of the statements of the Restatement and of the Civil Code with those of the UNIDROIT Principles. My purpose is to compare the Restatement and the Civil Code with the UNIDROIT Principles; I am not comparing these Principles with those two bodies of law. The results of the comparison of the statements fall into the following categories: the statement of the Restatement or of the Civil Code is *equal, similar, different*, or *opposite* to that of the UNIDROIT Principles, or the statement of the UNIDROIT Principles is *unknown* to the Restatement or the Civil Code.

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24. By "statement" I mean any proposition with juridical meaning; it could be a rule, description of a conduct, exception, requirement, or prohibition.

The results of a detailed analysis of chapters one and two of the UNIDROIT Principles are as follow:[25]

CHAPTER 1: of 27 UNIDROIT Principles statements analyzed:

	Restatment has	Civil Code has
Equal	16	16
Similar	2	1
Different	3	5
Opposite	0	0
Unknown	6	5

CHAPTER 2: of 52 UNIDROIT Principles statements analyzed:

	Restatement has	Civil Code has
Equal	29	22
Similar	12	14
Different	2	3
Opposite	2	4
Unknown	7	9

If we consider the *equal* and *similar* statements as consistencies, and the *different* and *opposite* statements as

25. This analysis will be published in Spanish in the REVISTA DE DERECHO PRIVADO (MEXICAN JOURNAL OF PRIVATE LAW), v. 23 and 24.

inconsistencies with the UNIDROIT Principles, without taking account of the *unknown* statements which could be either or both, we have the following results: Of the 66 related statements of the UNIDROIT Principles that were analyzed, 59 (89.3%) are consistent, and only 7 (10.7%) inconsistent with the statements of the Restatement; and of the terms of the Civil Code examined, 53 (81.5%) are consistent, and 12 (10.5%) inconsistent with the 65 related UNIDROIT Principles. Although I still have to complete and review my analysis, I offer here some preliminary and general conclusions.

My first conclusion is that the UNIDROIT Principles are not as complete and detailed as either of the two legal traditions. One can see this just by looking at the size of the volume of the UNIDROIT Principles as compared with the three volumes of the Restatement of or the many volumes of comment on the book of obligations or contracts of the Civil Code. It could not be otherwise; the centuries of experience condensed in those traditions are not to be surpassed by the work, as brilliant as it may be, of some jurists over a few decades.

But the second conclusion is that the UNIDROIT Principles are not in opposition to or remote from these traditions. They are the fruit of the work of jurists coming from these traditions and contain principles, rules and concepts common to both traditions, or sometimes extracted from one or the other of them. The Principles are not some sort of rare animal to any jurist of these traditions. They are fully understandable to them.

The third conclusion is that the Principles, although not alien to the common law or civil law of contracts, are also not completely equal to either of them. Sometimes the differences between a rule of the Principles and a common law rule can be explained by the adoption in the Principles of the corollary civil law rule, and the other way around. At other times the difference is a consequence of the international character of the contracts, as perceived by the authors of the Principles, instead of the national contracts contemplated by the national laws.

My last general conclusion is that the UNIDROIT Principles are not a complete body of contract law. They cover all the aspects of a general theory of international contracts, which is a very important contribution. But they do not cover them with all the needed detail. Moreover, they are not yet a clear and congruent theory of contracts; they are, I would say, a good set of rules for international contracts, but rules are nonsense if there is not a common understanding about their main principles and concepts, if there is not, in other words, a common theory of contracts.

Finally, I conclude that the UNIDROIT Principles are fit to govern international contracts in NAFTA, because: a) they cover all the aspects of international contracts that have to be covered; b) they are fully understandable to the judges and jurists from both traditions and from the three countries of the area; and c) they can provide a subsidiary law for contracts which already have an international rule, such as contracts for the international sale of goods,[26] or for other types of elaborate international contracts.

Although the parties have not agreed to it, there are at least two bases on which the UNIDROIT Principles could already be applied in the North American Free Trade Area. One is by means of the procedural rules of arbitration, which state that arbitrators have to apply general rules of arbitration, general principles of law, the *lex mercatoria*, or the usages of trade.[27] The other is by means of the Interamerican Convention on the Law Applicable to International Contracts,[28] which states that when the parties of a contract did not choose the governing law

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26. *See* Garro, *supra* note 7.

27. *See, e.g.,* UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 18, art. 28(4): "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

28. INTERAMERICAN CONVENTION ON THE LAW APPLICABLE TO INTERNATIONAL CONTRACTS, approved in Mexico City, 1994, 33 I.L.M. 732. This convention has been ratified by Mexico, but not by Canada or the United States. For a comment on this convention, *see* Friedrich Juenger, *The Interamerican Convention on the Law Applicable to International Contracts*, 42 AMERICAN JOURNAL OF COMPARATIVE LAW 381 (1994). For a critical opinion *see* Susie Malloy, *The Inter-American Convention on the Law Applicable to International Contracts*, 19 FORDHAM INTERNATIONAL LAW JOURNAL 662 (1995).

judges are to apply the law of the state with which the contract has the "closest ties."[29] But it adds that "the guidelines, customs, and principles of international commercial as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case."[30] By this provision, the UNIDROIT Principles are like a subsidiary law to the law which has the closest ties with the contract and, therefore governs the contract.

VI. THE UNIDROIT PRINCIPLES AS A STARTING POINT FOR THE CONSTRUCTION OF A THEORY OF INTERNATIONAL CONTRACTS

The UNIDROIT Principles and the related conventions on international private law form a body of substantive rules for international commercial contracts. But law is not a mere collection, it is rather a *corpus* of rules. This means that law requires the intellectual elaboration of the jurist - to organize the rules, point up relations among them, clarify their content and their effects, and harmonize them, as well as to develop new rules for new situations in accordance with the tradition of the law, and to make the law a teachable material that can be passed on to new generations. If, therefore, we agree that a free trade area requires a non-national contract law, we need to promote the elaboration of a doctrine of international commercial contracts. That doctrine can provide the concepts, principles and methods of work that constitute the common understanding of the rules. Without this common understanding, the rules are going to be interpreted in many different ways, according to the principles, concepts and methods in which each judge or lawyer happens to be learned.

The reorganization of the world in groups of countries requires the development of a *corpus* of law that derives its authority not from the political power of a state (whether legislative or judicial) but from some other non-national source. That source

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29. INTERAMERICAN CONVENTION, *supra* note 28, art. 9.
30. INTERAMERICAN CONVENTION, *supra* note 28, art. 10.

cannot be a supranational political power, since no such legitimate power exists. And if the law is to provide an independent and objective basis for the settlement of disputes, the source of a non-national law of international contracts also cannot be trans-national economic power. Instead, as the history of law shows us, a supranational law can derive its authority from its own objective reasonableness, tested and approved by society through experiences related to the law's application.

As a private document, the UNIDROIT Principles can be considered an intellectual effort in the direction of developing a general doctrine for international commercial contracts. But there is still much work to be done. It is the task of our universities and schools of law to create that doctrine to give sense to, and organize the different rules of law on international contracts. It is the task of lawyers to draft international contracts not with reference to their national law, but to the international doctrine. And we must look to judges and arbitrators to apply it for the settlement of disputes.