

2011

## Normative Modeling for Global Economic Governance: The Case of the United Nations Commission on International Trade Law (UNCITRAL)

Edward S. Cohen

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

---

### Recommended Citation

Edward S. Cohen, *Normative Modeling for Global Economic Governance: The Case of the United Nations Commission on International Trade Law (UNCITRAL)*, 36 *Brook. J. Int'l L.* (2011).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol36/iss2/4>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

# NORMATIVE MODELING FOR GLOBAL ECONOMIC GOVERNANCE: THE CASE OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

*Edward S. Cohen*\*

## INTRODUCTION

The United Nations Commission on International Trade Law (“UNCITRAL”) was created by the General Assembly in 1966 and given a mandate to “to further the progressive harmonization and unification of the law of international trade.”<sup>1</sup> In contrast to the emphasis placed on public law in the works of institutions such as the World Trade Organization (“WTO”), UNCITRAL’s focus is on private international law, defined as “the laws applicable to private parties in international transactions.”<sup>2</sup> After approximately two decades of small accomplishments and little recognition, however, UNCITRAL has emerged as an increasingly significant player in shaping the law and politics of international trade.<sup>3</sup> Its work product—model laws, legislative guides, contractual and arbitration rules, and conventions—is increasingly influential in

---

\* Associate Professor of Political Science, Westminster College, New Wilmington, PA, U.S.A. and Research Associate at the University Center for International Studies, University of Pittsburgh. He received a B.A. from Brooklyn College (CUNY) and an M.A. and Ph.D. in Political Science from the University of Wisconsin-Madison. His current research centers on the politics of international commercial law-making and the impact of commercial law on the changing structures of state power in the global political economy. He would like to thank Prof. Claire Kelly of Brooklyn Law School and Prof. Roderick Macdonald of McGill University, Montreal for comments on an earlier version of this paper, UNCITRAL Officials and participants for their candid comments on the operation of the institution, and the editorial staff of the *Brooklyn Journal of International Law* for their careful work on the manuscript.

1. *FAQ—Origin, Mandate and Composition of UNCITRAL*, U.N. COMM’N ON INT’L TRADE LAW (UNCITRAL) (Jan. 1, 2011), [http://www.uncitral.org/uncitral/en/about/origin\\_faq.html](http://www.uncitral.org/uncitral/en/about/origin_faq.html) [hereinafter *UNCITRAL FAQ*].

2. *Id.*

3. *See, e.g.*, Claire R. Kelly, *The Politics of International Economic Law: Legitimacy and the UNCITRAL Working Methods 1* (2009) (unpublished manuscript), available at [http://works.bepress.com/claire\\_kelly/15](http://works.bepress.com/claire_kelly/15) (citing U.N. COMM’N ON INT’L TRADE LAW, *THE UNCITRAL GUIDE: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW*, at 1, U.N. Sales No. E.07.V.12 (2007) (“UNCITRAL develops international norms that affect a variety of trade issues. It has had considerable success.”)).

shaping the law of global commerce.<sup>4</sup> Moreover, UNCITRAL engages in sustained cooperation with other public and private international organizations involved in shaping the legal frameworks of national and global commerce and investment.<sup>5</sup>

The aims of this Article are threefold: to present an overview of UNCITRAL and its role, explain how and why it has increased its presence in shaping international economic law, and explore how UNCITRAL's work and structure can help advance an understanding of the legal construction of the global political economy. The Article argues that UNCITRAL, as an institution, is best understood as a "site" for normative modeling<sup>6</sup> through which legal norms, principles, and standards for the global political economy are articulated. At stake in UNCITRAL's work is influence over the definition of normative standards that shape legal rules throughout the global economy, definitions over which actors with political, economic, and professional stakes compete intensely to control. These actors include states, corporate and industry representatives, legal experts and professionals, and other public and private international organizations. Without significant institutional resources of its own, UNCITRAL acts only when it is mobilized or "enrolled" by these actors.<sup>7</sup>

Two features of UNCITRAL's practice—the variety of forms through which it articulates legal norms and the unique political structures through which it works—make it increasingly attractive to resource-rich actors attempting to mold the law that governs contemporary international commerce. These features also enable UNCITRAL to draw simultaneously on political and technical standards of legitimacy for its work, further increasing its value for these actors. Increasingly, however, claims about the legitimacy of UNCITRAL's work as global standards of law have come under internal and external critiques.<sup>8</sup> The dynamics of

---

4. See U.N. COMM'N ON INT'L TRADE LAW, THE UNCITRAL GUIDE: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, at 1, U.N. Sales No. E.07.V.12 (2007) [hereinafter UNCITRAL GUIDE].

5. See *id.*

6. A normative model may be defined as "a prescriptive model which evaluates alternative solutions to answer the question, 'what is going on?' and suggests what ought to be done or how things should work according to an assumption or standard." BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/normative-model.html> (last visited Oct. 15, 2010).

7. Steve Charnovitz, *The Relevance of Non-State Actors to International Law*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 543, 544–48 (Rüdiger Wolfrum & Volker Röben eds., 2005) (advancing the notion that many international organizations function as arenas for action rather than actors themselves).

8. See discussion *infra* Part IV.

these claims and criticisms provide insight into larger questions regarding the substance and control over the legal rules governing global commerce.

#### I. NORMATIVE MODELING IN GLOBAL GOVERNANCE

In their magisterial work on the regulation of the global economy, Braithwaite and Drahos note that the constitution of business regulation on the global level is a complex process involving various agents, mechanisms, and locations.<sup>9</sup> The key agents in this process are major states, large corporate organizations, certain international institutions, key business organizations, and legal and business professionals acting in organizations or as individual “policy entrepreneurs.”<sup>10</sup> With rare exceptions, these actors share the ability to mobilize significant resources to engage mechanisms to advance their priorities and to catalyze projects for structuring the global political economy.<sup>11</sup> The most important of these mechanisms include military and economic coercion, reciprocal adjustment, systems of reward, and modeling.<sup>12</sup> The central pattern is one in which various agents employ a number of mechanisms that interact with one another to shape the “contest of principles” governing the scope and direction of specific areas of regulation.<sup>13</sup> These contests play out in a variety of locations, or “sites,” where regulations are defined and enforced.<sup>14</sup> These locations span the transnational, international, state, regional, and local level and can be of a public, private, or hybrid character. Given the variety and shifting nature of sites of regulatory practice, the most effective actors are ones that are able to “forum shift” among these sites, galvanizing support and advancing a common regulatory project.<sup>15</sup>

---

9. See generally JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000).

10. JOHN KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 188–93 (2d ed., 1997).

11. See generally BRAITHWAITE & DRAHOS, *supra* note 9, at 27–28, 475–06.

12. See *id.* at 532–49.

13. See *id.* at 507–31.

14. SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS* 69–70 (2006) (referring to “global cities” as key sites for innovation in the global economy. More generally, a “site” can refer to any institutional context for rule or law-making, interpretation, and enforcement.).

15. See Edward S. Cohen, *Constructing Power Through Law: Private Law Pluralism and Harmonization in the Global Political Economy*, 15 *REV. INT’L POL. ECON.* 770 (2008) [hereinafter Cohen, *Constructing Power Through Law*]. See BRAITHWAITE & DRAHOS, *supra* note 9, at 564–78, for a more detailed exploration of forum-shifting. See Peter Drahos, *Securing the Future of Intellectual Property: Intellectual Property Owners*

Normative modeling, in which actors attempt to define principles, standards, and rules that guide regulatory practices, plays a particularly important role in shaping global business law and regulation, one that is often unrecognized.<sup>16</sup> Such modeling is identified as an “important” mechanism of globalization in every field of business regulation as analyzed by Braithwaite and Drahos—a status few other mechanisms can claim.<sup>17</sup> But special care is needed in discussing normative modeling, as discussions of this process often begin with flawed assumptions.<sup>18</sup> Here, it is necessary to clarify three important starting points for this discussion.

First, the process or mechanism of normative modeling should be understood as one that takes place simultaneously with, and often as part of, an attempt to use other mechanisms of regulatory globalization.<sup>19</sup> Thus, coercive power and/or strategies of economic reward are often embodied in attempts at normative modeling, and advocates of particular normative models often try to engage actors with coercive or reward-based resources to help advance their agendas for shaping dominant models in a given area of regulation. As Braithwaite and Drahos put it, “modeling is patterned according to configurations of power.”<sup>20</sup> In order to capture this interaction, they draw on the concept of “enrollment,” which refers to the ways actors using different mechanisms are continually looking to mobilize each other to pursue projects of mutual interest.<sup>21</sup> In the specific context of international economic law, one can follow Susan Sell by understanding this process as one in which power can be mobilized *through* law and *vice-versa*.<sup>22</sup>

The second point is that normative modeling is usually driven by transnational coalitions, linking state power, private interests, and specif-

---

*and their Nodally Coordinated Enforcement Pyramid*, 36 CASE W. RES. J. INT'L L. 53 (2004), for an illustration of the application of forum-shifting to intellectual property law.

16. See BRAITHWAITE & DRAHOS, *supra* note 9, at 539–43.

17. *Id.* at 539.

18. *Id.* at 19–20. The term “norms” is used here as the most general category for describing the structure of a model for laws and regulations, within which principles, standards, and guidelines are sub-categories. *Id.*

19. See, e.g., David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, in 598 ANNALS AM. ACAD. POL. & SOC. SCI. 12 (2005) (exploring the concept and the dynamics of “regulatory globalization”).

20. BRAITHWAITE & DRAHOS, *supra* note 9, at 583.

21. *Id.* at 32.

22. See generally SUSAN K. SELL, *POWER & IDEAS* vii (1998) (analyzing “North-South politics and diplomacy of technology transfer, antitrust, and intellectual property in two eras—from the early 1970s to 1985[,] and from 1985 to the present”); see also SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW* (2003).

ic (in this case legal) expertise.<sup>23</sup> Scholars often emphasize, with good reason, the role of formal public institutions and organizations as the main vehicles through which norms are articulated, enforced, and legitimized.<sup>24</sup> But norms develop and consolidate in a variety of sites, as normative entrepreneurs<sup>25</sup> continually search for vehicles onto which they can attach their preferred models, principles, and rules. Thus, in the area of international economic law, norms can be modeled and diffused through standard contracts,<sup>26</sup> common practices in markets and industries,<sup>27</sup> the work of law firms and bar associations,<sup>28</sup> court decisions,<sup>29</sup> and legal scholarship,<sup>30</sup> as well as through the activities of public institutions at the national and international levels.<sup>31</sup> Normative entrepreneurs, who may be located in public, private, or expert positions, work continually to engage various mechanisms to enroll a variety of actors and sites into specific modeling projects.<sup>32</sup>

---

23. See Susan K. Sell & Aseem Prakash, *Using Ideas Strategically: The Contest Between Business and NGO Networks in Intellectual Property Rights*, 48 INT'L STUD. Q. 143 (2004) (analyzing the roles of coalitions of private business interests and legal expertise in shaping international legal norms).

24. See, e.g., IAN HURD, AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL (2007); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 725–35 (1988).

25. See KINGDON, *supra* note 10. The role of normative (and/or policy) entrepreneurs is discussed in detail in BRAITHWAITE & DRAHOS, *supra* note 9, at 18–26.

26. See, e.g., John Flood & Eleni Skordaki, *Structuring Transactions: The Case of Real Estate Finance*, in CONTRACTUAL CERTAINTY IN INTERNATIONAL TRADE 157, 157 (Volkmar Gessner ed., 2009).

27. See, e.g., Debora L. Spar, *Lost in (Cyber)space: The Private Rules of Online Commerce*, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 31, 32 (A. Claire Cutler, Virginia Haufler & Tony Porter eds., 1999).

28. See, e.g., John Flood & Fabian P. Sosa, *Lawyers, Law Firms, and the Stabilization of International Business*, 28 NW. J. INT'L L. & BUS. 489, 490 (2008) (explaining that, although states' legal systems are "a basic necessary condition," law firms and law associations play a large role in shaping transnational business and enterprise).

29. See, e.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 1, 65–100, 131–54 (2004).

30. See Roderick A. Macdonald, *Three Metaphors of Norm Migration in International Context*, 34 BROOK. J. INT'L L. 603 (2009).

31. See *id.*; see also JARROD WIENER, GLOBALIZATION AND THE HARMONIZATION OF LAW (1999).

32. Although the focus of this Article is on the work of one public institution, UNCITRAL's role in normative modeling cannot be fully understood unless it is placed in the context of these and other settings in which norms are developed and diffused. Indeed, it is the manner in which UNCITRAL's products and processes fit in with these dynamics of normative modeling in private international law that made it an increasingly influential site in the development of commercial law.

The final starting point is the recognition of the role of legitimacy in the fate of normative modeling projects for the global economy. In his classic and still widely influential essay, Mark Suchman defines legitimacy as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.”<sup>33</sup> While actors and coalitions invest in legal norms to advance their power and interests, the success of specific legal rules, standards, codes, and principles depends on their ability to claim some kind of legitimacy independent of these actors’ motivations.<sup>34</sup>

In the context of global economic governance, legal rules and regimes are usually justified in two ways.<sup>35</sup> One approach is political, emphasizing the scope of affected interests incorporated into the processes by which models are developed and adopted.<sup>36</sup> In this approach, legal regimes are considered legitimate to the extent that they are acceptable to the agents most impacted by their operation and the extent to which they conform to widely accepted principles of regulation.<sup>37</sup> The other approach is a technical one, in which regimes are judged by the sophistication of their drafting, their likelihood of attaining the regulatory ends desired, and the involvement of leading experts in their development.<sup>38</sup> In the context of private international law, for example, legal regimes are often justified by their proven ability to facilitate the mobility of capital and encourage investment that produces increases in wealth.<sup>39</sup> This Ar-

---

33. Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 *ACAD. MGMT. REV.* 571, 574 (1995).

34. For a systematic analysis of this relationship, and of the role of international legal discourse in constituting and shaping legitimacy claims, see FRIEDRICH V. KRATOCHWIL, *RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS* (1989).

35. This Article employs the distinction between “political” and “technical” legitimacy claims because it conforms to the language used by the participants in UNCITRAL’s work, and serves best to illuminate the forms in which emerging challenges to the legitimacy of this work have been articulated and advanced. *But see* Suchman, *supra* note 33, at 577–84 (distinguishing between “pragmatic,” “moral,” and “cognitive” forms of legitimacy claims).

36. This notion is equivalent to Majone’s classic definition and discussion of “procedural legitimacy.” See Giandomenico Majone, *Regulatory Legitimacy*, in *REGULATING EUROPE 291–94* (Jeremy Richardson ed., 1996).

37. *See id.*

38. *Id.* at 294 (although Majone categorizes this dimension as “substantive legitimacy”).

39. *See, e.g.*, Harold S. Burman, *The Commercial Challenge in Modernizing Secured Transactions Law*, 8 *UNIF. L. REV.* 347 (2003) (Burman is Assistant Legal Advisor for Private International Law in the U.S. Department of State, and has been the U.S. repre-

title postulates that UNCITRAL's work has proven itself amenable to both kinds of legitimacy claims, and this has been a key factor in its growing influence and the willingness of resource-rich actors to invest in its work.

Legitimacy claims, however, are fluid and always subject to contestation and change.<sup>40</sup> As understandings of legitimacy evolve, claims that were once unchallenged come under pressure from old and new actors as well as the institutions that utilize them.<sup>41</sup> Two kinds of processes that generate these challenges are especially relevant to the case of UNCITRAL. First, initially shared understandings of the way an institution works can be shattered as the evolution of the institution gradually transforms its patterns of operation and/or its work product begins to move in directions unanticipated by and unacceptable to key actors. Second, the growing interactions between different sites in the field of global business regulation and the degree to which any particular site conforms to a given understanding of what makes the rule-making legitimate can generate challenges to these accepted understandings.<sup>42</sup> Both kinds of processes are currently at work in the context of UNCITRAL, raising key questions regarding the larger process of the constitution of legal regimes for global commerce.

---

sentative in a number of UNCITRAL Working Groups. See HAROLD S. BURMAN, <http://pages.cthome.net/hplowry/Burman/> (last visited Jan. 13, 2011); Hannah L. Buxbaum, *Unification of the Law Governing Secured Transactions: Progress and Prospects for Reform*, 8 UNIF. L. REV. 321 (2003); see also Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471(2005) [hereinafter Wai, *Transnational Private Law*]; Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209 (2002) [hereinafter Wai, *Transnational Liftoff*].

40. See Suchman, *supra* note 33.

41. *Id.* at 585–99 (recognizing these dynamics and identifying the challenge of “legitimacy management” as central to the success of any organization). In effect, this Article suggests that UNCITRAL is now engaged in just such management.

42. See DAVID SZABLOWSKI, *TRANSNATIONAL LAW AND LOCAL STRUGGLES, MINING, COMMUNITIES AND THE WORLD BANK* 292–93 (2007). This is often referred to as a situation of “interlegality,” which Szabowski defines as “the overlapping or ‘intertwined’ action of different legal orders upon a single social situation.” *Id.* For the centrality of this phenomenon in the literature on transnational legal pluralism, see GERALF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (2010) (describing and analyzing various law-making regimes in the transnational arena).



## II. UNCITRAL: HISTORY AND WORK

A. *The Origins of UNCITRAL*

The impetus behind the creation of UNCITRAL, in 1966, must be put into two different contexts: the history of private law harmonization since the 1890s, and the changing political economy of international trade in the mid-1960s.<sup>43</sup> The project to “harmonize” or “unify” private international commercial law emerged in the 1890s, as a by-product of the intensifying economic interchanges of that period, sometimes called the “first wave” of globalization.<sup>44</sup> It was a project driven by legal academics, jurists, and politicians almost exclusively from the world of Continental European “civil law” states.<sup>45</sup> The idea behind this project was the contention that diversity of legal rules and procedures in such fundamental areas as contracts, property, and jurisdiction acts as a hindrance to deeper economic interaction across the states.<sup>46</sup> It was argued that by “harmonizing” or “unifying” law in these key areas, economic integration would be facilitated, which in turn would lead to more peaceful relationships between states.<sup>47</sup>

The immediate impact of this project was limited, but it did leave both an institutional and programmatic legacy. The institutional legacy was the formation of the Hague Conference on Private International Law in 1893<sup>48</sup> and of the International Institute for the Unification of Private

---

43. The following discussion, which is part of a larger research project by the Author on the politics of private international law, draws on the study of UNCITRAL documents, interviews with participants, observation of UNCITRAL Working Groups, and on a small but growing body of scholarly work which is presented in subsequent notes. Interviews with UNCITRAL Officials and participants were, in most cases, conducted on the agreement that the individuals would not be named, but that their position could be indicated in ways that did not compromise the confidentiality of the views expressed. This Article follows that practice.

44. A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY* 180–240 (2003). On the history of globalization, see JEFFREY A. FRIEDEN, *GLOBAL CAPITALISM: ITS FALL AND RISE IN THE TWENTIETH CENTURY* (2006).

45. CUTLER, *supra* note 44, at 207–11.

46. *Id.*

47. Note that “harmonization” of law means adjusting the rules of different legal systems so that they follow the same substantive principles in specific areas, even if they remain distinctive in some features; “unification” means that different states agree to adopt exactly similar rules in specific areas of law, usually through international conventions. See David. W. Leebron, *Lying Down With Procrustes: An Analysis of Harmonization Claims*, in 1 *FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FAIR TRADE?* 41 (Jagdish Baghwati & Robert E. Hudec eds., 1996).

48. See Statute of the Hague Conference on Private International Law art.1, Oct. 31, 1951, 220 U.N.T.S. 121 (entered into force on July 15, 1955 and amended on Jan. 1,

Law (“UNIDROIT”) in 1926,<sup>49</sup> which created stable fora through which experts and government officials could sustain the project over time and extend the scope and depth of their own networks of interested parties. Both institutions remain active today and indeed are involved in increasingly substantial cooperation with each other and with UNCITRAL.<sup>50</sup> Perhaps more importantly, the discourse and institutions created in this period generated a stable core of personnel and ideas that sustained the project of harmonization/unification, and established the basic framework for thinking about the value, purposes, and strategies for such projects.<sup>51</sup>

The second part of the context of UNCITRAL’s formation was the changing politics and economics of the post-World War II global system.<sup>52</sup> On the one hand, by the mid-1960s, the quickly increasing number of newly independent “developing” states began to take an active presence in multilateral discussions of issues surrounding the structure of the international economy.<sup>53</sup> Much of this activity focused on the United Nations (“UN”) system, which offered access and voice unavailable to these states in other contexts. In the General Assembly, Economic and Social Council (“ECOSOC”), and especially the UN Commission on Trade and Development (“UNCTAD”), developing states began pushing an aggressive program demanding aid and investment from developed states and criticizing key structural elements of the international economic order.<sup>54</sup> At the same time, the United States began to engage deeply in these debates at the multilateral level, perceiving this as a necessary aspect of the Cold War era competition for influence among the newly independent states. The US and its allies, however, faced structural impediments with

---

2007) [hereinafter Hague Conference] (“The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law.”).

49. See *UNIDROIT: An Overview*, INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), <http://www.unidroit.org/dynasite.cfm?dsmid=103284> (last visited Feb. 18, 2011). UNIDROIT was initially established as part of the League of Nations system, and was re-established in 1940 by participating states. *Id.*

50. For a review of UNCITRAL’s work with UNIDROIT and The Hague Conference, see UNCITRAL GUIDE, *supra* note 4, at 10–12.

51. See CUTLER, *supra* note 44, at 211–25.

52. In addition to personal interviews with UNCITRAL Officials, the following discussion is based generally on the accounts referenced in Susan Block-Lieb & Terence Halliday, *Harmonization and Modernization in UNCITRAL’s Legislative Guide on Insolvency Law*, 42 TEX. INT’L L.J. 475, 479 (2007) [hereinafter Block-Lieb & Halliday, *Harmonization and Modernization*]. See also CUTLER, *supra* note 44.

53. For an overview of the role of developing states in the United Nations system during this era, see JOAN E. SPERO & JEFFREY A. HART, *THE POLITICS OF INTERNATIONAL ECONOMIC RELATIONS*, 221–25 (5th ed., 1997).

54. *Id.*

the existing UN agencies. The one state/one vote rule, the dominance of critical perspectives in UNCTAD, and the general politicization of the debates in most UN fora limited US influence and led to a search for alternative institutional arenas in which to advance its interests in promoting a generally capitalist, market-oriented development agenda.<sup>55</sup>

UNCITRAL was created in response to this dilemma, though its emergence was rather circuitous.<sup>56</sup> The starting point was the adoption, in 1958 by a United Nations diplomatic conference, of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).<sup>57</sup> The New York Convention marked the first time that the US government, and key elements of the US legal community, played an active role in advancing the reformation and harmonization of elements of private commercial law as a tool for furthering global economic integration.<sup>58</sup> The quick adoption and initial success of the New York Treaty led the US and key European and Latin American states to explore the notion of creating a formal institution to incorporate the harmonization/unification project within the UN system.<sup>59</sup>

In 1965, the Secretary General commissioned a study of the need for and potential of a UN Commission to advance this project,<sup>60</sup> led by Clive Schmitthoff—the leading British authority on the law of international trade—and including legal experts from developed and developing states.<sup>61</sup> The resulting “Schmitthoff Report”<sup>62</sup> formed the basis for a con-

---

55. See CUTLER, *supra* note 44; see also Interview with U.S. Officials active in UNCITRAL’s work, in Washington, D.C. (Sept. 21, 2004) [hereinafter Sept. 21 Interview].

56. See generally CUTLER, *supra* note 44 (providing an overview of this process).

57. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force June 7, 1959).

58. See generally Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233 (2008) (exploring the re-emergence of arbitration and its impact on the study and practice of law).

59. See CUTLER, *supra* note 44.

60. For example, the harmonization and unification of the law of international trade.

61. See Nikitas E. Hatzimihail, *The Many Lives—and Faces—of Lex Mercatoria: History as Genealogy in International Business Law*, 71 LAW & CONTEMP. PROBS. 169, 175–90 (2008) (providing insight into Schmitthoff’s background on and his role in the creation of UNCITRAL).

62. U.N. Secretary-General, *Progressive Development of the Law of International Trade: Report of the Secretary-General*, ¶¶ 49–51, U.N. Doc. A/6396 (Sept. 23, 1966) [hereinafter *Progressive Development Report*]. The Secretary-General prepared this report on the basis of Dr. Clive M. Schmitthoff’s study on the subject. *Id.* ¶¶ 1–3. The report became widely referred to as the “Schmitthoff’s Report” or the “Schmitthoff Study” for this reason. See *Progressive Development of the Law of International Trade Official Records of the General Assembly—Meetings of the Sixth Committee*, U.N. COMM’N ON

sensus that led to the creation of UNCITRAL by the General Assembly in December, 1966.<sup>63</sup> At its foundation, UNCITRAL was given the responsibility to oversee the further development of the New York Convention and to explore other areas where legal harmonization seemed possible.<sup>64</sup> The first Chair of the Commission was John Honnold, an American legal expert with significant connections to the harmonization/unification expert community.<sup>65</sup>

The consensus leading to UNCITRAL was the product of a unique confluence of interests that led a number of actors to invest resources in the creation of a new organization. For key non-European states—the US, some developing states, and even the Soviet bloc—UNCITRAL provided a forum for advance commercial law reform projects outside of the West European-dominated fora of the Hague and UNIDROIT.<sup>66</sup> For the US and its allies in some key developing states in particular, UNCITRAL offered a forum in which they could pursue market-oriented legal change outside of the heavily “politicized” and confrontational UNCTAD environment.<sup>67</sup> For the legal experts committed to the harmonization project, UNCITRAL most likely presented an opportunity to revive their fortunes by attaching their work to the wider legitimacy of the UN system. In effect, UNCITRAL was the result of a decision by the US and key developed and developing states that the project of private law harmonization/unification could be used to advance their development projects, but only if pursued in a new, more inclusive, and differently structured organizational context.<sup>68</sup> UNCITRAL’s creation, then, amounted to the creation of a new forum to allow the pursuit of a forum-shifting strategy.<sup>69</sup>

---

INT’L TRADE LAW (Feb. 1, 2010), <http://www.uncitral.org/uncitral/en/commission/sessions/pre.html> (referring to the report to the Secretary General as “The Schmitthoff Study”).

63. *Progressive Development Report*, *supra* note 62.

64. *Id.*

65. This alliance between key states and a cohesive international network of legal experts has been central to all of UNCITRAL’s subsequent work. More generally, the harmonization project can be seen (in Sassen’s terms) as a residual “capability” created for one set of purposes but then mobilized for the creation of a different type of regime. *See* SASSEN, *supra* note 14, at 37–38.

66. *See* CUTLER, *supra* note 44, at 211–25.

67. *See id.*; *see also* SPERO & HART, *supra* note 53.

68. *See* CUTLER, *supra* note 44; *see also* SPERO & HART, *supra* note 53.

69. *See* sources cited *supra* notes 66–67.

### B. Forms of Work

How does UNCITRAL “do” normative modeling? UNCITRAL’s current understanding of its mission mixes the mandate to “harmonize” and “unify” law with an emphasis on the development and understanding of commercial law that embodies “best practice” standards for the promotion of trade and investment across national borders in the context of divergent legal traditions.<sup>70</sup> As the organization’s “Frequently Asked Questions” (“FAQ”) page asserts:

“Harmonization” and “unification” of the law of international trade refers to the process through which the law facilitating international commerce is created and adopted. International commerce may be hindered by factors such as the lack of a predictable governing law or out-of-date laws unsuited to commercial practice. The United Nations Commission on International Trade Law identifies such problems and then carefully crafts solutions which are acceptable to States having different legal systems and levels of economic and social development.<sup>71</sup>

UNCITRAL’s goal is to become one of the leading, authoritative international bodies in this area and to advance standards that are widely accepted by states and private agents in the global economy.<sup>72</sup> In order to accomplish these goals, UNCITRAL generates four different types of work products:<sup>73</sup>

1. The generation of a multilateral treaty (known as a “Convention”), which is adopted by the Commission and then put out for ratification by states. By signing and then approving such a Convention, a state commits to changing aspects of domestic law to conform to a common international approach; it can do this by applying the exact same provisions (unification) or by adopting rules that embody a general set of principles (harmonization).

---

70. UNCITRAL GUIDE, *supra* note 4. *But cf.* Terence C. Halliday, *Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead*, 32 BROOK. J. INT’L. L. 1081, 1097–98 (2007) (discussing the concept of “best practices” in UNCITRAL’s work and the fallacy of the adequacy of its application in all situations).

71. See UNCITRAL FAQ, *supra* note 1.

72. See *id.*; see also UNCITRAL GUIDE, *supra* note 4, at 1–3.

73. UNCITRAL breaks down its work into a greater number of categories and organizes them differently. See UNCITRAL GUIDE, *supra* note 4. This Article highlights these four types of work products because they are the most important forms in which UNCITRAL articulates legal norms and they have the most impact on international commercial law.

2. The promulgation of a “Model Law” that states can adopt or use to reform specific elements of commercial law within their jurisdictions, such as insolvency or sales contracts. These models tend to reflect a general consensus on the key principles and structures that should govern an area of commercial law across legal systems and can be more or less flexible.

3. The development of a “Legislative Guide” to aid states in the development or reform of a particular area of commercial law. These are less specific and structured than Model Laws; they are developed either to aid in the interpretation of a model law or to address an area where it proves too difficult to resolve the distinctions between national legal systems into a common structure. In addition, Legislative Guides are at times used by other international and regional institutions (especially lending banks and agencies) as part of the conditions for aid to specific states.

4. The “Model Rules” for use by private commercial actors in the design of contracts, in those areas where states allow businesses autonomy to construct their own rules of action.<sup>74</sup>

This variety of strategies allows UNCITRAL the flexibility to approach particular areas of law in ways most likely to gain support from member states and private actors and thus secure the legitimacy and authority of the institution.

These tools and strategies emerged over time through a process of trial and error. In its first few years of existence, UNCITRAL focused primarily on organizing itself, defining key directions for work, and identifying important constituencies that would support that work.<sup>75</sup> It was only in the mid-1970s that it began to generate a series of work products that addressed substantial issues in international commercial law.<sup>76</sup> The two most important and successful of these were the Convention on Contracts for the International Sale of Goods (“CISG”) (1980)<sup>77</sup> and the UNCITRAL Arbitration Rules (1976).<sup>78</sup>

---

74. See generally *id.* A fifth approach is the development of “Legal Guides” to clarify the issues presented in attempts to harmonize or “modernize” particular areas of law. While important as part of the effort to develop common understandings of legal questions, these Guides are usually part of the process of working towards the development one of the other four instruments.

75. See Block-Lieb & Halliday, *Harmonization and Modernization*, *supra* note 52, at 481–88.

76. See *infra* notes 73–74 and accompanying text (citing the most important of these products).

77. See United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, (entered into force Jan. 1, 1988) [hereinafter CISG].

78. See G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976).

The CISG provides a common model for contracts involving commerce across national jurisdictions. It has been ratified by seventy-four states, varying from key developed economies to a variety of developing economies across the world.<sup>79</sup> The CISG addresses the classic “conflicts of law” problem in international commerce, which has been at the heart of the harmonization movement from its beginnings.<sup>80</sup> A number of subsequent Conventions, in such areas as international payments and the transport of goods by sea, address similar problems. The negotiations of such multilateral Conventions, which aim to harmonize law directly through a binding treaty, illustrate UNCITRAL’s use of the traditional method of the harmonization movement.<sup>81</sup>

The Arbitration Rules are designed as a means for private parties to incorporate into contracts the designation of arbitration as the dispute resolution mechanism of choice. They are now one of the most commonly used arrangements in international commercial arbitration.<sup>82</sup> This work was a natural outcome of UNCITRAL’s role as the guardian of the New York Convention, but also amounted to a new strategy for shaping commercial law. Instead of focusing on changing state-promulgated rules, the Arbitration Rules attempt to shape commercial law by influencing legal practice “on the ground” through the promulgation of rules private parties are free to incorporate into their contracts, but that are ultimately enforced by states through the New York Convention.<sup>83</sup> The success of the Arbitration Rules demonstrated the potential for such a strategy and bolstered UNCITRAL’s authority in the area of commercial arbitration.<sup>84</sup>

---

79. See CISG, *supra* note 77.

80. See *id.*; see also Joseph Lookofsky, UNDERSTANDING THE CISG 1 (3d ed., 2008) (providing an overview and in-depth analysis of the CISG).

81. CUTLER, *supra* note 44, at 207–25.

82. See William K. Slate II et al., *UNCITRAL: Its Workings in International Arbitration and a New Model Conciliation Law*, 6 CARDOZO J. CONFLICT RESOL. 73, 78–82 (2004). Other important commercial arbitration rules include those of the International Chamber of Commerce (“ICC”) and the rules promulgated by specialized institutions such as the London Court of Arbitration (“LCIA”), the Stockholm Chamber of Commerce, and the American Arbitration Association. *Id.* The UNCITRAL Rules have also become, along with the rules of the International Centre for Settlement of Investment Disputes (“ICSID”) of the World Bank, one of the two major frameworks for investor-state dispute arbitration. See discussion *infra* Parts II–IV.

83. Slate et al., *supra* note 82, at 82–88, 106.

84. UNCITRAL has recently issued a revised version of the Arbitration Rules, designed to incorporate developments in the intervening decades. See G.A. Res. 31/98, *supra* note 78 (as revised in 2010), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-e.pdf>. It should be noted that UNCITRAL itself does not conduct or supervise arbitra-

*C. From Harmonization to “Modernization” of Law*

After the completion of the CISG and the Arbitration Rules, the Secretariat and select members identified other areas of commercial law—such as property, insolvency, and credit—that were within UNCITRAL’s ambit to address. After some initial consideration in the late 1970s, however, UNCITRAL concluded that the political and technical challenges of addressing such issues were too great.<sup>85</sup> But this context changed in the 1980s and 1990s, allowing UNCITRAL to significantly broaden the scope of its work and thus its importance as an institution.<sup>86</sup> While UNCITRAL participants seem surprised and even bemused<sup>87</sup> by this development, in retrospect it can be hypothesized that changing patterns of the global political economy created this opening. The spread of broadly neo-liberal, market-opening norms and projects, the growing focus on national institutions and rules as “non-tariff” barriers in trade politics, a growing concern with the “rule of law,” and the impact of all of these in shifting development strategies helped to put a whole range of issues of national commercial law on the agenda of international institutions and induced states to engage (albeit hesitantly) in projects aimed at establishing global legal standards.<sup>88</sup> Importantly, the deepening integration of markets, production, and investment flows “on the ground” seemed to make more pressing the action to coordinate legal and policy responses to the regulatory and crisis-management challenges that they presented.<sup>89</sup>

This proved a crucial turning point for UNCITRAL. In the early 1990s, key actors in the initiative to deepen global economic integration and

---

tions; these rules are chosen by commercial parties for arbitrations hosted in other contexts or institutions. *Id.*

85. See Buxbaum, *supra* note 39, at 321–22 (referring to the results of UNCITRAL’s discussion of the issue in the late 1970s: “The completed report, however, suggested that the divergence among legal systems was then too great to permit unification in the area . . . . As a result, UNCITRAL concluded that unification was not at that time feasible, and postponed its work in the area of security law.”); see also Spiros V. Bazinas, *UNCITRAL’s Work in the Field of Secured Transactions*, in *EMERGING FINANCIAL MARKETS AND SECURED TRANSACTIONS* 211, 211–18 (Joseph J. Norton & Mads Andenas eds., 1998).

86. Buxbaum, *supra* note 39, at 322.

87. Regarding the issue of secured transactions in particular, see Burman, *supra* note 39 (“In the mid-1990s, the accepted wisdom in the field had placed several areas in the ‘impossible’ list, consigned to the dustbin because of deep differences in legal traditions, the uses of commercial law, and legislative and cultural differences in changing long-standing law. Secured finance was near the top of that list.”).

88. See MARGARET P. KARNS & KAREN A. MINGST, *INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE* 351–91 (2d ed., 2004).

89. See WIENER, *supra* note 31, at 17–18; see also Leebron, *supra* note 47.



create new frameworks to secure this project—in particular, a coalition led by the US, sectors of the financial and investment communities, and legal professionals engaged in the reform of commercial law—were looking for new opportunities and sites through which they could advance their work.<sup>90</sup> The initial success of UNCITRAL's limited agenda, they believed, justified investing resources to incorporate it into efforts at commercial law reform that went well beyond the traditional areas and strategies of legal harmonization.<sup>91</sup> By the late 1990s, UNCITRAL's work had expanded to include such areas as insolvency, electronic commerce, secured transactions, government procurement, and the role of private financing in infrastructure projects.<sup>92</sup>

The form and self-understanding of UNCITRAL's work changed as well. In light of the reach and complexity of the legal work UNCITRAL now undertook, it needed to shift its focus away from the bulky and often difficult to negotiate Conventions, and take advantage of the alternative and more recently developed tools of model laws and legislative guides to help shape the direction of national law reform.<sup>93</sup> These could be offered as standards of legal best-practices, circulating among key actors to hopefully shape legal reform efforts in more indirect but effective ways than formal Conventions. By the late 1990s, the use of model laws and legislative guides became the preferred mode of operation for UNCITRAL in such key areas as Insolvency and Secured Transactions law.

More generally, UNCITRAL's understanding of its mission was transformed into one of promoting modernization and reform of commercial law in all of its aspects.<sup>94</sup> Indeed, the theme of UNCITRAL's fortieth anniversary Congress in 2007 was “Modern Law for Global Com-

---

90. See sources cited *infra* note 91 and accompanying text. This interpretation is confirmed by an interview with a UNCITRAL official. Interview with UNCITRAL Official, in Vienna, Austria (Sept. 6, 2005) [hereinafter Sept. 6 Interview].

91. See Burman, *supra* note 39; see also Terence C Halliday & Bruce G. Carruthers, *Globalizing Law: Political Influence in the Legal Construction of Markets by the UN 1–4* (2003) (unpublished manuscript), available at [http://www.allacademic.com/meta/p107001\\_index.html](http://www.allacademic.com/meta/p107001_index.html) [hereinafter Halliday & Carruthers, *Globalizing Law*]; see also Sept. 6 Interview, *supra* note 90.

92. See UNCITRAL GUIDE, *supra* note 4.

93. See generally Susan Block-Lieb & Terence Halliday, *Legitimation and Global Lawmaking* (Fordham Law Legal Studies, Research Paper No. 952492, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=952492](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952492) [hereinafter Block-Lieb & Halliday, *Legitimation and Global Lawmaking*].

94. On the evolution of these strategies in the context of insolvency law, see Block-Lieb & Halliday, *Harmonization and Modernization*, *supra* note 52.

merce.”<sup>95</sup> As this title and the proceedings indicated, UNCITRAL currently sees its mission extending well beyond, and taking a different shape than, the classic program of legal harmonization/unification.<sup>96</sup> What do “modernization” and “reform” mean in this context? While never clearly explained in official documents, participants share the understanding that the current role of UNCITRAL is to develop and diffuse principles and rules of commercial law that are most appropriate to the promotion and deepening of global economic integration as it has taken form since the late 1970s.<sup>97</sup> This “mission” is supported by the belief that there are certain particularly effective and “efficient”<sup>98</sup> commercial legal

---

95. See *UNCITRAL Colloquia*, U.N. COMM’N ON INT’L TRADE LAW, [http://www.uncitral.org/uncitral/en/commission/colloquia\\_general.html](http://www.uncitral.org/uncitral/en/commission/colloquia_general.html) (last visited Feb. 25, 2011); *Papers Presented at the UNCITRAL Congress “Modern Law for Global Commerce,” 9–12 July 2007, Vienna*, U.N. COMM’N ON INT’L TRADE LAW, <http://www.uncitral.org/uncitral/en/about/congresspapers.html> (last visited Feb. 25, 2011).

96. This interpretation is based on observations and reports of the Congressional proceedings. See Nicholas Michel, Under-Sec’y-Gen. for Legal Affairs, The Legal Counsel, Opening Address at Modern Law for Global Commerce: Congress to Celebrate the 40th Annual Session of UNCITRAL (July 9, 2007), available at [http://www.uncitral.org/pdf/english/congress/USG\\_Michel.pdf](http://www.uncitral.org/pdf/english/congress/USG_Michel.pdf).

97. E-mail correspondence between author and UNCITRAL Official (Dec. 21, 2005) (on file with author); see also *id.* Particularly important are Jernej Sekolec’s comments, at the time the Secretary of UNCITRAL. See Jernej Sekolec, Commentary, *Congressional Roundtable on Process and Methods of International Rule-Making*, (July 9, 2007) (on file with author).

98. Throughout UNCITRAL’s deliberations and personal interviews with participants and officials, the idea of “efficiency” has been used in a number of related but distinct ways. The most common usage is to suggest that legal rules and frameworks are most efficient if they are most successful at attracting investment to a given national economy. This is often explained in a manner drawn from the literature on the competition of legal regimes, with the added note that the efficiency of a legal regime is equivalent to its competitiveness in attracting the support of actors in financial markets. The presence of private investment, in this approach, indicates that investors believe in the superiority of the legal regime for protection of investor rights (this claim was often used by supporters of U.S. legal models who claimed that these proved most efficient at generating capital for private investment, at least prior to the current economic crisis). At other times, though, the claim of efficiency is articulated more broadly as the likelihood that a given legal regime will promote economic growth in a given economy, though it seems to be understood that the generation of private investment is central to that growth. A third and usually minor theme in the discussion of efficiency emphasizes reducing the costs and complexity of a legal regime, which would then encourage and facilitate greater private economic activity. The ultimate hope and claim is that UNCITRAL can use its broad representation and mobilization of expertise to identify the most efficient—and thus “advanced”—legal models and present them in a form attractive to those aiming at legal reform.

structures that will better allow all states, especially developing states, to participate effectively in the global economy.<sup>99</sup> By creating useful models and guides that embody these structures with the legitimacy of international support, the hope is that UNCITRAL can play a key role in shaping a positive evolution in the world's commercial law systems.<sup>100</sup>

An example of this kind of process is UNCITRAL's work on insolvency law. Faced with the increasing challenge of insolvencies that involve corporations with assets in a number of states, in 1997 UNCITRAL developed a "Model Law on Cross Border Insolvency."<sup>101</sup> This development aimed at helping states harmonize legal frameworks to smooth the work of addressing these complex issues. As insolvency became an increasingly central issue for advanced and developing states, and a key aspect of commercial law reform efforts, UNCITRAL then took on the more daunting task of developing a "modern" framework for the whole spectrum of insolvency law.<sup>102</sup> Despite the deep differences between legal orders, this task succeeded in the promulgation of a Legislative Guide on Insolvency Law, in 2004.<sup>103</sup> This Guide has been a significant success, and is frequently used as a reference and model by national, regional (the EU), and international (IMF, World Bank) actors as they develop more robust and "modern" insolvency structures.<sup>104</sup>

### III. EXPLAINING UNCITRAL'S SUCCESS

On the basis of this type of work, UNCITRAL has emerged as the leading public international institution for the development and diffusion of norms in private commercial law. Although the Hague Conference and UNIDROIT remain active—and all three have begun to work more cooperatively in recent years—UNCITRAL has become the most influential of the group, able to mobilize more support and to shape the

---

99. See Burman, *supra* note 39.

100. See Buxbaum, *supra* note 39.

101. G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (Jan. 30, 1998).

102. See sources cited *supra* notes 93–96; see also Halliday, *supra* note 70; Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135, 1185–86 (2007) [hereinafter Halliday & Carruthers, *The Recursivity of Law*].

103. See Halliday, *supra* note 70; Halliday & Carruthers, *The Recursivity of Law*, *supra* note 102.

104. See sources cited *supra* note 103. Similar strategies have been adopted in UNCITRAL's ongoing work on the law of secured transactions, which focuses on a key form of business financing. Edward S. Cohen, *The Harmonization of Private Commercial Law: The Case of Secured Finance*, in LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS 58, 70–72 (Christian Brütch & Dirk Lehmkuhl eds., 2007) [hereinafter Cohen, *The Harmonization of Private Commercial Law*].

agenda for international commercial law reform.<sup>105</sup> How can this success be explained? As previously suggested, UNCITRAL is best conceptualized as a “site” rather than an organization, which can be mobilized by different public and private actors working in and through its structure. The key question, then, is why resource-rich actors, such as states, private businesses, other international institutions, and professional networks, have chosen to invest resources in UNCITRAL.<sup>106</sup>

There are two key parts to the answer. The first derives from the structure of the world of private international commercial legal practice, in which UNCITRAL’s strategy for developing normative models and principles to be diffused in varied and subtle ways proves particularly effective. The second part of the answer is the particular structure and working methods of UNCITRAL, which distinguish it from most other international organizations in ways that can both empower resource-rich actors and allow them to reach agreements that may not be possible in other contexts.

#### *A. Where and How Does UNCITRAL Fit in Private International Law?*

The world of private international commercial law is plural, multi-layered, and dynamic.<sup>107</sup> It is shaped by two key principles: the existence of multiple and often overlapping legal regimes covering particular areas of commercial practice; and significant contractual autonomy for private

---

105. These claims are supported by interviews with a variety of participants in international commercial law reform and harmonization efforts. This argument should be put in context. First, it is a judgment of the relative impact of UNCITRAL, UNIDROIT, and the Hague Conference as the three public institutions devoted primarily to private commercial law reform at the international level. It is not meant to compare UNCITRAL’s import with that of private bodies that work on commercial law—i.e., the ICC, or the other public international organizations, such as the Organization of Economic Cooperation and Development (“OECD”), the World Bank, the Basle Committee—which can powerfully shape private commercial law even though this is not their primary task. Second, it is a judgment focusing on the development of norms, not the success of their implementation in particular contexts.

106. See BRAITHWAITE & DRAHOS, *supra* note 9, at 52–62 (using a similar approach in formulating the question of why resource-rich actors, such as states, private businesses, other international institutions, and professional networks, chose to invest resources in particular law making projects and institutions).

107. See generally CALLIESS & ZUMBANSEN, *supra* note 42; Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT’L L. & POL. 1, 1–3 (2006). In the literature on “global governance,” these are increasingly seen as characteristics of the “global” arena more generally. See, e.g., JONATHAN G. S. KOPPELL, *WORLD RULE: ACCOUNTABILITY, LEGITIMACY, AND THE DESIGN OF GLOBAL GOVERNANCE* (2010).

actors aiming to shape the law that governs their relationships.<sup>108</sup> The evolution of international commercial law is driven by a dynamic process in which actors, and especially networks of actors, in the field—states, corporations, professionals, firms and associations—constantly compete to shape the substance of law across a variety of law-making and law-applying sites.<sup>109</sup> National codes, standard industry practices, contractual innovations developed by law firms, and interpretive traditions can be adopted or discarded by commercial agents in the pursuit of business priorities.<sup>110</sup> As a result, different agents and institutions work continually to try to shape the choices of private and public actors, whether to increase their own profit, prestige, and influence on conceptions of proper legal practice (private corporations, law firms, arbitral institutions, bar associations, legal experts), secure the cohesion and stability of commercial practice (industry associations), or to order commercial practice in ways that advance national and global priorities (states).<sup>111</sup> The most successful agents or networks are able to work simultaneously in a number of fora to shape the direction of commercial legal practice according to their own goals and priorities.<sup>112</sup>

How does UNCITRAL fit into this context? The key is UNCITRAL's move away from a focus on standard harmonization treaties and toward the development of flexible formats in which its work is developed and presented.<sup>113</sup> The “technologies” of model laws, legislative guides, and model rules are much more fluid and flexible than those of formal conventions. It is easier for resource-rich actors to get their preferences embodied in such statements of global legal standards than in formal treaties, and they can then use these products to shape the behavior of public and private actors in a variety of nuanced ways.<sup>114</sup> As a result,

---

108. See generally PETER NYGH, *AUTONOMY IN INTERNATIONAL CONTRACTS* (1999); Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 511–13 (2006).

109. NYGH, *supra* note 108; Zhang, *supra* note 108, at 560–61.

110. See generally BRAITHWAITE & DRAHOS, *supra* note 9; see also sources cited *supra* note 108; discussion *supra* Part II.

111. See CONTRACTUAL CERTAINTY IN INTERNATIONAL TRADE (Volkmar Gessner ed., 2009); Sigrid Quack, *Who Fills the Legal “Black Holes” in Transnational Governance? Lawyers, Law Firms and Professional Associations as Border-Crossing Regulatory Actors*, in GLOBAL GOVERNANCE AND THE ROLE OF NON-STATE ACTORS 1, 81–100 (Gunner Folke Schuppert ed., 2006).

112. Cohen, *Constructing Power Through Law*, *supra* note 15, at 794.

113. *Id.*; see also sources cited *supra* notes 106–108.

114. See Susan Block-Lieb & Terence Halliday, *Incrementalisms in Global Lawmaking*, 32 BROOK. J. INT'L L. 851, 855 (2007) [hereinafter Block-Lieb & Halliday, *Incre-*

UNCITRAL's work product is more useful for actors or networks that need normative "tools" that can be advanced in different forms and, to different degrees, in the varying contexts in which legal norms are developed and enforced. For instance, supporters of the Model Law and Legislative Guide on Insolvency can advance them through a variety of strategies, which include, *inter alia*, convincing commercial actors and industry associations to lobby their home states to reform the law, encouraging international and regional lending institutions to incorporate these standards as conditions on lending capital to states, training legal professionals from developing states to advocate legal reform consistent with these principles, and advancing these norms via the various informal international financial policy-making bodies.<sup>115</sup> In the same regard, UNCITRAL's Legislative Guide on Secured Transactions is emerging as a reference for national and international institutions promoting the reform of credit and property law in emerging market states and, thus, serves as a vehicle through which supporters can enroll these institutions.<sup>116</sup> Because these are not formal treaties, their audience is not limited to states, nor must they be adopted *in toto* to exert significant influence on the development of commercial law.<sup>117</sup> They are thus more useful for agents attempting to structure legal practice in the fluid fields of private international law, allowing them to widely and subtly spread a set of common standards and principles.

As presented above, UNCITRAL's work is evidence that the Commission is an increasingly valuable and important institution or site through which resource-rich actors can invest in the shaping of international commercial law. Its products constitute respected and influential statements of existing global standards and principles of commercial law and provide a crucial vehicle for all actors in this area, while UNCITRAL's flexibility provides key tools or technologies for navigating the fluid and varied area of commercial law. The value and impact of UNCITRAL's work comes as much from its functionality, as from its formal promulgation, and the innovative use of legal norm technologies make its products much more useful to actors who possess the resources to advance their adoption in the variety of private and public international law contexts.

---

*mentalisms in Global Lawmaking*]; see also Block-Lieb & Halliday, *Legitimation and Global Lawmaking*, *supra* note 93, at 72.

115. See Halliday & Carruthers, *The Recursivity of Law*, *supra* note 102, at 1153–54.

116. Cohen, *The Harmonization of Private Commercial Law*, *supra* note 104.

117. See Susan Block-Lieb & Terence Halliday, *Incrementalisms in Global Lawmaking*, *supra* note 114; see also Block-Lieb & Halliday, *Legitimation and Global Lawmaking*, *supra* note 93, at 72.

*B. The Structure and Political Dynamics of UNCITRAL*

UNCITRAL's success is also due to its structure as a site of normative development, which has a number of unique features.<sup>118</sup> These features facilitate the "enrollment" of the institution by agents of legal modeling and enhance the perceived legitimacy of its work.<sup>119</sup> The basic features of UNCITRAL are straightforward.<sup>120</sup> It is organized as a general commission that sets broad policy directions, a set of Working Groups that carry out much of the institution's work, and a Secretariat that supports this work and links it with the broad policy goals of the commission.<sup>121</sup> Its membership is elected by the UN General Assembly and is distributed across five regional groupings: Africa, Asia, Eastern European, Latin America/Caribbean, Western Europe and Other.<sup>122</sup> Since 2004, sixty states have been members of the Commission, though for most of its history, UNCITRAL had only thirty-six permanent members.<sup>123</sup> Each year, the entire Commission meets in a plenary session, which rotates between the UN headquarters in Vienna and New York.<sup>124</sup> The Commission is served by a relatively small secretariat of legal experts/officers, which is part of the UN Office of Legal Affairs but has been based in Vienna since 1979.<sup>125</sup>

Each Working Group is assigned a specific area of work<sup>126</sup>—which changes when the Commission identifies new priorities—and is open to representatives from all member states. Moreover, each Group chooses a

---

118. See discussion *infra* Parts III.B–IV and accompanying notes.

119. UNCITRAL GUIDE, *supra* note 4, at 3–7; UNCITRAL FAQ, *supra* note 1.

120. See sources cited *supra* note 119; see also Kelly, *supra* note 3, at 3–9.

121. *Origin, Mandate and Composition of UNCITRAL*, U.N. COMM'N ON INT'L TRADE LAW, <http://www.uncitral.org/uncitral/en/about/origin.html> (last visited Feb. 25, 2011); UNCITRAL GUIDE, *supra* note 4, at 3–7.

122. UNCITRAL GUIDE, *supra* note 4, at 3–7; *Member States History*, U.N. COMM'N ON INT'L TRADE LAW, [http://www.uncitral.org/uncitral/about/origin\\_history.html](http://www.uncitral.org/uncitral/about/origin_history.html) (last visited Feb. 25, 2011) [hereinafter UNCITRAL, *Member States History*].

123. UNCITRAL, *Member States History*, *supra* note 122.

124. See UNCITRAL GUIDE, *supra* note 4.

125. As of August, 2010, there were fourteen permanent legal officers, including a division director of the U.N. Office of Legal Affairs, who serves as Secretary of UNCITRAL. E-mail correspondence between author and Sprios Bazinas, Senior Legal Officer, UNCITRAL Secretariat (Aug. 24, 2010) (on file with author).

126. Currently, the Working Groups are assigned the following topics/areas of work: Procurement, International Arbitration and Conciliation, Transport Law, Electronic Commerce, Insolvency Law, and Security Interests. Each Group meets formally twice a year, also rotating between Vienna and New York, but informal contact and meetings occur regularly. *Methods of Work*, U.N. COMM'N ON INT'L TRADE LAW, <http://www.uncitral.org/uncitral/en/about/methods.html> (last visited Feb. 25, 2011); UNCITRAL GUIDE, *supra* note 4, at 39–41.

Chair from participating delegations, and is assigned a legal officer from the Secretariat as its secretary. The Working Groups operate on the basis of “consensus” rather than voting, in which the Chair determines when a particular proposal or understanding embodies the preponderance of opinion among the state delegations.<sup>127</sup> The dynamics of the Working Groups are crucial to shaping UNCITRAL’s work and they are characterized by the following features:<sup>128</sup>

1. While all member states are eligible to participate in each Group, only a relatively small set of states do so actively. Active states tend to be the same across the Groups, of which the US, France, Canada, and Germany, are usually the most prominent, although this list is not complete and there can be significant variations across Groups. The membership of the delegations chosen to participate in the Working Groups varies. The most active delegations involve representatives directly from the government ministries whose responsibilities include private international law generally and UNCITRAL in particular, and often include legal experts from academia and/or private practice, while the less active and influential are comprised of members of the state’s UN mission.
2. Various non-state actors are able to participate in the work of the Groups and often do so actively, though they do not have voting authority. Indeed, in some Groups, these actors are as well-prepared and active participants as the major state delegations. There are generally two kinds of non-state actors. The first are organizations of professionals with a broad concern for commercial law or expertise in a specific area of law—for example, the International Chamber of Commerce (“ICC”) and the American Bar Association.<sup>129</sup> The second type of non-state actor are organizations of private business actors who play a central role in the areas of commerce likely to be affected by the proposals of the Group—such as the Commercial Finance Association

---

127. While voting is possible, it is avoided for fear of clarifying and hardening differences between members, and thus hindering the ability to make progress on the work of the Group. As one might guess, the determination of the “consensus” of a Group can be the source of much controversy, and has indeed become the focus of a current debate, which will be discussed in more detail below. *See* UNCITRAL GUIDE, *supra* note 4.

128. These characterizations are based on the author’s research as an observer, and the analysis in Terence C. Halliday, Josh Pacewicz, & Susan Block-Lieb, *Delegations: The Micro-Politics of Influence in International Organizations* (2009) (unpublished manuscript) (on file with author).

129. *See* G.A. Res. 63/120, ¶ 7, U.N. Doc. A/RES/63/120 (Jan. 15, 2009); *see also* *Our Projects*, AM. BAR ASS’N, <http://new.abanet.org/sections/businesslaw/CL190000/Pages/OurProjects.aspx> (last visited Jan. 17, 2011).



("CFA")<sup>130</sup> with the work on secured transactions and the International Federation of Insolvency and Restructuring Professionals ("INSOL")<sup>131</sup> with the work on insolvency. The participation of these actors goes beyond involvement in actual discussions. They actively consult with state delegations in the development of proposals, sponsor and participate in conferences dedicated to advancing and shaping the work of each Group,<sup>132</sup> and are regularly solicited for expert advice by the legal experts of the Secretariat, to whom they often submit draft proposals for the Groups to consider.<sup>133</sup>

3. Other significant regional and international organizations—whether they are part of the UN System<sup>134</sup> or outsiders<sup>135</sup>—are also able to attend discussions and are at times active in the behind the scenes work on key projects.<sup>136</sup>

As a result, while the decisions of each Working Group (and UNCITRAL generally) are in the hands of state delegations, the actual work of each Group often takes the form of a relatively smooth interaction between state and non-state actors working on common problems.

In light of the efforts made to include a variety of public and private actors, it is important to note the lack of transparency that attends much of UNCITRAL's work. There is a paradox here. On the one hand, UNCITRAL is a public institution that is open to the participation of all UN members and that regularly publicly publishes reports and press re-

---

130. See G.A. Res. 63/120, *supra* note 129, ¶ 7; UNCITRAL, COMMERCIAL FIN. ASS'N, <https://www.cfa.com/eweb/DynamicPage.aspx?Site=cfa&WebKey=b36047d6-f749-40cc-9133-cf78f437ad7e> (last visited Feb. 25, 2011).

131. See G.A. Res. 63/120, *supra* note 129, ¶ 7; UNCITRAL, INT'L ASS'N OF RESTRUCTURING, INSOLVENCY & BANKR. PROF'LS, <http://www.insol.org/page/58/uncitral> (last visited Feb. 25, 2011).

132. For a listing of the most important of these conferences or colloquia, see UNCITRAL *Colloquia*, U.N. COMM'N ON INT'L TRADE LAW, <http://www.uncitral.org/uncitral/en/commission/colloquia.html> (last visited Feb. 25, 2011).

133. As noted in the discussion, *infra*, individual experts often serve on the delegations of member states. See source cited *supra* note 128.

134. Such as the International Monetary Fund, the World Bank, and the World Intellectual Property Organization ("WIPO").

135. Such as the World Trade Organization, the Organization for Economic Cooperation and Development, and the Organization of American States.

136. For example, when the question of the use of intellectual property as security for lending emerged during the development of the Legislative Guide on Secured Transactions by UNCITRAL's Working Group VI, the Commission began sustained discussions with WIPO officials for expert advice and to ensure that the proposals of the two groups moved in the same direction. For an account of this cooperation, see G.A. Res. A/CN.9, ¶¶ 2–3, U.N. Doc. A/CN.9/WG.VI/WP.39/Add.3 (July 20, 2009).

leases on its work (both in print and on its website). And, unlike other private international law-making institutions such as UNIDROIT and the Hague Conference, non-governmental organizations are actively encouraged to participate in UNCITRAL's deliberations.<sup>137</sup> On the other hand, a variety of subtle and not always intentional strategies work to limit its exposure beyond the small world of Working Group participants and direct constituencies. Access to the Working Groups' meetings by Non-Governmental Organizations ("NGOs") or observers is limited by the Secretariat to organizations considered to have relevant legal expertise in the specific area of work; in practice, this means organizations of expert practitioners and affected businesses.<sup>138</sup> Members of these Groups, both states and non-state actors, rarely publicize the work of UNCITRAL beyond the same scope of actors believed to have a substantial interest and support for its work. There is little if any attempt to inform or involve in the work of the Groups potentially interested organizations outside of the world of commerce or commercial law—in such areas as consumer protection, sustainable development, labor, or human rights. As a result, for all practical purposes, UNCITRAL works behind a curtain of opacity.

What is the benefit of UNCITRAL's sometimes opaque working structure? It provides a uniquely accommodating context in which resource-rich actors and networks can advance legal reform projects and work out stable understandings of legal principles with limited oversight. While the Commission is able to set and correct the overall direction of the Groups' work, it leaves much of the detail and specific direction in the hands of the latter, and there has been little conflict between the Commission and UNCITRAL's Working Groups.<sup>139</sup> As a result, networks of interested and resourceful actors can use the Working Groups as a forum within which to elaborate, evaluate, and advance projects of legal norm definition and thus advance their own goals of legal reform. According to participants, UNCITRAL's most successful work—in the areas of arbi-

---

137. See UNCITRAL GUIDE, *supra* note 4, at 4. On the approach of the other private international law institutions, see Hague Conference, *supra* note 48; see also UNCITRAL GUIDE, *supra* note 4.

138. See U.N. Comm'n on Int'l Trade Law [UNCITRAL], *UNCITRAL Rules and Methods of Work*, ¶¶ 41–44, A, U.N. Doc. A/CN.9/638/Add.5 (Oct. 22, 2007) (prepared as background for a systematic discussion of the issue in 2007).

139. In rare cases, such as the issue of investor-state arbitration discussed below, a Working Group will ask the Commission for specific guidance. In this case, the Group accepted and acted on the subsequent guidance with little debate (though the guidance followed the preferences indicated by the Group itself). See UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fiftieth Session*, U.N. Doc. A/CN.9/669 (Mar. 9, 2009).

tration, insolvency, and contractual engineering—is the product of such consensual negotiation among public and private experts.<sup>140</sup>

Moreover, the working methods of the institution contribute to bolstering the legitimacy claims made for its products.<sup>141</sup> From this perspective, the active role of legal specialists and commercial actors is needed to make the work relevant, and their participation in the Working Groups is a further guarantee of the quality and usefulness of UNCITRAL's legal products. Evidence from such areas as insolvency and arbitration indicate that this argument is indeed a significant one in shaping the reception of UNCITRAL's work.<sup>142</sup> It is this unique structure, then, that provides the other central reason that resource-rich actors have invested in UNCITRAL as a tool of commercial legal construction and change since the 1980s.

### C. *Questions of Power and Legitimacy*

UNCITRAL's increased prominence raises questions about the impact of power relationships in shaping its work and the extent to which these relationships underlie claims of its legitimacy. UNCITRAL participants and officials offer two arguments to support the value and legitimacy of the institution's structure and the resulting legal products. On the one hand, supporters cite the broad spectrum of states involved in the organization, representing all major legal traditions and levels of economic development, and the consensus-based working method as signs of political legitimacy.<sup>143</sup> They claim that these characteristics ensure that UNCITRAL's legal products represent not the specific issues or agendas of certain states, but the considered judgment of the international community.<sup>144</sup> The result, they suggest, is that UNCITRAL's work can claim unique weight and status as normative models in the international system.<sup>145</sup> On the other hand, supporters emphasize the unique ways in which UNCITRAL incorporates expert knowledge into its deliberations;

---

140. Interview with Senior UNCITRAL Officials, in Vienna, Austria (Sept. 6–7, 2005); Interview with Members of State and Observer Delegations to Meeting of Working Group VI, in N.Y.C., N.Y. (Jan. 25–26, 2005); Interview with Members of Observer Delegations to UNCITRAL 40th Anniversary Congress, in Vienna, Austria (July 9–10, 2007).

141. See Kelly, *supra* note 3.

142. See Block-Lieb & Halliday, *Harmonization and Modernization*, *supra* note 52; see also Block-Lieb & Halliday, *Legitimation and Global Lawmaking*, *supra* note 93; Halliday, *supra* note 70; Slate et al., *supra* note 82 (discussing the arbitration aspect with respect to UNCITRAL's work).

143. Sept. 6 Interview, *supra* note 90.

144. *Id.*

145. *Id.*

this allows its products to carry the stamp of advanced, impartial, technical expertise, rather than the limits of pure political compromise.<sup>146</sup> In both ways, claims about the working methods of UNCITRAL are crucial to narratives of its legitimacy. But there remains both a tension as well as an interdependence between the narratives of political balance and professional expertise.

What holds these narratives together? It is the notion that UNCITRAL's structure and methods work effectively to negate the influence of unequal political power on its products. The combination of broad representation and a rule of consensus, as the first narrative suggests, means that one or a few powerful actors cannot impose their norms on the institution and its work. As a result, the second narrative explains, states are constrained to find legal principles, models, and norms that follow the most "advanced" legal thinking and practice in the world of international commerce.<sup>147</sup> Of course, there are always elements of conflict and contention in the process of developing legal products, but the combination of political balance and the input of expertise accord solutions that are acceptable to all states. Moreover, the combined narrative potentially suggests that the political balance ensured by the working methods pushes legal experts and state delegations to advance commercial law in ways that make technical solutions workable within a variety of legal traditions and systems.<sup>148</sup> UNCITRAL's work in insolvency and secured transactions law has, in fact, attempted to do just this, consciously producing principles or models that can be adjusted to different legal contexts.<sup>149</sup> Together, these narratives support the value of UNCITRAL

---

146. See, e.g., Block-Lieb & Halliday, *Legitimation and Global Lawmaking*, *supra* note 93, at 13; Sept. 6 Interview, *supra* note 90; Sept. 21 Interview, *supra* note 55.

147. See Burman, *supra* note 39.

148. For a discussion of the products of UNCITRAL's work, see UNCITRAL GUIDE, *supra* note 4, at 1.

These instruments are negotiated through an international process involving a variety of participants, including member States of UNCITRAL, which represent different legal traditions and levels of economic development; non-member States; intergovernmental organizations; and non-governmental organizations. Thus, these texts are widely acceptable as offering solutions appropriate to different legal traditions and to countries at different stages of economic development.

*Id.*

149. Bruce G. Carruthers & Terence C. Halliday, *Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes*, 31 *LAW & SOC. INQUIRY* 521, 538–39 (2006); Cohen, *The Harmonization of Private Commercial Law*, *supra* note 104, at 72–77.

as a context for problem solving, rather than a forum for the mobilization of power.<sup>150</sup>

How well do these narratives fit the actual work and impact of UNCITRAL over the past two decades? As noted earlier, UNCITRAL's work in this period centered on the promotion of the broad neo-liberal agenda of market opening and regulation that has dominated the global political economy since the 1980s. Many of UNCITRAL's crucial constituencies widely support this agenda,<sup>151</sup> but that is not to suggest that the agenda is simply the outcome of consensual agreement on the most "modern" or "advanced" legal thinking. As a site of normative modeling mobilized by transnational coalitions, during this period, UNCITRAL's work has been led by a generally cohesive coalition dedicated to advancing US-based, or common law models, of law as the preferred standards for the global economy.<sup>152</sup> Across a variety of areas of commercial law, this transnational coalition has dominated the agenda-setting of the Working Groups and taken the initiative in advancing normative models for "modern" commercial law. The following factors, shaping the global political economy more generally, facilitated the success of this project within UNCITRAL:

1. Beginning in the 1980s, the construction of the global commercial order was overwhelmingly driven by US corporations and markets, which brought with them US models of legal practice as the preferred

---

150. As such, this narrative suggests that UNCITRAL's work promotes the ideal of the "rule of law" rather than arbitrary power, and draws on the centrality of this norm in contemporary international relations. For an excellent review of the history and ambiguities of the "rule of law" concept and ideal, see BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 1, 1-6 (2004). *But cf.* *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek & Alvaro Santos eds., 2006) (criticizing the link between the "rule of law" and international economic development projects).

151. These include key business and professional associations, such as the International Chamber of Commerce ("ICC"), the American Bar Association ("ABA"), the International Association of Restructuring, Insolvency, and Bankruptcy Professionals ("INSOL"), the Commercial Finance Association ("CFA"), and the International Bar Association ("IBA"), as well as major public international institutions, such as the IMF, the World Bank, and the European Bank for Reconstruction and Development ("EBRD"), and, of course, the major states involved in shaping UNCITRAL's work, particularly the U.S. *See generally* Cohen, *Constructing Power Through Law*, *supra* note 15; Cohen, *The Harmonization of Private Commercial Law*, *supra* note 104; *see also* Block-Lieb & Halliday, *Harmonization and Modernization*, *supra* note 52; Block-Lieb & Halliday, *Legitimation and Global Lawmaking*, *supra* note 93; Halliday, Paccwicz, & Block-Lieb, *supra* note 128.

152. *See* Cohen, *Constructing Power Through Law*, *supra* note 15; *see also* Halliday & Carruthers, *Globalizing Law*, *supra* note 91; Macdonald, *supra* note 30, at 635-45.

way of doing business. As a result, the key legal dynamic during this period was the spreading influence of these US-based normative models across the sites of commercial law.<sup>153</sup> The direction of UNCITRAL's work, inevitably, reflected this trend.

2. During the same period, the US state was able to draw on its economic and geopolitical resources to exercise "structural power" over the global economic order.<sup>154</sup> Participating in the global economy meant adjusting to this power. The participants in UNCITRAL were constrained to do so in the same manner as all the major international economic institutions.<sup>155</sup>

3. In the world of commercial legal expertise, this same era was one in which US legal ideas and models—especially those associated with the "law and economics" movement—diffused quickly throughout legal expert networks around the world.<sup>156</sup> This was partly the result of the need for expertise in US law (and, thus, the structural power noted above), the growth of global law firms based in the US, and also because of active efforts of the US legal community to spread its models through legal reform work. As a result, the trend of opinion among commercial legal experts represented in the work of UNCITRAL became heavily biased towards US models.<sup>157</sup>

The interesting twist, in light of this political economy, is that the dominance of US-based actors and models in UNCITRAL is not complete, and UNCITRAL's influence and legitimacy depend on maintaining some check on any one dominant power.<sup>158</sup> In certain areas of work the US-led coalitions encountered opposition from advocates of competing models of legal principles and practice, representing different national traditions and interests or Continental civil law concepts and practices more gener-

---

153. See BRAITHWAITE & DRAHOS, *supra* note 9, at 539–46.

154. SUSAN STRANGE, *STATES AND MARKETS* 1, 236–37 (2d ed., 1988) (illustrating the concept of structural power in this context); Susan Strange, *The Persistent Myth of Lost Hegemony*, 41 INT'L ORG. 551, 553–57 (1987); see also SASSEN, *supra* note 14 (presenting a more contemporary examination of the same phenomenon).

155. See Halliday & Carruthers, *Globalizing Law*, *supra* note 91.

156. See Spencer Weber Waller, *The Law and Economics Virus* 1, 1–5 (2008) (unpublished manuscript), available at [http://works.bepress.com/spencer\\_waller/3/](http://works.bepress.com/spencer_waller/3/) (discussing the law and economics movement, spreading from the U.S. to "other legal jurisdictions so that an increasing number of countries are creating, analyzing, and enforcing law with an eye toward its economic consequences . . .").

157. Cohen, *The Harmonization of Private Commercial Law*, *supra* note 104, at 75–76; see also Macdonald, *supra* note 30.

158. See Sept. 6 Interview, *supra* note 90; see also Block-Lieb & Halliday, *Incrementalisms in Global Lawmaking*, *supra* note 114.

ally.<sup>159</sup> As a result, many of UNCITRAL's more important legal products, such as its work in insolvency and secured transactions, embody compromises that attempt to identify fundamental legal principles that can be adapted to different legal traditions.<sup>160</sup>

It is in this context that the claims to legitimacy surrounding UNCITRAL's working methods take on their importance. By allowing all resource-rich actors to participate, requiring the reaching of consensus, and avoiding much transparency, these methods facilitate the process of compromise and give all participants an interest in advancing the resulting products of each Working Group. This judgment is affirmed by participants and observers alike.<sup>161</sup> The working structure of UNCITRAL, it seems, has accommodated US leadership while forcing the kinds of compromises that allow its products to be accepted as statements of a broader international normative consensus on commercial law.<sup>162</sup> Combined with its innovations in the technologies of normative modeling, UNCITRAL has emerged as an institution whose work is supported by a wide scope of resource-rich actors and is, thus, of significant prestige and influence in shaping the commercial legal norms of the contemporary global economy.

#### IV. EMERGING CONFLICTS AND THE FUTURE OF UNCITRAL

Over the past four years, UNCITRAL's success has generated an emerging critical dialogue regarding its work, from inside and outside of the organization. This dialogue takes form and focus in two critiques centered on UNCITRAL's working methods: one arising from debates internal to the institution and one offered by external actors demanding

---

159. See, e.g., Cohen, *The Harmonization of Private Commercial Law*, *supra* note 104 (discussing secured transactions law in the context of competing legal principles, in opposition to US-based models).

160. See Block-Lieb & Halliday, *Harmonization and Modernization*, *supra* note 52 (discussing UNCITRAL's work in the field of insolvency law); see also Halliday & Caruthers, *The Recursivity of Law*, *supra* note 102, at 1185–86; Cohen, *Constructing Power Through Law*, *supra* note 15 (discussing UNCITRAL's work in the field of secured transactions law).

161. See Sept. 6 Interview, *supra* note 90; see also Sept. 21 Interview, *supra* note 55; see generally Block-Lieb & Halliday, *Legitimation and Global Lawmaking*, *supra* note 93; Kelly, *supra* note 3.

162. This dynamic is similar to the tension between “authority” and “legitimacy” that Koppell identifies as central to all global governance organizations. See KOPPELL, *supra* note 107, at 31–67 (exploring how the need for legitimacy leads many powerful actors (especially states) to accept outcomes that diverge to a degree from their immediate preferences).

inclusion into its work.<sup>163</sup> These critiques, in turn, embody and illustrate the two forms of emergent challenges to the institution's legitimacy narratives, discussed above.<sup>164</sup> These challenges originate internally with active agents dissatisfied with the procedural and substantive direction in which UNCITRAL has moved and from outside the institution, resulting from the unintended use of UNCITRAL's work product by agents outside of the traditional world of private commercial law.<sup>165</sup> The responses of UNCITRAL and its key actors illustrate an attempt at what Suchman calls "legitimacy management,"<sup>166</sup> and their direction and relative successes will determine the future of the institution.<sup>167</sup>

The internal critique concerns the influence of non-state actors—particularly legal professionals and organized interests—on the work of the Groups and the Secretariat. In May, 2007, the French government circulated a memo (the "French memo") suggesting that these actors exercise too much influence over the deliberations of the Groups, steering their work in directions counter to the goals of many participating states as well as exerting too much influence over the work of the Secretariat.<sup>168</sup> The French memo highlights two aspects of this influence. First, it suggests that the ways in which the "consensus" procedure is used in the Working Groups often gives too much weight to the views of non-state actors, as chairs and participants tend to give the views of these actors the same weight as those of states. Second, the French memo criticizes what it believes is an over-reliance on non-state experts and interests in shaping work themes, drafting proposals, and otherwise dominating the "behind the scenes" work of the Secretariat.<sup>169</sup> It also attacks the perceived use of experts and non-state actors in these ways by some states to advance their agendas.

The French memo raises two kinds of issues regarding the manner in which UNCITRAL operates.<sup>170</sup> On the one hand, it amounts to a not-too-subtle swipe at the working methods of the US and some of its allies, who work closely with non-state actors to define the agenda, shape alter-

---

163. See discussion *infra* Part IV.

164. See *supra* text and accompanying notes 36–41.

165. See discussion *infra* Part IV.

166. Suchman, *supra* note 33, at 594.

167. See *id.*

168. UNCITRAL, *France's Observations on UNCITRAL's Working Methods: Note by the Secretariat*, U.N. Doc. A/CN.9/635 (May 24, 3007) [hereinafter UNCITRAL, *France's Observations*].

169. *Id.* ¶¶ 3–4.

170. See Kelly, *supra* note 3, at 10–15 (detailing France's challenge of UNCITRAL's work methods, specifically with respect to "UNCITRAL's general lack of procedures for its 'legislative' process" as well as concerns regarding "consensus and participation.").



natives, and mobilize support for their own legal agendas. On the other hand, the French document takes issue with the broader implications of the relationships between states, private actors, and experts that define the operation of the institution. According to this position, the lack of clear boundaries between public and private actors threatens the legitimacy of UNCITRAL's work by both weakening the control of sovereign states over UNCITRAL's work—the only actors able to claim any authority to make rules that govern the actions of citizens and institutions—and creating the appearance of the manipulation of UNCITRAL, under the guise of impartial international law-making, to impose rules that benefit only interested parties.<sup>171</sup>

The solution suggested by the French government is to establish clearer boundaries between the role of states and non-state actors through changing or clarifying the rules governing consensus, limiting the participation of non-state actors in public deliberations, and exerting more supervision over the role of non-state actors in the development of agenda items and substantive proposals.<sup>172</sup> This approach has been resisted by the US and its allies, who believe that UNCITRAL's current working methods best facilitate the organization's ability to work smoothly and to generate products likely to be supported by key public and private agents.<sup>173</sup> At this point, discussion continues regarding ways of clarifying UNCITRAL's operating rules without fundamentally changing its actual work.

The external critique of UNCITRAL is currently not much more than a set of murmurs, but it pushes in a different direction.<sup>174</sup> This argument centers on the absence of any significant "civil society" presence in the work of UNCITRAL, which is at odds with much of the current work of the UN and indeed of some of the other major institutions involved in shaping the rules of international trade and investment.<sup>175</sup> In this debate,

---

171. See UNCITRAL, *France's Observations*, *supra* note 168, ¶¶ 6–7.

172. *Id.* ¶¶ 5–8.

173. See UNCITRAL, *UNCITRAL Rules and Methods of Work: Note by the Secretariat, Observations by the United States*, U.N. Doc. A/CN.9/639 (Nov. 22, 2007) (detailing the official US response to the French memorandum) [hereinafter UNCITRAL, *U.S. Response*].

174. See, e.g., Cohen, *The Harmonization of Private Commercial Law*, *supra* note 104 (providing an example from the field of secured transactions law).

175. Consider, for example, the manner in which the World Bank has increasingly opened up its deliberations to consultations with various NGOs and the growing dialogue between the WTO and the NGO community. See SZABLOWSKI, *supra* note 42; see, e.g., John S. Odell & Susan K. Sell, *Reframing the Issue: The WTO Coalition on Intellectual Property and Public Health, 2001*, in NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA 85, 85–114 (2006).

the Center for International Environmental Law (“CIEL”) and the International Institute for Sustainable Development (“IISD”), both NGOs based in Geneva and Canada respectively, are two of the most vocal critics. Offering their critiques in the context of the ongoing work of Working Group II, to revise and update the UNCITRAL Arbitration Rules,<sup>176</sup> their argument centers on the increasing use of the rules in investor-state arbitrations, particularly in the context of bi-lateral investment treaties that usually specify arbitration as the preferred means for dispute resolution.<sup>177</sup> In this case, the adoption of UNCITRAL products in an increasingly controversial area of public international law—where the dynamics of political conflict and organizational participation are quite different than in private commercial law—has opened up UNCITRAL’s rules and processes to unanticipated challenges.

While not disputing the appropriateness of the current process for promulgating purely “private” arbitration rules, the CIEL/IISD position argues that the use of UNCITRAL rules in disputes to which states are parties means that these rules have significant impacts on the use of state power and authority, and thus on various groups in a state—such as consumers, workers, taxpayers, and public institutions—whose interests are directly affected by public policy decisions.<sup>178</sup> But key features of these rules that may be appropriate for purely private commercial arbitrations—the general lack of transparency in arbitration processes, the limits on who can be involved in arbitration, the lack of publicity of decisions—are not appropriate when states and the public and sectoral interests affected by their policy choices are involved. This position suggests not only that some modification of the rules themselves is required, but also that the process of rule-making requires the involvement of organi-

---

176. CTR. FOR INT’L ENVTL. LAW. & INT’L INST. FOR SUSTAINABLE DEV. (CIEL), *REVISING THE UNCITRAL ARBITRATION RULES TO ADDRESS STATE ARBITRATIONS* (Feb. 2007) [hereinafter *REVISING THE UNCITRAL ARBITRATION RULES*].

177. *See id.* at 3; *see also* CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2007) (broadly describing the current system of investor state arbitration); *see generally* GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007); U.N. CONFERENCE ON TRADE AND DEV., *INVESTOR-STATE DISPUTES ARISING FROM INVESTMENT TREATIES: A REVIEW*, UNCTAD/ITE/IIT/2005/4, U.N. Sales No. E.06.II.D.1 (2005).

178. *See* *REVISING THE UNCITRAL ARBITRATION RULES*, *supra* note 176, at 4 (“Arbitrations brought by an investor against a State under the terms of a treaty . . . differ significantly from commercial arbitrations involving only private parties because the former implicate the public interest in ways the latter do not.”).

zations that can represent the interests of the various publics whose fate is implicated in the results of public investor-state arbitrations.<sup>179</sup>

This initiative takes a different direction than that of the French government. Rather than attempting to reassert state control over the work of UNCITRAL, the CIEL/IISD position argues that a legitimate process for international law-making must include the representatives of the diverse groups of interests and publics affected by the process and a broader set of experts and expertise.<sup>180</sup> By implicitly rejecting the ability of states alone to provide this representation, it suggests an alternative approach to securing legitimacy for international institutions in the context of the evolving relationships between the public, private, and expert power and authority in the global context.

The fate of this initiative, though, remains uncertain. CIEL/IISD initially advanced this argument in 2007, in the context of a request for observer status at the then upcoming sessions of Working Group II.<sup>181</sup> Despite their status as registered NGOs by ECOSOC, which required approval of their participation under UN rules, UNCITRAL initially rejected this request on the basis that neither group had “relevant” expertise in the area of arbitration law.<sup>182</sup> After convincing the UNCITRAL secretariat to reverse this decision, CIEL and IISD attended the February, 2008 session of the Working Group, where they presented a proposal to include special rules for transparency in investor-state arbitrations in the revised UNCITRAL rules. While garnering the support of the UN Special Representative on Business and Human Rights,<sup>183</sup> the proposal led to substantial debate over its appropriateness. The Group eventually decided not to pursue the issue and instead submitted it to the Commission

---

179. *Id.* In this context, the CIEL/IISD position notes the manner in which the ICSID Arbitration Rules specifically address this issue, provide for more public information and access for investor-state arbitrations, and use these as a model for suggested reforms in the UNCITRAL rules. For further analysis of the ICSID Rules, see sources cited *supra* notes 176–177; see also Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

180. REVISING THE UNCITRAL ARBITRATION RULE, *supra* note 176, at 9–14.

181. *Id.*; Telephone Interview with IISD Representative at the February 2008 Working Group Meeting (Oct. 29, 2007); Interview with State and Observer Delegation Members at the February 2008 Working Group Meetings (Feb. 5–7, 2008); see also Letter to Nicholas Michel, Under-Sec’y-Gen. for Legal Affairs and the Legal Counsel of the U.N., CIEL-IISD (Jan. 30, 2007) (on file with author) [hereinafter Letter to Nicholas Michel].

182. See Letter to Nicholas Michel, *supra* note 181.

183. See John Ruggie, Professor, Special Representative of the U.N. Sec’y-Gen. on Bus. & Human Rights, Statement to the UNCITRAL Working Group II (Arbitration and Conciliation) (Feb. 29, 2008), available at <http://198.170.85.29/Ruggie-statement-UNCITRAL-Feb-2008.pdf>.

meeting that summer for resolution.<sup>184</sup> With the support of key states, particularly Canada, the Commission instructed the Working Group to return to the issue once it had completed revising the “purely commercial” aspects of the arbitration rules.<sup>185</sup>

Both the internal and external critiques pose fundamental challenges to the work of UNCITRAL. From different directions, both positions threaten to upend a delicate balance between the power and influence of states, key international business interests and associations, and expert communities that have been essential to the operation and success of the institution in its current form. To return to terminology introduced earlier, UNCITRAL has become an important “site” of commercial law-making for the global economy because of the ways in which it has been mobilized by a set of complex public-private-expert networks to advance a particular agenda for commercial law.<sup>186</sup> This does not mean that the ultimate authority over UNCITRAL is not in the hands of the member states, but that its success in advancing an agenda for legal reform has depended upon states working with and through such networks. A reassertion of state-centrality, as the French proposal demands, could damage these relationships and probably weaken the effectiveness and impact of the institution as an advocate for the kind of commercial legal reform it has pursued over three decades.<sup>187</sup> In such circumstances, it is likely that key states that have supported this agenda will reduce their investment in UNCITRAL, as would the business and expert networks on which these states have depended for their success.<sup>188</sup>

A move towards more transparency and the involvement of a wider range of NGOs and interests, as the CIEL/IISD suggests, would also change the dynamics of the institution, but in a somewhat different, perhaps more fundamental, direction. By breaking open the relative opacity and “below the radar” status of UNCITRAL, it would make it less amenable for relatively closed networks of power and expertise to use it as a site for developing law with minimal public oversight. In essence, it would reshape the institution in a model more common among international institutions in the UN system, which would likely make it both

---

184. UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fiftieth Session*, U.N. Doc. A/CN.9/669 (Mar. 9, 2009).

185. *See id.*

186. *See* discussion *supra* Part III.

187. UNCITRAL, *France’s Observations*, *supra* note 168, ¶¶ 6–7.

188. *See, e.g.*, UNCITRAL, U.S. Response, *supra* note 173. A senior official in the U.S. delegation to UNCITRAL suggested in an interview, on the condition of anonymity, that the U.S. might shift its resources away from the institution and work in other law-making capacities if the French proposal (or a similar proposal) succeeded.

more transparent and less “effective” in generating norms and rules for international commercial law.<sup>189</sup> Once again, it is likely that such a development would lead key actors to shift resources into other fora in the pursuit of their agendas. Ultimately, UNCITRAL’s fate will depend upon its ability to productively manage and incorporate these legitimacy challenges.

#### CONCLUSION

UNCITRAL’s success in shaping the world of commercial law over the past three decades is an important, if neglected, story for the study of how international institutions shape the legal frameworks for global commerce. UNCITRAL’s ability to insert itself innovatively in the world of commercial law-making, to re-create itself as a forum in which the most “modern” and “advanced” norms for commercial law are defined, and the persuasiveness with which it has justified its working methods as the product of a combination of political consensus and technical “expert” authority are all essential aspects of its emergence as a key vehicle for normative modeling in global economic governance. Together, these factors have created conditions in which most powerful actors in the area of international commercial law have decided to invest significant resources in shaping UNCITRAL’s work and sustaining the authority of the institution and its work product.<sup>190</sup> As a result, UNCITRAL is now an important player in shaping the practices of transnational commercial law in such fields as arbitration, insolvency, investment, and secured transactions.

UNCITRAL’s work has been held together by a shared (but not always uncontested) commitment to developing new or “modernized” legal norms that promote greater market and financial integration in the global economy as well as the desire of most actors to preserve the flexibility and opaqueness of its working arrangements.<sup>191</sup> To be sure, this cohesion is now coming under some strain, as are all the institutions working in the field of global economic governance, and the outcome of these challenges are uncertain. But it is worthwhile to emphasize two lessons to be learned, or questions that are posed, by UNCITRAL’s success:

---

189. See KARNs & MINGST, *supra* note 88, at 95–145 (describing the UN system); see also THOMAS G. WEISS ET AL., *THE UNITED NATIONS AND CHANGING WORLD POLITICS* 173–228 (2d ed., 1994); KOPPEL, *supra* note 107 (arguing that more procedural transparency and “due process” can hinder the effectiveness of international institutions).

190. See generally discussion *supra* Parts I–III.

191. See *id.*; see also Block-Lieb & Halliday, *Incrementalisms in Global Lawmaking*, *supra* note 114.

1. UNCITRAL has successfully constructed an account of its legitimacy that preserves a unique balance between political consensus and technical legal expertise. Underlying this account, though, is the assumption that the matters of private international commercial law are of little relevance to constituencies beyond states, international organizations, affected industries, and technical legal experts. Or, if there is a broader impact, it is the role of states to incorporate these in their decisions on the substance of UNCITRAL's work. This has enabled the institution to limit participation in its deliberations in ways that are unavailable to many institutions of public international law. But commercial law can and does have significant impact on a variety of civil society constituencies—for example, communities, workers, and social movements—that have had little voice in its operations.<sup>192</sup> As the developments surrounding investor-state arbitration indicate, the growing impact of UNCITRAL's work may be forcing it deal more directly with these constituencies. The ways this will impact UNCITRAL's structure, operation, work product, and ultimately, its claims to legitimacy, will prove a key test of its ability to continue to adapt to a changing global political context.

2. The structure of private international law-making, as illustrated by UNCITRAL's evolution, raises some troubling issues regarding the role of power in the normative modeling that informs global economic governance. This observation takes off from Braithwaite and Drahos' argument that normative modeling can be a mechanism whereby relatively resource-poor actors exert disproportionate impact on global governance.<sup>193</sup> The example of UNCITRAL, however, seems to suggest that the more plural, flexible, and multi-layered the structure of governance, the more that resource-rich actors are at an advantage in shaping the content and application of rules and norms. The exercise of real power over time in global governance requires the ability to be present and active at a number of sites and to simultaneously mobilize various agents and coalitions behind a common agenda that is pursued across different fora. In addition to being required by the plural and fluid ways in which governance takes place, this kind of forum-shifting ability allows its possessors to work around potential opposition that emerges in only one arena. At the international level, it seems clear that only the most resource-rich actors possess these abilities over time and across

---

192. See generally BRAITHWAITE & DRAHOS, *supra* note 9; see also CALLIENS & ZUMBANSEN, *supra* note 42; Wai, *Transnational Private Law*, *supra* note 39, at 471, 477–85 (2005); Wai, *Transnational Liftoff*, *supra* note 39, at 209, 212–13, 233–39, 256–58 (2002).

193. BRAITHWAITE & DRAHOS, *supra* note 9, at 593–94.

issue areas.<sup>194</sup> To the extent that the governance of the global economy continues to evolve in more fluid and plural forms, careful thought must be given to the implications of this pattern for the design of institutions through which rules and norms are made, diffused, and enforced, and for the ability to uphold claims to legitimacy made by these institutions.

---

194. See Cohen, *Constructing Power Through Law*, *supra* note 15; see also Drahos, *supra* note 15; Sell & Prakash, *supra* note 23. A similar argument has been made with great force, in the context of the debate regarding the “fragmentation” of international law, in Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007).