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Reforming the Law Reform Ecosystem

Timothy Schnabel

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ABSTRACT

This Article outlines a series of reforms that would make global law reform efforts more effective and efficient. These efforts currently occur primarily in three multilateral organizations (UNCITRAL, UNIDROIT, and the Hague Conference). The member states of these organizations could easily increase coordination—even to the point of de facto consolidation of the organizations' work—and could increase the attention given to selecting projects and promoting instruments. Additionally, the U.S. government could organize plurilateral law reform efforts outside these organizations and draw on U.S. domestic law reform efforts to identify new topics for work. Finally, non-government actors could themselves coordinate across the multilateral fora and could use the American Law Institute as a model to develop new lawyer-driven (rather than government-driven) law reform organizations at the global level.

INTRODUCTION

Others participating in this Festschrift are better able to praise and explain the significance of Neil Cohen's substantive contributions to domestic and international law reform. Instead, I want to highlight *where* he has contributed—and in particular, the wide range of fora across which he has made an indelible mark.

Professor Cohen has worked extensively on secured transactions instruments in multiple Working Groups of the United Nations Commission on International Trade Law (UNCITRAL), including the development of UNCITRAL's general instruments on secured transactions and the more recent work focused on access to credit for micro, small, and medium enterprises. He has participated in projects on contract law, factoring, and debt enforcement in the International Institute for the Unification of Private Law (UNIDROIT). He has tackled choice-of-law issues in the Hague

* Executive Director of the Uniform Law Commission.

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Conference on Private International Law. He served as the reporter for the Restatement of the Law of Suretyship and Guaranty in the American Law Institute (ALI), and was an advisor on other ALI projects, including the Principles of Software Contracts and the Restatement of the Law of Conflict of Laws. With respect to the ALI and the Uniform Law Commission (ULC), he has been at the center of the organizations' joint work on the Uniform Commercial Code (UCC): he served as the reporter for Revised Article 1 of the UCC, the research director for the Permanent Editorial Board for the UCC, and as a member of multiple drafting committees of UCC amendments, such as the recent effort related to emerging technologies. Outside of the UCC, he has contributed to more than a dozen other ULC projects in a wide range of areas of law, such as real property, choice of law, and commercial transactions. He has even worked on a joint project between the ALI and the European Law Institute (ELI), serving as a co-reporter on the Principles for a Data Economy project. This listing undoubtedly omits other work of Professor Cohen that ought to be highlighted.

Having worked with UNCITRAL, UNIDROIT, the Hague Conference, the ALI, the ULC, and the ELI may put Professor Cohen in a class by himself, in terms of the number of significant fora in which he has worked on multi-jurisdictional law reform efforts—let alone with respect to the extent of his contributions in each forum. It is unlikely that anyone can exceed Professor Cohen in terms of having such a complete view of the working methods, institutional quirks, and strengths and weaknesses of all six of those fora.

Thus, a Festschrift in his honor is an appropriate occasion to delve into issues relating to the law reform ecosystem that these organizations comprise. This Article addresses the work of these organizations from a systemic perspective, identifying ways in which global law reform work could be done more effectively and efficiently. When we discuss multilateral law reform, commercial and otherwise, domestically, or internationally, we too often focus on particular projects. For example, we consider whether the policy decisions made in a specific set of ongoing negotiations are the right ones and whether governments will use the resulting instruments. Because so few individuals have worked—like Professor Cohen—extensively across many organizational borders and areas of law, the law reform ecosystem is rarely a subject of analysis and debate.[1] For the most part, the organizations remain

1. To be sure, the cross-organizational experience of individuals like Professor Cohen is also highly relevant within the context of individuals projects. New instruments might inadvertently interfere with rules crafted by other organizations' prior work, unless the negotiations include participants who are familiar with the broader context. *See, e.g.*, U.N., *UNCITRAL, Hague Conference and UNIDROIT Texts on Security Interests*, n.4 (2012), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-hcch-unidroit-e.pdf (noting assistance from Professor Cohen); UNCITRAL, HCCH AND UNIDROIT LEGAL GUIDE TO UNIFORM INSTRUMENTS IN THE AREA OF INTERNATIONAL COMMERCIAL CONTRACTS, WITH A FOCUS ON SALES, at 3, U.N. Sales No. E.21.V.3 (2021), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/tripartiteguide.pdf (noting contributions of Professor Cohen). But the

in their respective silos: individual organizations usually focus only on the work at hand or on what project comes next, occasionally work on self-improvement, and rarely consider their places in the broader ecosystem or lessons that could be learned from other organizations. As so few people have Professor Cohen's ability to see across those organizational silos, the status quo is rarely questioned, and inertia remains a dominant force. The issue of how the broader law reform ecosystem should be reformed is infrequently discussed.

Despite the lack of attention given to reforms of organizational structures and working methods, such efforts—or even the formation of new organizations—are worthwhile, given that they can positively affect many individual law reform projects. Each law reform *project* entails designing a system—i.e., a collective effort to craft a system of rules for individual jurisdictions to implement.[2] Each law reform *organization* is itself a system that designs systems (legal frameworks) using particular working methods and resources. And the law reform *ecosystem* as a whole—a set of organizations working toward similar ends—is a system of system-designing systems. If each participant in these law reform efforts redirected a fraction of the time spent in the weeds of individual projects to the discussion of reforming the broader ecosystem, the amount and quality of law reform produced in the coming decades could be drastically increased.[3]

Thus, as part of this Festschrift's discussion of the future of commercial law reform, this Article outlines a proposed agenda of systemic improvements at the international level that could contribute to the success of decades of law reform projects—whatever they may be. Part I, below, offers several suggestions of steps that could be taken by the governments that are most actively engaged in multilateral law reform work. Part II discusses steps that could be taken by the U.S. government to increase its success in law reform efforts at the international level. Finally, Part III suggests the development of several new categories of institutions that could be built by actors other than governments in the international law reform space.

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focus for current purposes is the need for cross-organizational perspectives regarding working methods and system architecture.

2. Admittedly, individual instruments may not provide a *complete* "system" of rules; governments may need to supplement the models with additional components. For example, some commercial law instruments need accompanying regulatory frameworks (though such public law issues are generally seen as beyond the mandates of UNIDROIT, UNCITRAL, and the Hague Conference).

3. For an example of analysis of law reform efforts cutting across the organizations' silos, *see generally* Henry Deeb Gabriel, *The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference*, 34 BROOK. J. INT'L L. 655 (2009).

I. THE NEED FOR SYSTEMIC REFORMS OF THE MULTILATERAL LAW REFORM ORGANIZATIONS

National governments primarily support law reform efforts at the multilateral level in two ways. First, they contribute to the budgets of the three relevant organizations—UNCITRAL, UNIDROIT, and the Hague Conference.[4] Second, they allocate domestic resources to the work of those organizations via the time that government employees spend participating in law reform efforts and the costs of having those employees travel to multilateral negotiations. Yet although these resources all support law reform work at the global level, the resources are not allocated according to a coherent, well-considered plan, as the law reform work itself is thoroughly siloed in multiple ways.[5]

First, few countries task one group of lawyers with the responsibility of participating in all three organizations. In the United States, the Office of the Assistant Legal Adviser for Private International Law (commonly known as L/PIL) at the State Department is responsible for representing the United States in all three organizations.[6] A few other countries have analogous structures, such as offices in the justice ministries of Canada and Switzerland, but most countries have a more fragmented approach. Some countries assign responsibility for one organization to a particular ministry, or part of a ministry, while assigning responsibility for another organization elsewhere. In many countries, participation in individual projects is determined by substantive expertise, such that one ministry may handle a project on

4. Note that member states of UNIDROIT and the Hague Conference pay membership dues directly to those organizations, whereas UNCITRAL is allocated funding from the broader United Nations budget.

5. Of course, many other institutions are also relevant to law reform discussions. For example, the World Bank Group and other multilateral development institutions fund law reform efforts in particular countries, at time using the instruments developed via UNCITRAL, UNIDROIT, and the Hague Conference, and sometimes they also conduct standard-setting activities (although not through multilateral negotiations among states). *See, e.g.*, THE WORLD BANK, PRINCIPLES FOR EFFECTIVE INSOLVENCY AND CREDITOR/DEBTOR REGIMES (rev. 2021 ed.). Some other regional organizations, such as Asia-Pacific Economic Cooperation (APEC) and the Organization of American States (OAS) develop law reform instruments as well. These efforts fall outside the scope of the current analysis, which focuses primarily on efforts at the global level.

6. *See, e.g.*, *Private International Law*, U.S. DEP'T OF STATE, https://2009-2017.state.gov/s/l/c3452.htm (last visited Aug. 31, 2022); American Society of International Law, *How to Get Involved in the State Department's Work in Private International Law*, YOUTUBE (Sept. 9, 2015), https://www.youtube.com/watch?v=6QJ4qX8I6dY. Similarly, L/PIL has a formal structure established under the Federal Advisory Committee Act —the Advisory Committee on Private International Law—through which it can hold public meetings to elicit stakeholder feedback on potential projects or in-progress negotiations. *See Committee Detail,* FACADATABASE.GOV, https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=a10t0000001gzpOAAQ (last visited Aug. 31, 2022). Although the usefulness of feedback provided via ACPIL can be uneven, the general concept could be considered by other countries as a tool for assessing the views of stakeholders on the work of the three multilateral organizations. Receiving this input prior to the completion of negotiations would likely increase the likelihood that multilateral instruments would be seen as acceptable in domestic systems after finalization.

insolvency, and another may handle a project on arbitration. Officials who are not involved in an organization's substantive work, and who might not be lawyers, may participate in that organization's discussions on administrative and governance issues.

When participation in law reform organizations is fragmented in this way, participants may not be aware of how their piece of the puzzle—whether it involves a substantive project or organizational governance—fits into the overall law reform ecosystem. Conversations within governments to determine priorities within each of the organizations, let alone across all three organizations, may rarely occur. As a result, many officials participating in law reform activities make decisions without fully considering the interests of other parts of their governments.

Further, the three organizations make internal resource-allocation decisions in isolation. Each has its own process for selecting and prioritizing projects, subject to the control of their respective member states. The Hague Conference has ninety member states,[7] UNIDROIT has sixty-three member states,[8] and UNCITRAL has seventy member states that are elected on a regional basis from the broader United Nations (U.N.) membership (although any U.N. member states can participate in discussions).[9] Though many states actively participate in all three organizations, the Venn diagram of membership status includes some non-overlapping areas. For example, the Holy See is a member of UNIDROIT, merely an observer in the U.N. system, and not a member of the Hague Conference; the European Union is a full member of the Hague Conference, an observer in the U.N. system, and not a member of UNIDROIT; and Peru is a member of both UNCITRAL and the Hague Conference but is not yet a member of UNIDROIT. Although the secretariats of the three organizations meet periodically to coordinate,[10] and individual staff members will sometimes attend meetings for other organizations' projects, the three organizations' internal management structures are entirely independent of each other, as are government efforts to oversee the organizations.

Critically, the substantive projects undertaken by the three organizations—which comprise the organizations' overall agendas, commonly referred to as their "work programs"—are generally chosen independently, aside from some informal coordination. For example, a member state, an observer in any organization, or an organization's

7. *HCCH Members*, HCCH, https://www.hcch.net/en/states/hcch-members (last visited Aug. 31, 2022).

8. *Membership*, UNIDROIT, https://www.unidroit.org/about-unidroit/membership/ (last visited Aug. 31, 2022).

9. Note that although UNCITRAL has traditionally had sixty members, its membership has recently been expanded to seventy. *See* G.A. Res. 76/109 (Dec. 9, 2022).

10. Enabling others to observe these meetings—at least representatives of member states, if not also stakeholders or the general public—could be a useful step in encouraging coordination as well.

secretariat[11] may propose a new project. If the proposal survives that organization's internal process for project selection, the project will move forward in that organization, regardless of whether it would have been better suited for one of the other organizations.[12] Similarly, one organization may have too many or too few high-quality projects at any one time; valuable ideas may languish at one organization due to lack of bandwidth, while another organization spends time on far less useful projects. The organizations' priorities may also diverge based on the officials who represent their governments, given that these officials do not represent a coordinated view of their governments' priorities.[13]

UNCITRAL's use of semi-permanent "Working Groups" compounds the problem within that organization. UNCITRAL receives an allotment of conference resources from the U.N. each year, which are then allocated to its six Working Groups, each dedicated to a particular area of law.[14] The decisions regarding UNCITRAL's overall work program are made at its

11. Indeed, the personal areas of interest of secretariat officers—and especially the heads of the organizations—often has a significant influence on the organizations' work programs.

12. To some extent, the organizations have opted to focus on different subject-matter areas. For example, UNIDROIT and UNCITRAL leave family law projects to the Hague Conference (which also tends to handle projects related to choice of law or general judicial cooperation). UNCITRAL and the Hague Conference leave cultural property issues to UNIDROIT. The Hague Conference and UNIDROIT generally leave insolvency and procurement law to UNCITRAL. But overlaps exist—for example, all three organizations have done work relevant to contract law, dispute resolution, and secured transactions.

13. A coherent argument can be made, of course, that the fracturing of the law reform ecosystem—across organizations and even within UNCITRAL—has beneficial aspects. Although most of the same governments are active in the various fora, different officials represent those governments in different fora, and the positions taken in individual meetings may not fully reflect the same views that would have been expressed if the views of all interested offices had been fully taken into account. In some instances, then, a decision may be made in one forum—e.g., to proceed with developing a particular instrument—that would not have been made in another forum in which a different subset of views were expressed. In theory, such an uncoordinated decision might lead to the development of an instrument that proves itself to be successful even though its existence is essentially a happy accident. However, absent officials who, given the opportunity, would have blocked the development of an instrument are unlikely to accede later to its domestic implementation; thus, an instrument that owes its existence to a lack of coordination seems unlikely to gain truly global acceptance. To the extent that the multilateral organizations aim to develop instruments that represent a global consensus, full scrutiny by all relevant government interests seems more appropriate than relying on the hope that a lack of coordinated consideration may at times result in decisions that turn out fortuitously. At the same time, instruments that may not appeal to all legal systems can still have tremendous value and should be a key part of global law reform efforts. Other reforms—such as the use of plurilateral negotiations among like-minded states, as suggested in Part II.B, or even a shift away from consensus decision-making in the multilateral organizations—would seem to be more rational and efficient routes to develop such instruments, instead of relying on a lack of coordination to let them occur haphazardly.

14. *See, e.g.*, U.N. Comm'n on Int'l Trade L., *Provisional Agenda, Annotations Thereto and Scheduling of Meetings of the Fifty-Fourth Session*, at 14–15, U.N. Doc. A/CN.9/1041 (Apr. 7, 2021). Each Working Group typically meets twice a year, spending one week in the spring in New York and another in the fall in Vienna. The resources provided to Working Groups include Secretariat staffing, conference facilities, and real-time interpretation into the six official U.N. languages.

annual Commission meeting, which also finalizes the instruments developed by the Working Groups. However, in most cases, the proposals for new projects emerge from existing Working Groups, some of which are particularly notorious for their efforts (justified or otherwise) at self-perpetuation.[15] UNCITRAL should, theoretically, weigh the value of further projects in existing areas of work versus new projects in areas of law to determine which to pursue. Instead, its decisions tend to be driven by whoever happens to be present when the relevant agenda item comes up. As few governments have dedicated offices responsible for these organizations, participants are often only present for one substantive part of the meeting's agenda. Thus, when the Commission reviews and gives final approval to an instrument developed by a Working Group, governments often send the same delegates that were sent to the Working Group-level discussions. Members of that Working Group then tend to be overrepresented in the room when the Commission later proceeds to other business, including the decision regarding the newly idle Working Group's next project and the rest of the overall work program.[16]

A. COORDINATION AND CONSOLIDATION OF UNCITRAL, UNIDROIT, AND THE HAGUE CONFERENCE

To address this fragmentation, governments could take a vital step toward more efficient multilateral law reform efforts by increasing coordination across the existing silos. Coordination is needed *within each* government (in its internal consideration of each organization's work and the overall use of resources across governments) and *with other* governments.

The easiest approach would be for additional governments to each designate a specific office to have the lead responsibility for representing those governments in the activities of the three multilateral organizations. New bureaucratic structures could be created for this purpose but, in light of resource scarcity, simply consolidating responsibility into one existing office would suffice. Those offices would still need to coordinate with officials in other offices and ministries, but having one hub for consideration of the three organizations' work would encourage governments to take a bird's-eye view of the work being done across the law reform ecosystem. Ensuring that at least a few government lawyers in each country are aware of all pending and proposed projects, and have some authority to decide how to prioritize them, would be a significant first step.

15. UNCITRAL Working Groups even hold colloquia at times to generate new ideas for their future work.

16. This self-perpetuation dynamic, although often seen with UNCITRAL Working Groups, is of course not a universal phenomenon. Secretariat-driven projects also make it onto the UNCITRAL agenda, as do proposals from particular member states. But the instances in which member states broadly survey the possible areas of work and make well-informed decisions about opportunity costs and priorities are far less frequent than one would hope.

Similarly, governments could take steps to coordinate with each other regarding the work programs of the three multilateral organizations without incurring significant new costs. Although the organizations' memberships do not entirely overlap, the active participants in most of the organizations' projects tend to come from a core group of countries. If merely ten or fifteen key countries started meeting regularly to discuss the overall shape of the law reform agenda across the organizations, a greater level of coordination could be achieved, leading to significant shifts in the decisions made within each organization. Organizations such as the International Law Institute (ILI) could convene these meetings if countries preferred a non-government host. In fact, the ILI hosted such a meeting back in 2015, with representatives of UNCITRAL, UNIDROIT, and the Hague Conference joining a group of member-state officials to discuss issues related to working methods and work program development. Given the pervasive use of videoconferencing after the COVID-19 pandemic, conducting these meetings would be much easier now than in 2015. Virtual meetings would allow governments without a central office for multilateral law reform to delegate officials to participate in these discussions without spending money on travel. Although coordination would be easier if more countries had such offices, a three-hour Zoom meeting held several times a year could be a convenient way for countries to discuss the allocation of projects across the organizations, as well as reforms to the organizations' working methods.

These discussions would likely be a necessary predicate for a more ambitious step that would take years of planning, if it is even achievable: consolidating the three organizations into one. The fracturing of multilateral law reform work across three organizations is an accident of history: the Hague Conference started its work in 1893,[17] but UNIDROIT in 1926[18] and UNCITRAL in 1966[19] were created later when both the League of Nations (of which UNIDROIT was originally a component) and the U.N. opted to form duplicative entities within their systems. If countries were starting today from a blank slate, the idea of establishing three separate organizations would be irrational. Consolidating multilateral law reform efforts into one organization would allow the same resources to be used more efficiently, not

17. The Hague Conference first met in 1893, although it was not established as an international organization until the 1950s. *See History*, HCCH, https://www.hcch.net/en/about/history (last visited Sept. 7, 2022).

18. After the demise of the League of Nations, UNIDROIT was reestablished as an independent organization in 1940. *See About UNIDROIT*, UNIDROIT, https://www.unidroit.org/about-unidroit/ (last visited Sept. 7, 2022).

19. *See About UNCITRAL*, UNCITRAL, https://uncitral.un.org/en/about (last visited Sept. 7, 2022).

only by reducing duplicative overhead and personnel costs, but by enabling the development of a unified work program.[20]

Although the U.N. General Assembly created UNCITRAL and may structurally alter it by resolution, UNIDROIT and the Hague Conference are each established by treaties. Therefore, formally making structural changes to either of these organizations would take unanimous agreement by the organizations' member states. To avoid the difficult and time-consuming process of amending the treaties, aiming for de facto consolidation of the organizations' work would be preferable to attempting de jure consolidation of their legal entities. Thankfully, consolidating the organizations' operations without a formal legal merger may be possible. The members of two of the organizations could divert the organizations' resources to the third organization, which would accept any additional member states that wanted to join.

Such de facto consolidation could consist of an approach in which the Hague Conference's Council on General Affairs and Policy develops a work program encompassing the activities currently split between all three organizations. The UNCITRAL Commission and UNIDROIT General Assembly could approve that same work program and make the rest of their resources available for its implementation, coordinated by the Hague Conference Permanent Bureau. UNIDROIT's staff and budget could be transferred to the Hague Conference,[21] and UNCITRAL's staff (members of the larger U.N. bureaucracy) could work there on secondment. The allocation of conference resources—e.g., meeting rooms, translation, and interpretation—that UNCITRAL receives from the U.N. system could be dedicated to projects according to the centrally developed work program. All that would be required for this approach to work is sufficient buy-in from the key member states that would drive the debate in all three organizations.

Alternatively, either UNCITRAL or UNIDROIT could play the role of the Hague Conference in the above hypothetical, although they might not be as well-suited for the role. Because UNCITRAL is a part of the larger U.N. bureaucracy, it is not as directly under the control of the delegations focused on law reform. Although the Fifth and Sixth Committees of the General Assembly oversee UNCITRAL's operations and resource allocations, those committees are generally attended by member-state officials who otherwise do not work on law reform efforts.[22] Moreover, the U.N.'s Office of Legal

20. Consolidation could also enable governments to achieve the same level of law reform activity more efficiently—i.e., through a reduced commitment of resources—but increasing productivity without reducing resource commitments would be the preferable outcome.

21. The merged staff could continue to work on behalf of UNIDROIT to manage that organization's functions as a treaty depositary.

22. UNCITRAL does have the advantage of the broadest membership and the imprimatur of the United Nations on its instruments. However, as noted in Part II.B below, the existing organizations' broad memberships often do not result in correspondingly broad adoption of instruments. With respect to the utility of having the U.N. imprimatur on particular instruments, the U.N. could still

Affairs makes decisions about the hiring, promotion, and assignment of secretariat personnel, thus insulating those decisions from the direct control of member states that are active in law reform efforts. UNIDROIT's peculiar internal governance structure would similarly hinder any efforts to use it as the central body for coordination of the law reform ecosystem. In addition to its General Assembly of state representatives, UNIDROIT has a Governing Council that plays an active role in managing the organization's staff and work program; as the Governing Council consists of individuals elected in their personal capacities, direct control by member states is somewhat attenuated.

Regardless of the approach taken, consolidation would require member states to overcome several forms of resistance to change. Given the fragmentation of responsibility for the different organizations' work, one significant challenge would be the likelihood of bureaucratic resistance to change by those whose current responsibilities would be reduced or eliminated. Another challenge would be the sentimental attachment to the organizations (and to the status quo) on the part of long-time delegates to the various organizations. As the organizations' working methods each have their own strengths and weaknesses, consolidation would need to preserve these comparative advantages.

For example, UNIDROIT is the smallest of the organizations, but has the greatest flexibility in working methods, such as through the use of "study groups" selected by the secretariat that can develop an initial draft of an instrument prior to intergovernmental negotiations.[23] Similarly, the Hague Conference has a practice through which delegations are expected to submit written proposals for discussion during the work of a Special Commission.[24] In contrast, UNICITRAL and UNIDROIT have comparatively chaotic

endorse instruments resulting from a combined organization (or even add the UNCITRAL name as a co-branding exercise), even if UNCITRAL were not the organization into which all work were centralized.

23. *See*, *e.g.*, UNIDROIT Secretariat, UNIDROIT Comm. of Governmental Experts on the Enforceability of Close-Out Netting Provisions, Annotated Draft Agenda, U.N. Doc. C.G.E./Netting/1/W.P.1, at 2 (May 2012), https://www.unidroit.org/english/documents/2012/study78c/cge-01/cge-1-wp01-e.pdf (noting that the "committee of governmental experts"—i.e., the forum in which member state delegations would commence intergovernmental negotiations—would be using a draft from a study group as the basis for its work); UNIDROIT Comm. of Governmental Experts on the Enforceability of Close-Out Netting Provisions, Draft Principles Regarding the Enforceability of Close-Out Netting Provisions, U.N. Doc. C.G.E./Netting/1/W.P.2, at 1 n.1 (May 2012), https://www.unidroit.org/english/documents/2012/study78c/cge-01/cge-1-wp02-e.pdf ("The draft Principles were established by the UNIDROIT Study Group on Principles and Rules on the netting of financial instruments and endorsed for submission to a Committee of governmental experts by the UNIDROIT Governing Council at its 91st session, held from 7 to 9 May 2012.").

24. *See, e.g.*, Rules of Procedure of the Hague Conference on Private International Law (HCCH), HCCH at II.6.d, https://www.hcch.net/en/governance/rules-of-procedure ("Any delegation may object to a proposal being discussed, or be decided upon, if the text of the proposal has not been circulated to the delegations.").

systems in which delegations propose new text orally without prior notice.[25] With respect to UNCITRAL, the use of long-term Working Groups that produce multiple instruments in succession has downsides, such as the tendency toward self-perpetuation. At the same time, the continuity of efforts in particular areas of law over many years enables those Working Groups to develop not only deep pools of expertise, but also the camaraderie that facilitates compromise. Any successful consolidation effort would import advantageous procedures from the two organizations whose resources were moved to the third.[26] Blending the organizations' working methods would take careful planning, but the consolidation process would be slow enough to accommodate the necessary discussions.

B. NEW PROCESSES DESIGNED TO AID IN THE SUCCESS OF INSTRUMENTS

The governments that participate in these multilateral organizations could also implement new processes to help each organization promote its instruments and pick new projects in a more coordinated manner. Too often, years of work and significant resources are spent on finalizing instruments that sit on shelves, unused by governments.[27] Instead, governments need to ensure that each project is selected with an eye toward its likelihood of success and that adequate effort is made to promote their use after completion.

Although directly mirroring one country's domestic approach at the international level is often inadvisable, the multilateral organizations' domestic analogue in the United States provides some helpful examples of how such institutional structures could be conceived. As further discussed in Part III.B below, the ULC plays the same role within the United States as UNIDROIT, UNCITRAL, and the Hague Conference play at the global level. Just as countries send delegations to these multilateral organizations, U.S. states appoint commissioners who are members of the ULC; these commissioners develop uniform and model acts that the commissioners then seek to get enacted in their home states.[28] However, unlike these multilateral

25. *See, e.g.*, Audiotape: Interventions of the Chair and Israel, in UNCITRAL Working Group II (Dispute Settlement), 66th Session, at 15:00-18:00 (Feb. 7, 2017), https://conferences.unite.un.org/carbonweb/public/uncitral/speakerslog/2332cbc3-282e-4473-8396-a949d51f011b (introducing a proposal developed during informal consultations over a lunch break).

26. An in-progress project on warehouse receipts—being developed jointly by UNIDROIT and UNCITRAL—demonstrates the feasibility and utility of cross-organizational collaboration. *See Model Law on Warehouse Receipts,* UNIDROIT, https://www.unidroit.org/work-in-progress/model-law-on-warehouse-receipts/ (last visited Sept. 7, 2022).

27. *See infra* note 61.

28. One difference between the ULC's role and that of the multilateral organizations is, of course, that the instruments developed at the multilateral level also include treaties and not only model legislation. Whether at the domestic or international level, model legislation can be altered by states that choose to enact it, making the stakes of the negotiations somewhat lower than with treaties (which, other than permitted declarations and reservations, must be accepted or rejected as

organizations, the ULC uses a vast system of committees to facilitate work on a wide range of issues simultaneously.[29] Analogues to some of the ULC's institutional approaches might be helpful at the international level.

For example, the ULC takes a multi-layered approach to promote the enactment of its acts. Each state's delegation of commissioners is ultimately responsible for selecting acts to prioritize and identifying legislators to introduce those bills. However, a permanent committee called the Legislative Council is responsible for overseeing efforts to enact ULC instruments in state legislatures. The purpose of the Legislative Council is to provide a forum in which the ULC can address the overall strategy for these efforts and provide assistance and guidance to state delegations where needed. In addition, the commissioners appointed to the Legislative Council are each responsible for liaising with a particular region, generally consisting of four states, with significant assistance from ULC staff. Similarly, "enactment committees" are formed after the conclusion of a drafting project to encourage those who participated in the development of an act to assist in state enactment efforts.

In contrast, the member states of the three international organizations generally do not work collectively to assess efforts to promote instruments, though the organizations' secretariats monitor, assist, and report on countries' efforts to implement them.[30] To further implementation efforts, the organizations could establish a committee of volunteers from active member states that work with the organizations' secretariats and interested stakeholders to coordinate outreach to countries that are good candidates for implementing particular instruments. Coordinated outreach by the embassies of participating member states could be an effective method for promoting these instruments.

The ULC also has a more methodical system for identifying possible projects and analyzing their merits prior to embarking on a formal drafting effort. All proposals for new projects—whether from ULC commissioners, outside stakeholders, or other sources—are routed to a Scope and Program Committee for an initial assessment.[31] The Scope and Program Committee then recommends to the ULC's Executive Committee which projects warrant

a package). Thus, the dynamics cited in Part II.B below (regarding the risk of "lowest common denominator" approaches in multilateral instruments) is even more of a risk for treaties than for model legislation.

29. For example, the ULC currently has twelve in-progress drafting projects and another seventeen active study committees—far more efforts under way simultaneously than any of the multilateral organizations. *See ULC Project List*, UNIF. L. COMM'N, https://www.uniformlaws.org/viewdocument/ulc-projects-list (last visited Jan. 3, 2023).

30. Some coordination already occurs among secretariats and other organizations on technical assistance and implementation efforts. *See, e.g.*, *Joint Network for Coordinating and Supporting Secured Transactions Reforms*, UNCITRAL, https://uncitral.un.org/en/content/joint-network-coordinating-and-supporting-secured-transactions-reforms (last visited Sept. 7, 2022).

31. *See New Project Criteria*, UNIF. L. COMM'N, http://uniformlaws.org/projects/overview/newprojectcriteria (last visited Jan. 4, 2023).

the establishment of a study committee to assess whether a uniform law on the identified topic would be useful, feasible, and likely to be enacted (including by reaching out to key stakeholders to assess their views). Study committees typically work for about a year before reporting to the Scope and Program Committee with a recommendation regarding whether a drafting committee should be established to develop such a uniform or model act.[32]

Although most study committees recommend proceeding to a drafting phase, and most of these recommendations are approved, the process still weeds out many projects that would be unlikely to result in widespread enactment. By providing a more formalized process—one that includes opportunities for discontinuing work on projects with dubious prospects for success—resource allocation can be more efficient. Moreover, the stakes of initially exploring a possible project are lower if work can be terminated more easily.

Unlike the ULC, the multilateral law reform organizations do not have such a regimented process for evaluating possible projects. In UNCITRAL, approval of an idea for a new project can result in its assignment to a Working Group without sufficient evaluation of whether it merits the investment of the resources needed for full multilateral discussions.[33] Although UNIDROIT and Hague Conference projects generally undergo initial study phases before intergovernmental negotiations commence, even those organizations rarely decide to discontinue work on a topic entirely based on the initial work.[34] Inertia is powerful in all three organizations, which underscores the importance of careful decision-making in the initial choice of whether to authorize a project.[35] Implementing a more structured screening process—particularly one that facilitates efforts to rapidly discard projects

32. *See, e.g.*, Memorandum from Samuel A. Thumma, Chair, Professor Nita A. Farahanay, JD, Ph.D., Reporter & Study Comm. on Updating the Unif. Determination of Death Act., to Unif. L. Comm'n on Scope & Program, Final Report and Recommendation (June 16, 2021), https://higherlogicdownload.s3-external-1.amazonaws.com/UNIFORMLAWS/04b158fb-82e9-6ded-f799-9485aedd7e17_file.pdf?AWSAccessKeyId=AKIAVRDO7IEREB57R7MT&Expires=1672849839&Signature=Fk2469tc%2BINg7Z8syAcTtsvwCyk%3D.

33. *See, e.g.,* U.N. GAOR, 65th Sess., Supp. No. 17, 43rd Sess., at 52, U.N. Doc. A/65/17 (2010) https://daccess-ods.un.org/tmp/1773234.45677757.html (assigning two insolvency projects to Working Group V on the basis of member state proposals).

34. For a fairly rare example of topics being dropped from UNIDROIT's work program, *see* UNIDROIT, Rep. of the Governing Council, at 47, U.N. Doc. C.D. (95) 15 (June 2016), https://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-15-e.pdf.

35. The power of inertia is also evident in the extent to which the multilateral organizations struggle to discontinue work on a project when intergovernmental negotiations reach an impasse. For example, UNCITRAL's Working Group III spent years attempting to develop an instrument on online dispute resolution. Once it became clear that disagreements on key issues (in particular, whether pre-dispute arbitration agreements can bind consumers) precluded the development of model rules (let alone any legally binding instrument), the Working Group nevertheless continued to push forward, even though the final result was merely a set of "technical notes" with no real purpose or utility.

without sufficient promise—would significantly boost organizations' ability to use their resources more efficiently.

II. INCREASING U.S. GOVERNMENT LEADERSHIP IN GLOBAL LAW REFORM EFFORTS

The U.S. government is in an enviable position with respect to its participation in multilateral law reform efforts. As described in Part I, it is one of the few governments to have designated one office (L/PIL at the State Department) to lead its participation in the three multilateral organizations, even though that office is often somewhat neglected—marooned in a semi-dilapidated annex across the street from the main State Department building, and rarely adequately staffed. But the United States has other significant advantages as well. For example, the efforts of lawyers from L/PIL are supplemented by an extensive network of experts—law professors, practitioners, judges, and others—who volunteer their time to assist with U.S. participation in the multilateral organizations' law reform efforts.[36] In addition, some of the non-governmental organizations that participate as observers in UNCITRAL, UNIDROIT, and Hague Conference meetings are also often represented by U.S. lawyers, which can helpfully shape discussions, even when those groups take positions that diverge from U.S. government goals.[37] Moreover, the central role of the U.S. economy and legal system means that the U.S. voice in multilateral law reform negotiations is always seen as an important one, even when it takes a minority view. The U.S. delegation thus has the ability to play a significant role in shaping the issues that are discussed, whether during formal negotiations or informal discussions on the margins of, and between, meetings.

36. *See, e.g.*, Lindsey Stevenson, *Insider Briefing: Private International Law*, 91 AM. SOC'Y OF INT'L L. PROC. 40, 44 (1997) ("Through the formidable expertise provided us by the U.S. legal community at virtually no cost—a fact which is the envy of many other countries—the United States has gained considerable respect and influence in these organizations."). The willingness of U.S. lawyers to contribute significant amounts of time to law reform efforts may be an indirect consequence of the high costs of legal services in the United States, given that efforts to ensure broader access to those services contributed to the emergence of the broader pro bono culture now institutionalized in law firms and bar associations. *See generally* Richard Abel, *The Paradoxes of Pro Bono*, 78 FORDHAM L. REV. 2443 (2010); Ann Juergens & Diane Galatowitsch, *A Call to Cultivate the Public Interest: Beyond Pro Bono*, 51 WASH. U. J.L. & POL'Y 95 (2016).

37. Even some of the lawyers representing other governments in these organizations' efforts have received some of their legal education (e.g., an LLM degree) from U.S. law schools. Those lawyers' increased familiarity with looking at legal problems from the perspective of the U.S. legal system provides a subtle, but real, boost to U.S. efforts in law reform negotiations—as does the pervasiveness of English as the common language for informal discussions on the margins of meetings.

A. SPEARHEADING REFORMS TO THE MULTILATERAL ORGANIZATIONS

The ability of the U.S. government to draw attention to issues, and to convene groups of delegates (like-minded or otherwise) to discuss them, has significant implications for identifying steps to take to improve the global law reform ecosystem. For example, although the various ideas proposed in Part I would need widespread support to achieve their goals, each of those ideas would need some actor—whether a government, a secretariat, or a non-government organization—to spearhead attempts at implementation. In most cases, the U.S. government would have the best odds of pulling together the necessary coalitions. Regarding informal coordination across the three organizations, the organizations themselves lack the institutional incentives to encourage their members to develop a holistic approach to managing law reform resources across silos. One or more key countries would have to take the initiative of convening the discussions, or at least endorsing and signaling an intent to participate in discussions that a neutral organization, like ILI, could host. Any effort to move beyond coordination and toward an actual merger of the organizations would similarly need to be driven by one or more governments. Even efforts to coordinate outreach on implementation issues, or to impose a more rigorous process on project selection, would need one or more governments to be vocal advocates. Due to all the factors noted above, and the lack of an obvious alternative, the U.S. government may be in the best position to serve as a focal point for one or more of these efforts.[38]

B. SPEARHEADING THE USE OF PLURILATERAL LAW REFORM EFFORTS

Yet even beyond the opportunity to lead the initiatives outlined in Part I, the U.S. government could use its unique convening ability to create new opportunities for law reform efforts outside the existing multilateral organizations. The existing fora combine broad membership with a consensus-driven approach to developing instruments, an approach that is beneficial when the broad membership involved in developing an instrument then facilitates its wide acceptance. However, the search for consensus within a broad membership also frequently limits the level of ambition that can be achieved in an instrument (creating the risk of codifying a "least common denominator" approach). Given that few instruments achieve truly

38. An alternative view is that having three organizations picking projects in an uncoordinated fashion creates additional opportunities for advancing law reform projects—a form of arbitrage among the institutions' decision-making processes. One could argue that, with three separate organizations essentially competing with each other, the United States is in a better position than other governments to take advantage of the fracturing of law reform activities among three fora, each with their advantages and disadvantages for particular projects, by making tactical decisions regarding the location for certain projects. Yet the inefficiencies created by the multiplicity of fora likely far outweigh the benefits, in terms of the net progress being made in law reform efforts.

widespread acceptance, the putative tradeoffs of this approach are not self-evidently worthwhile in all cases.

By contrast, another model is possible—albeit only outside the existing fora. A smaller group of countries with more ambitious goals for a particular instrument could be convened to negotiate an instrument that would set higher standards or develop an entirely novel solution to a problem.[39] The completed instrument could then be made available (whether via ratification of a treaty or implementation of a model law) to a broader group of countries once its benefits have been demonstrated. Although this approach has not yet been attempted in the areas of law reform that UNCITRAL, UNIDROIT, and the Hague Conference typically address, the model would not be unprecedented. For example, the United States, the European Union, Australia, Canada, South Korea, Japan, Mexico, New Zealand, Morocco, Switzerland, and Singapore negotiated the Anti-Counterfeiting Trade Agreement (ACTA) in an attempt to move forward with a more ambitious agenda of intellectual property protection than could be obtained in further work in the World Trade Organization.[40]

Although ACTA has not entered into force (and likely will never do so), a plurilateral approach could be more fruitful in areas of law that are less fraught than intellectual property protection. A plurilateral treaty on the recognition and enforcement of foreign judgments, for example, could set a higher standard than is reflected in the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.[41] Plurilateral efforts to develop an ambitious instrument could result in more generous treatment of foreign judgments and a more streamlined framework than the existing treaty. Regarding arbitration, a protocol to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards could address additional aspects of the arbitration process not covered by the existing treaty and could provide greater clarity on some issues that are covered by the treaty but that have seen non-uniform approaches to implementation over the decades.[42] Such a project is probably

39. Although staffing and other resource constraints could make participating in additional fora challenging at times for some developing countries, the possibility of achieving more useful instruments in groups of more limited size could make such participation worthwhile. Ensuring some level of participation by developing countries would also be important to increase the odds that the resulting instruments would have significant prospects for wider use.

40. *See, e g., Anti-Counterfeiting Trade Agreement (ACTA)*, OFF. OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/acta (last visited Sept. 7, 2022); *Conclusion of the Anti-Counterfeiting Trade Agreement (ACTA) by Japan,* MINISTRY OF FOREIGN AFF. OF JAPAN (Oct. 5, 2012), https://www.mofa.go.jp/policy/economy/i_property/acta_conclusion_1210.html.

41. *See Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, HCCH, (July 2, 2019), https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf.

42. *See* UNCITRAL, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf.

not achievable in UNCITRAL but could be plausibly developed in a plurilateral setting. Similar projects could easily be envisioned in some of the existing multilateral organizations' other areas of work, such as insolvency and secured transactions. Working in smaller groups might also reveal additional areas in which global agreement might not be feasible, but in which significant progress could still be made—e.g., in torts or trusts. The U.S. government can and should explore the possibility of plurilateral negotiations as a valuable tool for specific law reform topics.[43]

C. PROPOSED DOMESTIC INITIATIVES FOR THE U.S. GOVERNMENT

The U.S. government could also take several domestic steps to strengthen its efforts across the existing multilateral organizations and in any new plurilateral efforts. First, although the domestic network of outside experts willing to assist with multilateral law reform efforts is robust, it needs to be strengthened. Relying on the same experts repeatedly is natural: over many years of work, experts demonstrate their capabilities and build valuable relationships with experts from other delegations.[44] However, finding ways to incorporate additional experts into U.S. law reform efforts would deepen the pool of substantive knowledge available for the projects and help to preserve the continuity of U.S. efforts over the coming decades.[45]

Moreover, just as Part I highlighted some examples of ULC processes that could be usefully replicated at the multilateral level, the U.S. government could similarly draw on domestic efforts by the ULC and the ALI to help reshape the substantive work agendas of the existing multilateral organizations. In the absence of coordination or consolidation of the three organizations' work programs, each organization has a perpetual need to identify new projects to demonstrate its productivity. The need to fuel three separate bureaucracies often results in the launching of projects that, from a U.S. perspective, waste resources and may harm the advancement of the law. However, forestalling work on a problematic topic generally requires proposing a better substitute. The work of the ULC and ALI can provide useful examples of areas of work that could be proposed as alternatives. The

43. As an ancillary benefit, exploring this approach could increase U.S. negotiating leverage within the multilateral organizations. To the extent that a multilateral project on a topic veered off into a problematic direction or demonstrated insufficient levels of ambition, any U.S. arguments that those decisions would deter U.S. adoption of the relevant instrument would be more credible in light of a plausible prospect of having an alternative venue for developing a better instrument on the same topic.

44. For example, the Federal Advisory Committee on Private International Law—the membership of which also happens to encompass many of the experts relied on for individual law reform projects—consists primarily of experts who have worked with L/PIL for many years. *See Committee Members, Meetings and Advisory Reports*, FACADATABASE.GOV, https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzpOAAQ (last visited Sept. 7, 2022).

45. Broadening participation in law reform efforts would also have the beneficial side effect of raising visibility of those efforts within the U.S. legal community.

ULC has over 150 "current" acts,[46] and the ALI has developed Restatements on many additional topics.[47] Although the majority of these instruments on U.S. law address topics that may be too parochial for developing a multilateral instrument, they may provide inspiration for plausible projects in one of the organizations. Indeed, many of these multilateral organizations' past projects have been inspired or informed by U.S. domestic legal innovations, suggesting that a more concerted effort to pore through ULC and ALI instruments could result in similar possibilities being identified.[48] To the extent that plurilateral law reform efforts are attempted in new fora, even more of the topics may be worth exploring, such as those relevant to all common-law jurisdictions. Putting in place a process for working with the ULC, the ALI, and other domestic organizations to develop a prioritized list of possible projects would be useful.

46. *See 2021-2022 Guide to Uniform and Model Acts*, UNIF. L. COMM'N, https://ww .uniformlaws.org/viewdocument/guide-to-uniform-and-model-acts-202 (last visited Sept. 7, 2022).

47. *See Restatements of the Law*, THE AM. L. INST., https://www.ali.org/publications /#publication-type-restatements (last visited Sept. 7, 2022).

48. *See, e.g.*, The Convention on the Law Applicable to Certain Rights in Respect of Securities Held With an Intermediary, July 5, 2006, S. TREATY DOC. NO. 112-6 at VII (2012), https:// www.congress.gov/112/cdoc/tdoc6/CDOC-112tdoc6.pdf ("The rules adopted by the [Hague Securities] Convention reflect modern finance law in the U.S. as set out in Articles 8 and 9 of the Uniform Commercial Code"); PERMANENT ED. BD. FOR THE UNIF. COM. CODE, PEB COMMENT. NO. 19, HAGUE SECURITIES CONVENTION'S EFFECT ON DETERMINING THE APPLICABLE LAW FOR INDIRECTLY HELD SECURITIES at 2 (Apr. 11, 2017), https://www.ali.org/media/filer_public /3b/f0/3bf0bba2-d0cf-48d7-aaac-54d4132e111a/peb-commentary-19.pdf (stating that "overall the [Hague Securities] Convention meshes very well with UCC Articles 8 and 9"); Convention on International Interests in Mobile Equipment and Protocol to Convention on International Interests in Mobile Equipment, Nov. 16, 2001, S. TREATY DOC. NO. 108-10 at VI, https://www.congress .gov/108/cdoc/tdoc10/CDOC-108tdoc10.pdf (noting, with respect to the Cape Town Convention, that "a treaty extending financing methods which are already in place in the United States through the Uniform Commercial Code (UCC) would benefit other countries as well as U.S. manufacturing, employment, finance and export interests"); U.N. Convention on the Assignment of Receivables in International Trade, Dec. 30, 2003, S. TREATY DOC. NO. 114-7 at III, https:// www.congress.gov/114/cdoc/tdoc7/CDOC-114tdoc7.pdf ("[I]n virtually all cases, application of the Convention will produce the same results as those under the Uniform Commercial Code (UCC) Article 9"); Neil B. Cohen, *The Private International Law of Secured Transactions: Rules in Search of Harmonization*, 81 L. & CONTEMP. PROBS. 203, 204 (2018) ("The text of the [UNCITRAL] Model Law [on Secured Transactions] achieves a remarkable degree of substantive harmonization to create a model legal regime that adopts a very thoughtful version of the modern notice-filing based secured transactions systems that were the focus of Article 9 of the Uniform Commercial Code (U.C.C.) in the United States"); U.N. Convention on the Use of Electronic Communications in International Contracts, S. TREATY DOC. NO. 114-6 at III (*entered into force* Mar. 1, 2013), https://www.congress.gov/114/cdoc/tdoc5/CDOC-114tdoc5.pdf ("The [E-Commerce] Convention's provisions are substantively similar to State law enactments in the United States of the 1999 Uniform Electronic Transactions Act (UETA)"); Kenneth C. Kettering, *Harmonizing Choice of Law in Article 9 With Emerging International Norms*, 46 GONZAGA L. REV. 235, 239 n.18 (2010-11) (noting that the Geneva Securities Convention "was inspired by the 1994 revision of UCC Article 8").

III. ESTABLISHMENT OF NEW NON-GOVERNMENT EFFORTS

As described in Parts I and II, the various governments that are most active in global law reform efforts—and the U.S. government in particular—have several opportunities to make structural changes to the international law reform ecosystem in the coming decades that would strengthen that ecosystem and improve the prospects for the successful development of a wide range of instruments. However, as significant as these changes could be, complementary efforts by actors other than governments could be just as important.

A. OBSERVER COORDINATION

Just as improved coordination across organizations and areas of law could be a vital step forward for governments, it could also be significant among non-government organizations. Non-state observer organizations play a central role in the negotiation of all instruments developed by the multilateral organizations. Expertise in most of the organizations' areas of law (e.g., secured finance, bankruptcy, mediation, and contract law) resides primarily outside government offices, so participation by leading practitioners and academics is needed to ensure that instruments reflect approaches that will actually work. In recognition of this need, each organization provides for observer participation in its work.[49] Although the details of such participation vary across organizations, and the extent to which observers actively participate varies by project, the subset of participants who are most vocal during negotiations often includes a significant representation of non-state attendees.[50]

Although observers cannot participate in formal votes that occur in the organizations, such votes are rare, with decisions generally taken by consensus (including "prevailing view" determinations by the chair, which UNCITRAL deems to be a form of consensus if no vote is requested).[51] Thus,

49. *See, e.g.,* Harold Burman, *Private International Law*, 43 INT'L L. 741, 757 (2009) ("Private law bodies often operate somewhat differently than many public law bodies, in part because the subject matter is detailed law, private-sector driven, and industry or sector focused. Decisions are normally reached without vote, and matters are decided by the equivalent of the substantial prevailing majority rule, so that progress can be made on detailed provisions of law under consideration. NGOs have traditionally played a significant role in framing issues and assessing how proposed provisions work in the particular sector at issue.").

50. For both state delegates and observers, the personality, expertise, and diplomatic skills of the individual representative—e.g., that person's willingness and ability to engage actively with other delegations—has a disproportionate effect on the influence of the state or NGO in the negotiations. In many projects, several smaller states and some relatively obscure observer organizations play prominent roles, while major states may be silent or even absent.

51. *See, e.g.*, U.N. Secretariat, UNCITRAL, Note by the Secretariat: UNCITRAL Rules of Procedure and Methods of Work, at 7, U.N. Doc. A/CN.9/653 (Mar. 19, 2008) ("The fact that such voting may result in decisions being taken by a simple majority of members present and voting may explain why the Commission, to ensure that decisions would reflect a broader majority, developed a practice of determining consensus based on what was sometimes described as 'substantially

the ability of observers to provide substantive expertise means that their influence is significant. Moreover, observers' views can often be highly relevant to the post-finalization prospects of instruments, given the influence of key stakeholder groups on law reform efforts in national legislatures.[52]

The constellation of relevant organizations includes broad-based membership groups like the American Bar Association and the International Bar Association; subject-matter-based groups such as the International Insolvency Institute and the Corporate Counsel International Arbitration Group; dispute-resolution providers such as the American Arbitration Association and the China International Economic and Trade Arbitration Commission; trade associations such as the U.S. Council for International Business; and treaty-specific groups such as the Aviation Working Group. Yet these groups' participation across projects and organizations is even more fractured than participation by government delegates. Organizations concerned with particular subject matters are typically only invited to projects deemed relevant to the expertise they can provide. For example, organizations focused on insolvency law will attend negotiations on insolvency law and will not participate in meetings on dispute resolution. Organizations with broader mandates (such as the American Bar Association) that participate across a range of projects nevertheless tend to send subject-matter experts to relevant meetings rather than sending generalist representatives to a range of projects.

This approach is rational from the perspective of the multilateral organizations' secretariats, and even from the perspective of observer organizations that want to send individuals whose personal expertise can maximize their impact on the specific project. Yet the result is that few, if any, non-government organizations pay attention to the multilateral organizations' consideration of broader issues such as resource allocation, work program decisions, and working methods reform. Fewer still are in a

prevailing view'. While such a flexible notion does not embody a pre-defined mode of calculation, it has ensured that decisions have been made by a proportion of members present that, in any event, was considerably larger than a simple majority.") A formal vote has only been called twice in UNCITRAL's history, with the author having the dubious honor of casting the U.S. vote in the more recent instance. *See, e.g.*, UNCITRAL, Rep. of Working Group. III (Inv.-State Disp. Settlement Reform) on the Work of its Thirty-Fourth Session, at 4, U.N. Doc. A/CN.9/930/Rev.1 (Dec. 1, 2017) ("In the absence of consensus on the election of a chairperson and having received more than one nomination for that position, the Working Group proceeded with the election of the chairperson by secret ballot in accordance with the Rules of Procedure of the General Assembly as applicable to UNCITRAL."); Anthea Roberts, *UNCITRAL and ISDS Reform: Not Business as Usual*, EJIL: TALK! (Dec. 17, 2017), https://www.ejiltalk.org/uncitral-and-isds-reform-not-business-as-usual/ ("In the whole history of UNCITRAL, only one issue had ever been put to the vote and that was the decision on whether to move the headquarters of UNCITRAL to Vienna. The premium placed on consensus meant that voting enjoyed somewhat of a mystical taboo. That was, at least, until this meeting when the spell was broken for a second time.").

52. An underappreciated ancillary benefit of observer participation in the multilateral process is that delegates from states are forced to openly debate legal policy with non-governmental representatives, which may not be common practice in some of those states' domestic systems.

position to influence such consideration. The decisions made by the multilateral organizations on those broader governance issues significantly affect the progress made in law reform efforts in specific subject matters, including the opportunity cost of poorly chosen projects that crowd out more useful work.[53] If the observer organizations that participate in projects across UNCITRAL, UNIDROIT, and the Hague Conference would coordinate, they could jointly advocate for decisions that would benefit the overall law reform ecosystem and, therefore, the areas of law they each care about. The combined influence of observer organizations working across subject-matter lines would far exceed their current ability to shape the agenda, particularly if they developed a persuasive set of priorities across all three multilateral organizations, such that they would not merely be advocating for the approval of specific projects, but rather which subject-matter areas ought to be prioritized.

Given that most of the observer organizations would not individually have the capacity to follow all the multilateral activities in various subject matters, they should strive to form an umbrella organization that could provide easily digestible summaries of what the multilateral organizations are considering. Such an organization could also help to coordinate group decisions and outreach—essentially, a trade association for observer organizations. A trade association could improve the use of multilateral instruments as well by coordinating outreach regarding countries' implementation of those instruments. Currently, observer groups only focus on advocating for countries to implement instruments in which the observers have a specific interest—e.g., the Aviation Working Group advocating for ratification and implementation of the Cape Town Convention, and the International Mediation Institute advocating for the Singapore Mediation Convention.[54] But if these organizations, along with broader groups such as chambers of commerce, could develop a joint list of multilateral instruments that countries should prioritize for implementation, outreach by the broader coalition would likely carry more weight with governments.

53. For example, UNCITRAL's ongoing work on reform of investor-state dispute settlement—which is consuming a disproportionate share of the organization's resources—was driven primarily by policy priorities of a subset of state participants, and is unlikely to result in reforms that will be seen as beneficial by non-governmental organizations representing the perspective of investors (who would have preferred the status quo) or those seeking fundamental changes to international investment law (who will be disappointed by procedural reforms). Had UNCITRAL instead dedicated those resources to other areas of law, significantly more useful reforms could have been generated.

54. *See Cape Town Convention*, AVIATION WORKING GRP., http://awg.aero/project/cape-town-convention/ (last visited Sept. 7, 2022); *United Nations Commission on International Trade Law (UNCITRAL)*, INT'L MEDIATION INST., https://imimediation.org/about/initiatives/united-nations/ (last visited Sept. 8, 2022).

B. REPLICATING THE ALI MODEL

In the United States, the ULC serves as roughly the domestic equivalent of UNCITRAL, UNIDROIT, and the Hague Conference. Every U.S. state (including the District of Columbia, Puerto Rico, and the U.S. Virgin Islands) appoints lawyers to serve as uniform law commissioners who work together via the ULC to develop uniform and model acts that they then seek to get enacted in their home jurisdictions.[55] Since its founding in 1892, ULC acts have been enacted over 6,000 times by legislatures.

Although the majority of the ULC's roughly four hundred commissioners are private practitioners or academics (in addition to many judges, legislators, and other government officials), all commissioners are appointed by state governments.[56] This structure has advantages and disadvantages. The ability to get appointed by their states means that commissioners generally have some level of connection to their states' political institutions, which (in theory, at least) can be helpful for their efforts to seek enactment of uniform laws and their ability to gauge whether proposals for new uniform acts would be well-received politically. But, at the same time, the decentralized appointment process means that the ULC is at the mercy of the states' individual decisions regarding whom to appoint. This approach deprives the ULC of the ability to fill gaps in its membership, such as when particular areas of substantive expertise are needed or when some states' delegations fail to participate actively in drafting or enactment efforts.

Yet the U.S. domestic law reform ecosystem has another key institution built on a model not replicated at the global level: the ALI. Founded in 1923 by a group of American judges, practitioners, and academics, the ALI has developed highly influential "Restatements" of U.S. law, as well as sets of principles and model codes (including, in partnership with the ULC, the Uniform Commercial Code).[57] Although the subject matter (and, at times, the form) of ALI's work overlaps with the ULC's work, its membership model is entirely different. The ALI has over 4,500 members, but they are selected by the ALI based on "professional achievement and demonstrated interest in improving the law." ALI members nominate new members, and the ALI Council, its primary governance body, elects them.[58] Thus, unlike the ULC, the ALI's membership and agenda are not directly or indirectly controlled by

55. *See, e.g.*, *About Us*, UNIF. L. COMM'N, http://uniformlaws.org/aboutulc/overview (last visited Sept. 8, 2022); Gregory A. Elinson & Robert H. Sitkoff, *When a Statute Comes With a User Manual: Reconciling Textualism and Uniform Acts*, 71 EMORY L.J. 1073, 1081–1092 (2022).

56. Commissioners who have served for over 20 years are eligible for "life membership" in the ULC, such that they no longer need to be reappointed by their states to continue participating in ULC activities. However, even life members were originally appointed by state governments.

57. *See About ALI*, AM. L. INST., https://www.ali.org/about-ali/ (last visited Sept. 8, 2022); *Frequently Asked Questions*, AM. L. INST., https://www.ali.org/about-ali/faq/ (last visited Sept. 8, 2022).

58. *See id.*; *About ALI*, *supra* note 57; *About Our Members*, AM. L. INST., https://www.ali.org/members/about-our-members/ (last visited Sept. 8, 2022).

governments. As with the ULC model, the ALI's approach has its own advantages and disadvantages. Its political independence frees the ALI to focus more on identifying the "right" resolution of legal questions without being concerned directly with enactability, as does its primary focus on developing instruments that have courts rather than legislatures as audiences. In some instances, though, this freedom can be accompanied by a greater risk of developing instruments that elicit strong negative reactions.[59]

But regardless of how these organizational differences play out with respect to particular projects, the U.S. law reform landscape is far more effective because of the existence and cooperation of these two organizations with different perspectives, memberships, and working methods. By contrast, the proliferation of multilateral law reform organizations merely provides the same government-centric model in triplicate. Despite the diverging working methods and memberships of the Hague Conference, UNCITRAL, and UNIDROIT, all three represent efforts by national governments to develop law reform instruments jointly, with input from some non-state actors, but with ultimate decisions being made by governments.

A global analogue to the ALI is absent, and the absence of an organization driven by lawyers rather than by governments is hurting law reform efforts. A regional equivalent to the ALI was formed in 2011 with the founding of the ELI, which provides a forum for European law reform efforts not driven by governments.[60] But as yet, no such organization exists at the global level, depriving the legal community of a forum in which it can develop law reform instruments without governments selecting the topics or dictating the outcomes.[61] Of course, the ultimate "consumers" of such instruments would be state actors—whether legislatures that would be asked to ratify treaties and enact model codes or courts that would be asked to rely on the instruments in resolving cases—and the acceptability of the instruments to states would thus need to be kept in mind. But government-centric multilateral law reform has enough of a mixed track record—with

59. *See, e.g.,* Richard L. Revesz, *The Restatement of Liability Insurance in the Courts*, ALI ADVISER (Dec. 16, 2021), https://www.thealiadviser.org/inside-the-ali-posts/the-restatement-of-liability-insurance-in-the-courts/; Victor E. Schwartz & Christopher E. Appel, *Restating or Reshaping the Law?: A Critical Analysis of the Restatement of the Law, Liability Insurance*, 22 J. BUS. L. 718, 719 (2020) ("The controversy surrounding this ALI Restatement of Law, both then and now, is the charge that the work product fails to faithfully 'restate' prevailing liability insurance rules, and instead represents an effort to reshape the contours of liability insurance law through novel recommended rules for courts to adopt. Adding to the controversy is the charge that the Restatement's novel rule formulations consistently operate to enhance the potential liability of insurers, a result that may signal a project bias against insurers.").

60. *See About ELI*, EUR. L. INST., https://www.europeanlawinstitute.eu/about-eli/ (last visited Sept. 8, 2022).

61. Organizations such as the International Law Association and the International Bar Association are open to anyone who wants to join, unlike the ALI/ELI model in which the existing membership chooses new members on the basis of merit. Moreover, those organizations do not focus on the same types of law reform activities as ALI, ELI, the ULC, and the multilateral organizations.

many instruments rarely used by states—that an alternative model is worth attempting.[62]

Such an organization could be more ambitious in its goals for instruments—aiming to move the law forward more quickly rather than developing a least-common-denominator approach based on what governments currently find acceptable. Part II.B above noted some projects that could be more feasibly addressed in plurilateral fora than in the existing multilateral organizations, such as treaties on arbitration or judgments and other instruments in areas of law such as insolvency, secured transactions, trusts, and torts. Yet such projects could just as easily be attempted by an organization driven by lawyers rather than governments, e.g., instruments that break new ground or codify best practices in enforcement of arbitral awards and judgments, cross-border insolvency cooperation, and secured transactions, or that explore areas of law that might not be relevant to all legal cultures. Such an organization could develop not only model laws, principles, and instruments analogous to Restatements, but even treaties, so long as a state or an international organization were willing to serve as the depositary.[63]

The membership of such an organization would need to be calibrated to ensure at least some minimal level of regional balance to maximize the chances that the instruments it develops would have broad acceptance.[64] At the same time, the organization would need to emphasize an expectation that members would participate in their personal capacities and on the basis of their individual views and expertise. A well-rounded membership roster

62. For example, an unfortunate number of treaties developed by the multilateral organizations have never entered into force. *See, e.g., Status: United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules")*, UNCITRAL, https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status (last visited Sept. 8, 2022); *Status: United Nations Convention on the Assignment of Receivables in International Trade*, UNCITRAL, https://uncitral.un.org/en/texts/securityinterests/conventions/receivables/status (last visited Sept. 8, 2022); *41: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, HCCH, https://www.hcch.net/en/instruments/conventions/status-table/?cid=137 (last updated Aug. 19, 2022); *32: Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*, HCCH, https://www.hcch.net/en/instruments/conventions/status-table/?cid=62; *31: Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*, HCCH, https://www.hcch.net/en/instruments/conventions/status-table/?cid=61 (last updated Dec. 11, 2007); *Status - UNIDROIT Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (Berlin, 2012)*, UNIDROIT, https://www.unidroit.org/instruments/security-interests/space-protocol/status/ (last visited Sept. 8, 2022); *Status of the UNIDROIT Convention on Substantive Rules for Intermediated Securities (Geneva, 2009)*, UNIDROIT, https://www.unidroit.org/instruments/capital-markets/geneva-convention/status/ (last visited Sept. 8, 2022).

63. *See* Vienna Convention on the Law of Treaties, art. 76(1), May 23, 1969, 1155 U.N.T.S. 331.

64. For that same reason, although the organization could mimic the ALI's membership model, its working methods would likely need to be closer to the approach taken by the multilateral organizations and the ULC—i.e., with members taking the lead on developing instruments, rather than relying on external reporters.

would inevitably include some lawyers who are currently government employees; those members would be able to provide insights regarding the perspectives of particular governments or regions, which could be useful and welcome as long as not advocated as "official" positions. Similarly, efforts to coordinate positions on a regional basis (akin to how the European Union forces its member states to coordinate in the multilateral fora) or to act as proxies for state views would need to be discouraged. The work of such an organization could be done primarily via videoconferencing, given the experiences of the existing organizations during the pandemic. However, in-person meetings would facilitate the development of personal relationships that often lead to successful projects.

Similarly, the development of domestic analogues to the ALI within individual countries would also be a positive step forward for law reform efforts. The ULC model is primarily useful for countries that similarly have a federal system in place, such that territorial units can be represented. The Uniform Law Conference of Canada is a particularly successful example.[65] But whether or not a country has a domestic political structure that merits a domestic institution akin to the ULC, bringing together lawyers "on the basis of professional achievement and demonstrated interest in improving the law"—as the ALI does—would be useful in any country.[66] Indeed, Don Wallace, as the head of the United Rule of Law Appeal, has for years sought to encourage projects "on the order of and at the level of an ALI … for a particular country."[67]

CONCLUSION

By contributing so much to six different law reform organizations over decades of work, Neil Cohen has not only advanced the substance of the law across many topics but has contributed to the flourishing of the law reform ecosystem. The rest of us now owe a duty to build upon his contributions by continuing to improve the law reform ecosystem in the coming decades.

The structural issues discussed in this Article are important not only because of how many substantive projects would be facilitated by improvements to the law reform ecosystem but also because law reform efforts are a vital component of the promotion of the rule of law. The multilateral law reform ecosystem is thus central to any efforts to promote

65. *See, e.g.*, *What We Do*, UNIF. L. CONF. OF CAN., https://www.ulcc-chlc.ca/About-ULCC/What-We-Do (last visited Sept. 8, 2022); *Jurisdictional Representatives*, UNIF. L. CONF. OF CAN., https://www.ulcc-chlc.ca/About-ULCC/Jurisdictional-Representatives (last visited Sept. 8, 2022).

66. *See About Our Members*, *supra* note 58.

67. *See, e.g.*, *United Rule of Law Appeal*, INT'L L. INST., https://www.ili.org/3-global-affiliates/global-affiliates/1080-urola.html; *Announcement of Winners of UROLA's First Annual Rule of Law Competition,* INT'L L. INST. (Oct. 3, 2019), https://www.ili.org/about/news/1066-announcement-of-winners-of-urola%E2%80%99s-first-annual-rule-of-law-competition.html.

the rule of law at a global level. In that way, Professor Cohen has made a concrete contribution to the health of the rule of law at the global level.

Rule-of-law discussions tend to focus primarily on public law issues like corruption, criminal justice, democratic governance, and human rights.[68] Yet, in terms of the number of times that an individual or a business interacts with the law, most law is private law—e.g., contracts, wills, and child custody. Private law reform thus improves the interactions of individuals and businesses with the law at a concrete level, in ways more common, though less dramatic, than public law. For the public law aspects of the rule of law to be sustainable, a country's legal system as a whole must be healthy and robust—it must have a general culture of law—and private law must be central to the legal system if for no other reason than the sheer volume of transactions needed to support a healthy legal sector that can insist on adherence to the rule-of-law generally. Law reform efforts build more robust, extensive networks of lawyers who build a culture of the rule of law, and cross-border efforts help tie the legal sector within a country more tightly to the global legal community and its commitment to the rule of law.

The importance of law reform work thus arises not only from the substantive improvements to the law that result from individual projects but also from the process through which the law reforms are developed, including not only participation by lawyers from different legal cultures but participation by non-governmental organizations that provide key expertise on how the law works in practice. Moreover, law reform instruments developed through multilateral processes have broad buy-in from the legal community across borders—including on issues related to adequate implementation by states and faithful application by courts—and thus serve as an ideal core for domestic law reform efforts aimed at promoting the rule of law. Expending some effort to improve the law reform ecosystem through structural innovations is therefore well worth our time, not only to improve the quality of future law reform instruments but to bolster the rule of law as well.

68. *See, e.g.*, U.S. AGENCY FOR INT'L DEV., DRAFT FOR EXTERNAL NOTICE AND COMMENT, USAID RULE OF LAW POLICY: A RENEWED COMMITMENT TO JUSTICE, RIGHTS, AND SECURITY FOR ALL 1 (Jan. 2022), https://www.usaid.gov/sites/default/files/documents/USAID-ROL-Policy-Draft-External-Review.pdf.