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A Sociology of International Commercial Law

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1. Introduction

In *Global Lawmakers: International Organisations in Crafting of World Markets*,[1] Terence Halliday and I propose a sociological analysis of international commercial law. We focus in our book on the work of the United Nation's Commission on International Trade Law (UNCITRAL), and in particular on three case studies, three working groups within UNICTRAL, that produced three different international texts on three different commercial law topics: a treaty involving the international transport of goods by sea[2] and international standards for laws governing corporate insolvency[3] and commercial finance transactions.[4]

With our book, *Global Lawmakers*, Halliday and I explore what had been hiding in plain sight: a very technical, uncontroversial kind of law has been made in a tiny UN Commission for decades. The international texts produced by UNICTRAL are only a small subset of international law founded on the belief that international and transnational laws shape global trade. We see evidence of this belief in the World Trade Organization,[5]

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[1] Susan Block-Lieb and Terence C Halliday, *Global Lawmakers: International Organizations in the Crafting of World Markets* (Cambridge University Press 2017).

[2] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) <http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/Rotterdam-Rules-E.pdf> [hereinafter Rotterdam Rules].

[3] UNICTRAL Legislative Guide on Insolvency Law, U.N. Sales No. E.05.V.10 (2005).

[4] UNCITRAL Legislative Guide on Secured Transactions (2007), U.N. Sales No. E.09.V.12 (2010).

[5] For discussion of the World Trade Organization (WTO), and debates about it over history, see Craig van Grasstek, 'The History And Future Of The World Trade Organization', WTO Working Paper (2013), <https://www.wto.org/english/res_e/booksp_e/historywto_e.pdf> accessed 29 March 2020; Carolyn Deere Birkbeck (ed), *Making Global Trade Governance Work for Development Perspectives and Priorities from Developing Countries* (Cambridge University Press 2011), describing WTO as 'the leading multilateral institution for global trade' and noting that since its emergence 'the issue of institutional reform or 'strengthening' – whether it is needed, in what form, and through what kind of process – has been an ever-present issue for the organization and its Member States'.

in regional blocs, like the European Union,[6] the Comprehensive and Progressive Agreement for Trans-Pacific Partnership,[7] and the draft United States-Mexico-Canada Agreement[8] (which likely will replace the North-American Free Trade Agreement).[9] The United Nations also has committed to economic development through the writing of commercial law for fifty plus years through its Commission on International Trade Law (UNCITRAL).[10]

Despite the depth and breadth of the international texts that have been produced, lawmaking in the service of global governance often has been invisible, observed by invitation only. It is technical and lacking transparency, a black box to scholars and to the public. In *Global Lawmakers* we look to 'open the black box of global lawmaking to examine internal processes that shape legal construction of transnational markets.'[11]

Unlike many books on international law and international lawmaking, which are often written by lawyers or legal academics, *Global Lawmakers* combines international law with sociology. It proceeds from a socio-legal or law-and-society perspective to explain the work of international organisations engaged in the making of international commercial and financial law. This sociological focus of the book may confuse legal

[6] For discussion of the broad purposes of the European Union (EU), see N Piers Ludlow, 'More than just a Single Market: European integration, peace and security in the 1980s' (2017) 19 British Journal of Politics & International Relations 48. For comprehensive consideration of the law governing within the EU, see Damien Chalmers, Gareth Davies, Giorgio Monti, *European Union Law* (3rd edn, Cambridge University Press 2018).

[7] For discussion of the status of the Trans-Pacific Partnership since the Trump Administration withdrew from it in January 2018, see James McBride and Andres Chatzky, Council on Foreign Affairs, 'What Is the Trans-Pacific Partnership (TPP)?' (4 January 2019) <https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp> accessed 29 March 2020.

[8] For the full text of the USMCA, see Office of the United States Trade Representative, 'Agreement between the United States of America, the United Mexican States, and Canada 12/13/19 Text' (November 18, 2018) <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> accessed 29 March 2020.

[9] Although the US Congress has authorized the United States-Mexico-Canada Agreement (USMCA), as have Canada and Mexico, the USMCA does not enter into effect until each country reviews the others' compliance with the agreement. The US Trade Representative, Robert Lighthizer, had indicated that the US might be prepared to all the agreement to enter into effect as early as 1 June 2020, a bipartisan group within the US Senate has indicated their concerns about this schedule given the COVID-19 pandemic and widespread government closures. See 'US senators urge coronavirus delay to June 1 USMCA trade deal start date' (*Reuters,* 30 March 2020) <https://www.reuters.com/article/us-health-coronavirus-trade-usmca/u-s-senators-urge-coronavirus-delay-to-june-1-usmca-trade-deal-start-date-idUSKBN21I01J> accessed 7 April 2020.

[10] For extensive discussion of UNCITRAL's origins and work, see Block-Lieb and Halliday (n 1).

[11] ibid 11.

readers in that it only rarely focuses on *what* international law UNCITRAL produces. Instead, *Global Lawmakers* aims to understand *how* lawmaking international organisations like UNICTRAL work and, thus, to understand *who* governs in this process.

My goal in this essay is to summarize *Global Lawmakers*, and in particular to explain its sociology of international commercial law to lawyers and law students. Part 2 describes the two theoretical foundations on which our book rests: an ecology theory of international organisations; and transnational legal order theory. These theories are framed in terms of the principle tenets of the sociology of law and socio-legal analysis, of economic sociology and the sociology of institutions. Most socio-legal analysis is empirically grounded and ours is no exception. Part 3 describes the data and data collection in our study of UNCITRAL. Part 4 reports the major findings in our book: *who* makes commercial law for the world? *How* does UNCITRAL produce legal texts? *What* form did these legal texts take, and why does form matter? *Who* came out ahead? *Was* there pushback? Each finding is linked to the theory identified in Part 2, and so its implications for further research and theoretical analysis. Part 5 concludes.

2. Socio-legal theories of transnational lawmaking.

A sociological approach to the understanding of law considers the nature and origins of a belief in the validity of the law and the order that it establishes.[12] This perspective holds particular importance for the comprehension of international law.[13] While positivist theories question whether international law should be viewed as law at all given that it is so difficult to ensure its enforceability against sovereign states,[14]

[12] See Max Weber, *Max Weber on Law in Economy and Society*, (Max Rheinstein and Edward Shils trs and eds, Harvard University Press 1954); Julien Freund, *The Sociology of Max Weber* (Random House 1968).

[13] See Max Huber*, Die soziologischen Grundlagen des Völkerrechts* (2nd edn, 1928) (which generally is translated as *The Sociological Foundations of International Law);* Jost Delbrück, 'Max Humber's Sociological Approach to International Law Revisited' (2007) 18 EJIL 97; Thomas M Franck, 'Legitimacy in the International System' (1988) 82 AJIL 705, 710 arguing that there 'is a stronger motivation for studying legitimacy in the international system than the academic objective of creating a bridge from national to international speculative jurisprudence'.

[14] For discussion of positivists' perspectives on law generally, see John Austin, *The Province of Jurisprudence Determined* (first published 1832, Cambridge University Press 1995). This perspective has widely been adopted to question international law, in particular Mark W Janis*, '*Jeremy Bentham and the

sociological theories are premised on the empirical observation that international law is often followed, despite these difficulties, and aim to understand why and when states conduct themselves consistent with international law.[15] The sociology of law and international organisations, thus, focuses intently on the legitimacy of the rules adopted through international legislation and law-like texts and the processes through which such rules get adopted.[16] Adopting a sociological approach to international law and international organisations, Halliday and I similarly look to 'unveil the processes'[17] through which international commercial law has been adopted by UNCITRAL and other lawmaking IOs to discern perceptions of its legitimacy.[18]

Because the law we study is international commercial law, we also draw on the insights of economic sociology, which may focus on how 'law and markets mutually constitute each other in a transnational world.'[19] In iterative cycles, market changes beget incentives for legal reform and the law creates incentives for market reaction.[20] Demands for reform of the international law governing, trade, commerce and finance arise out of the markets this law is intended to regulate. As a result, economic sociologists emphasise 'the interplay of form and process in the legal constitution of markets,'[21] often finding that these processes 'reflect, anticipate, and involve' international, national, and local actors and institutions.[22]

Fashioning of "International Law*,"'* (1984) 78 AJIL 405, 410; Franck (n 13) at 706; and (n 3) noting dissenters from this perspective.

[15] Franck (n 13) 705 ('The surprising thing about international law is that nations ever obey its strictures or carry out its mandates'); Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990).

[16] See Gregory Shaffer, 'The New Legal Realist Approach to International Law' (2015) 28 Leiden Journal of International Law 189 describing 'processual concerns' as among those identifying 'new legal realist' approach to international law); Franck (n 13) 725-35 discussing the importance of 'validation' to the concept of legitimacy of international law and describing validation in terms of symbolic importance of process and form.

[17] Block-Lieb and Halliday (n 1) 9.

[18] ibid 10.

[19] ibid 11.

[20] See Terence Halliday and Bruce Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford University Press 2009); Victoria Nourse and Gregory Shaffer, 'Varieties of New Legal Realism' (2009) 95 Cornell Law Review 61; Jay Lawrence Westbrook, 'A Global Solution to Multinational Default' (2000) 98 Michigan Law Review 2276.

[21] Block-Lieb and Halliday (n 1) 13.

[22] ibid 11.

Building on these foundations, *Global Lawmakers* proposes that the practices and scholarly comprehension of law and markets can be approached systematically through the intersection of two new lines of sociological theory:[23] Transnational Legal Order (TLO) theory;[24] and social ecology theory as applied to international organisations. Our book proceeds on the premise that much global governance, certainly of markets, can be understood as the creation of TLOs to solve a problem of governance beyond the state. We argue also that UNCITRAL was one of many IOs potentially competing to be the architects of law for the world—competing in an ecology facing scarce resources.

2.1. Transnational Legal Order Theory

Transnational legal order theory proposes that a TLO arises when actors seek to solve problems spanning national borders through legal means. More formally, a TLO is defined as:

> 'a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.'[25]

In short, a TLO is transnational insofar as it 'transcends the nation-state,' it is legal insofar as 'what it produces has legal form,' and it is considered to result in law that is 'ordered' insofar as what results gets accepted or taken for granted as the solution for some underlying 'problem.'[26]

Two things are important to emphasise about TLO theory for purposes of this essay. First, TLO theory is not just a top-down perspective on transnational ordering. International and transnational laws and legal norms are produced by IOs and other transnational actors, with the object of enactment by nation-states and eventual influence on behaviours on the ground. The impetus for reform might come from international

[23] ibid.
[24] Discourse on TLO theory began with a group of essays that both defined the theory and applied it across numerous issue areas. See Terence Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015).
[25] Halliday and Shaffer (n 24) 5.
[26] ibid.

sources and get directed 'top-down' at national and local objectives, but it need not. It might instead be the case that local actors press for international reform in a 'bottom-up' trajectory.

Second, while TLO theory focuses on law-in-the-books and is concerned that international laws are aligned with national and local laws as they settle in jurists' comprehension, TLO theory looks ultimately toward the institutionalisation of all this law-in-the-books upon behaviours of commercial actors on the ground. A TLO is said to be institutionalized 'when legal norms and practices converge to guide actors over what norms apply in given situations.'[27]

As a result, TLO theory demands that we extend our analysis beyond the transnational and beyond the textual. We do both in *Global Lawmakers*. Although Halliday and I focus our research on that aspect of TLO construction and reform that occurs inside a transnational arena or ecology—that is, within lawmaking IOs, and particularly within UNCITRAL—we apply this research both on UNCITRAL's internal processes and its external implications. Similarly, although we focus on the international texts that UNCITRAL promulgates, our examination is supplemented with attention to the unwritten, unspoken and informal.

2.2. Ecology Theory, especially as Applied to Lawmaking IOs

In examining the inner-workings of UNCITRAL's proceedings, we found that existing international law and international organisation scholarship, including TLO theory, was insufficient to explain what we observed about UNCITRAL: inside between UNCITRAL and the organisations sent as delegations to UNCITRAL's three working groups; externally between UNCITRAL and other international organisations engaged in international lawmaking on topics of commercial law.

[27] ibid 42. See also Block-Lieb and Halliday (n 1) 23-31.

To help in our search for further explanation, we turned to sociology and particularly to ecology theory. This theory initially dates back roughly a century,[28] but also has been the subject of more cutting-edge modern work.[29]

Ecology theory conceives of actors as situated in a position or location in some social space, including overlapping or nested spaces. It theorises that actors' positions within this social space are affected: by their interactions; in making claims to available resources, which are inevitably scarce; by their ability to adapt over time. This movement occurs through 'boundary work'—boundary demarcation, boundary claiming, but also boundary blurring. Movement like this occurs across social spaces and over time. Ecology theory posits that these spatial and temporal movements occur through several types of interaction: some competitive, some cooperative.

We identify at least three overlapping ecologies in our book: a standing (or permanent) ecology of international organisations engaged in lawmaking situated adjacent to a standing ecology of actors engaged in commerce. If these two standing ecologies agree that some problem exists and should get resolved through law, we argue that a temporary issue ecology may emerge that combines elements of, or actors from, both standing ecologies dedicated to the project at hand. The emergence of an issue ecology allows for interaction between institutional expertise and practical expertise. While ordinarily the two epistemic communities might situate themselves at a distance, the desire to resolve a pressing issue creates incentive for combination. The goal—usually articulated in terms of international law—may result in cooperation and consensus, or in competition and contestation.

[28] Robert E Park, Ernest W Burgess, and RD MacKenzie, *The City* (University of Chicago Press 1925).
[29] Sida Liu and Mustafa Emirbayer, 'Field and Ecology' (2016) 34 Sociological Theory 62; Sida Liu, 'Overlapping Ecologies Professions and Development in the Rise of Legal Services in China' (2017) 3 Sociology of Development 212; Sida Liu and Hongqui Wu, 'The Ecology of Organizational Growth: Chinese Law Firms in the Age of Globalization' (2016) 122 American Journal of Sociology 798; Sida Liu, David M Trubeck and David B Wilkins, 'Mapping the Ecology of China's Corporate Legal Sector: Globalization and Its Impact on Lawyers and Society' (2016) 3 Asian Journal of Law and Society 273.

3. Our Data on Transnational Lawmaking within UNCITRAL

With the recognition that any theory must correspond to the results of empirical analysis, *Global Lawmakers* couples its theory-building with empirical grounding. Halliday and I had the good fortune to be the first inter-disciplinary scholars to gain essentially unlimited access to UNCITRAL's deliberations for twelve years. We were seated in assigned seats next to each other as delegates to UNCITRAL's insolvency working group; we made ourselves known to the other working groups through an intensive series of interviews.

Our empirical analysis of UNCITRAL consists of several different sorts of data. Perhaps most importantly, we rely on our real-time observations of UNCITRAL's proceedings over about twelve years. Our status within UNICTRAL allowed us to get embedded inside an international process. This includes both the formal proceedings of UNCITRAL, as well as the meetings among delegates and delegations that took place outside UNCITRAL's working group sessions, such as colloquia, expert meetings and so on. In addition, we interacted with delegates as they mingled with each other—at coffee breaks, dinners, conference calls and meetings of professional associations. As participant-observer insiders to the working group sessions and annual meetings of the governing Commission, we saw lawmaking unfold inside UNCITRAL in real time. Our study is, as a result, a sort of ethnography of the three working groups: transport; insolvency; and secured transactions.

To these observations, we combined years of observations with hundreds of interviews. These interviews systematically ranged across the three working groups but also across the various sorts of delegations that attended these working group sessions (state and non-state delegations). UNCITRAL's international civil servants in their Secretariat also opened themselves up to interviews over our dozen years of observations, as did actors involved in lawmaking IOs other than UNCITRAL, such as UNIDROIT and the Hague Conference of Private International Law.

To this qualitative analysis, we also added a sort of quantitative analysis of the attendance records kept by UNCITRAL of their proceedings. In at least one setting, we also counted the frequency that working group delegates spoke in the formal sessions.

This data review was combined with (and informed by) a review of all or nearly all of the texts and international reports produced by UNCITRAL and UNCITRAL's Secretariat during this twelve-year period, as well as the many other texts produced by UNCITRAL over its fifty-year history. Some of this textual analysis focused both on the substance of the legal rules and on patterns in the language employed to draft these rules.

4. Inside the Black Box

What did we learn in examining all these data on how UNCITRAL conducted working group sessions and produced the three international texts in our three case studies? UNCITRAL worked through formal and informal processes, to be sure, but also through the people it employs, appoints, and invites to observe. In observing and studying all these people and their product, we sought to understand: who set agendas; who attended and who spoke in order to exert more or less influence in UNCITRAL's lawmaking chamber; who contributed resources; who was at the centre of the Big Deals that got struck; and mostly whose interests were served.

In the section below, I analyse our findings through the lens of five questions: *who* makes commercial law for the world? *How* does UNCITRAL produce legal texts? *What* form did these legal texts take, and why does form matter? *Who* came out ahead? *Was* there pushback?

4.1. Who Makes Commercial Law for the World?

UNCITRAL was founded 1966.[30] It is an inter-governmental organisation with sixty member-states in its governing Commission. UNCITRAL is understood to be a more political lawmaking organisation than other IOs. Perhaps one indicia of its political

[30] Block-Lieb and Halliday (n 1) 63.

focus is the specification in its by-laws that member states should be representative of all regions, economies, legal families.[31]

The real work of UNCITRAL gets done in one of its six working groups, which meet twice a year for a week, once in New York and once in Vienna. Three kinds of delegations participate in meetings of these working groups or UNCITRAL's governing Commission: certainly, delegations come from the sixty member-states, but state delegations might also come from any state that is a member of the General Assembly and ask permission to observe at UNCITRAL sessions. Non-state delegations might also observe at these sessions. Observer delegations can only attend if invited by UNCITRAL's Secretariat—the international civil servants employed by the United Nations to administer UNCITRAL and its work. Moreover, UNCITRAL invites delegations, and delegations invite delegates. Individuals are never invited as individuals, only as delegates.[32]

This close attention to membership in UNICTRAL is intended, not inadvertently, to ensure that UNCITRAL would be a more representative IO than the lawmaking IOs that preceded it. Although this has changed over time, in the late 1960s, when UNCITRAL was founded, UNIDROIT and the Hague Conference of Private International Law were comprised of mostly European member states, certainly when their governing councils were considered.[33] The European focus of UNIDROIT and the Hague Conference was one of the reasons given for the need to create a UN-related entity focused on the drafting of international private law.[34]

As social scientists, we wondered: is UNCITRAL, in fact, representative of the world? This is an important question to ask because UNCITRAL bases its claim to legitimacy on its breadth of representativeness.[35] But membership is distinct from

[31] See UNCITRAL, A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law, at 2 (2013) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf > accessed 8 April 2020.
[32] Block-Lieb and Halliday (n 1) 195-96.
[33] ibid 63.
[34] ibid.
[35] ibid 190.

participation. In *Global Lawmakers*,[36] we looked to determine whether the delegations that participated in UNCITRAL's working group sessions were representative of the world at large, or whether participants mostly came from the richest countries, a particular geographic region, or were more likely to represent one legal family or another.[37] We wanted also to be careful to distinguish between the delegations and the delegates within each delegation, since involvement and influence are best carried forward through individuals who participate in person and who are known by and interact with the other delegates in the chamber.

To answer this question, we collected systematic data on all delegates and delegations attending all formal sessions of UNCITRAL working groups for our three case studies. These data showed that UNCITRAL created commercial law for the world through a tiny number of individuals—that is, those high-attendance delegates who regularly attended on behalf of high-attendance delegations and, thus, uniquely possessed an ability to participate in the drafting of UNCITRAL's texts.[38] We reproduce these statistics in Figure 1, below.

Figure 1

	Insolvency	**Maritime Transport**	**Secured Transaction**
Delegation Attendance, overall	129	149	161
High Attendance Delegations	36	56	41
Delegate Attendance, overall	545	903	739
High Attendance Delegates	28	50	30
High Attending Delegations with High Attending Delegates	19	21	20

[36] See also Terence Halliday, Josh Pacewicz and Susan Block-Lieb, 'Who Governs? Delegates and Delegations in Global Trade Lawmaking' (2013) 7 Regulation and Governance 279 (analysing attendance records and speech turn data from UNCITRAL's insolvency work group).
[37] Block-Lieb and Halliday (n 1) ch 3.
[38] ibid 168-86.

Figure 1 shows a very large, very diverse participation by delegations when we count delegations attending at least one working group session but, as noted above, UNCITRAL's legal texts often take years not weeks to write. Figure 1 also shows a big drop-off when we count delegations that attend a majority of the working group sessions. This same pattern exists when we look at the attendance of the delegates across working groups—that is, without regard to whether we examine attendance in the working groups organized around international transport, insolvency or secured transactions law. In each of the three working groups we see a core of high-attendance delegates from high-attendance delegations that numbers between nineteen or twenty such delegates.

Note here the connection between data and theory: these roughly twenty delegates constitute the issue ecology that arose in each of our three case studies—an issue ecology composed of an inner core of high-attendance delegates. Who is in this inner core?

Our data show that these high-attendance delegates from high-attendance member-state and observer-state delegations overwhelmingly come from the most economically powerful countries.[39] Nearly all of these high-attendance delegations are members of the Organisation for Economic Cooperation and Development (OECD).[40]

Our data also show a core of high-attendance delegates from non-state delegations.[41] These high-attendance non-state delegations may be distinguishable from one another on the basis of the non-state organisations that they represent. Some are from the International Financial Institutions (IFIs), such as the World Bank and International Monetary Fund; some are from international professional associations, such as the International Bar Association; and some are from industry groups, like the Commercial Finance Association.[42] But the delegates that represent these delegations are predominately US or EU residents, and if they are not US or EU passport holders then they were educated in elite academic institutions in the US or EU.[43]

[39] ibid 186.
[40] For a list of the 33 members states within the OECD, see 'OECD List of OECD Member countries - Ratification of the Convention on the OECD' <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm> accessed 29 March 2020.
[41] Block-Lieb and Halliday (n 1)176-77, Table 4.2.
[42] ibid 181, Table 4.4.
[43] ibid 177, 181.

In either case, whether we focus on state or non-state delegations, these data on high-attendance delegations and delegates show a preponderance of lawyers as compared to individuals from other professions or from the trade. Delegations invited a range of actors to attend as their delegates, including members of the country's mission to the United Nations, but their high-attendance delegates were nearly exclusively lawyers.[44]

These data are suggestive, as well, of whose voices are missing from UNCITRAL working group sessions. Specifically, delegations from transitional and developing economies (except for transport), including surprisingly the BRICS.[45] Although some of these countries sent high-attendance delegations, these delegations never contained high-attendance delegates.[46] In addition, certain sorts of non-state delegations were absent or virtually absent. For example, there were no NGOs representing consumers' interests in either the Insolvency Working Group or Secured Transactions Working Group. And while the International Labour Organisation did attend the Insolvency Working Group, they did so only once.[47] These data are also suggestive in terms of the sorts of delegates who mostly did not attend. Delegations tended overwhelmingly to invite lawyers to sit as delegates on their delegation.[48] This means that businessmen were mostly absent, although business interests may have been represented indirectly by the lawyers in attendance who regularly represented business-oriented clients.[49]

[44] ibid 187.
[45] ibid. The term BRICS refers to Brazil, Russia, India, China and South Africa, the five major emerging economies.
[46] ibid.
[47] ibid 287.
[48] ibid 187.
[49] Terence C Halliday, Susan Block-Lieb and Bruce Carruthers, 'Missing Debtors: National Lawmaking and Global Normmaking of Corporate Bankruptcy Regimes' in Ralph Brubaker and Robert Lawless (eds), *A Debtor World: Interdisciplinary Perspectives on Debt* (Oxford University Press 2012).

4.2. How does UNCITRAL work? How does it produce legal texts?

Over decades, UNCITRAL has produced a profusion of legal products, both hard and soft international laws, in such diverse areas as sale of goods,[50] arbitration,[51] infrastructure projects,[52] electronic commerce,[53] as well as the legal texts that frame the three subjects of our vignettes.[54] UNCITRAL's delegations often take several years to produce each legal text.[55] What are these processes that are both so time-consuming and yet productive?

We differentiate between two methods of work at UNICTRAL: formal and informal. In both methods of work, there is a spatial component to the differentiation (inside; outside), as well as a temporal aspect in that its informal methods allow UNCITRAL to multiply, expand, or extend the limited time available for working group deliberations.

The formal processes followed in UNCITRAL's lawmaking arena are not so different from those of other UN-related entities. Twice a year, delegations assemble as working groups to deliberate together on a draft text that is presented to them by the Secretariat. They sit in seats that are fixed by the Secretariat, alphabetically by the delegation but also spatially in terms of the type of delegation (state delegations to the front; non-state delegations to the rear). After a summary of the text, and possibly of the motivations of the Commission in setting the working group's mandate or of the Secretary in making drafting decisions, delegations raise their flags. Questions are asked and opinions are offered by the delegates in attendance. The Chair listens carefully as

[50] United Nations Convention on Contracts for the International Sale of Goods, April 11 1980, 1489 U.N.T.S. 3 [hereinafter CISG].
[51] See UNCITRAL Arbitration Rules, UN Commission on International Trade Law, <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> accessed March 24 2019; UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, UN Commission on International Trade Law, <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> accessed 24 March 2019.
[52] See UNCITRAL Model Law on Public Procurement (2011), UN Commission on International Trade Law, <https://uncitral.un.org/en/texts/procurement/modellaw/public_procurement> accessed 24 March 2019.
[53] UNCITRAL Model Law on Electronic Transferable Records (2017), UN Commission on International Trade Law, <https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records> accessed 24 March 2019.
[54] (n 2, 3, 4).
[55] Block-Lieb and Halliday (n 1) 232.

each delegation speaks in one of the six UN languages that is simultaneously interpreted for all in attendance. From time to time, the Chair summarises these interventions in the hopes of finding consensus within the group. A report on the progress that has been achieved is drafted by the Secretary for the working group at the end of each week of deliberations (or two weeks, in the case of a rare two-week session). As might have been inferred from the attendance data referred to above, this is a laborious process that only the most patient delegates persist in participating in.

There are also informal methods through which UNCITRAL delegations communicate: coffee breaks; dinners; expert drafting groups; roundtable meetings; colloquia; email, telephone contact and exchanges of position papers or scholarly articles. Most of these informal conversations (other than the coffee breaks) occur outside the UN offices. All of these meetings occur without the participation of interpreters; often, this means the meetings are conducted in 'English only' although, of course, coffee breaks (which the Chair often refers to as informal consultations so that the interpreters can also have a break from their responsibilities) involve any language chosen by the speakers.

Although agreements might be reached over email, a coffee break, or a late-night dinner, these may not be viewed as informal working group sessions by participants. Expert drafting sessions, roundtables and colloquia are viewed differently by delegates, however. Colloquia, which generally are organized by private organisations such as professional associations, are conducted on-site at United Nations facilities. These generally take place before working group sessions are convened by the Commission and are organised in order to reach a sort of informal consensus that the Commission ought to be asked to consider the creation of a working group to deliberate within the confines of a mandate set by the Commission. Expert drafting sessions are instead organised by the working group secretaries to take place immediately before or after working group sessions. Experts, mostly from non-state delegations, are invited to meet at off-site locations in order to assist the secretary with implementing the details of the drafting decisions reached in a working group session. Roundtables, mostly involving participants from state delegations, are also organized to occur between working group sessions, but their purpose is more political than technical. Roundtables get organised if

the week-long formal sessions are not enough for consensus to be reached; their goal is to encourage consensus to develop in a setting that allows for a more informal give-and-take, question-and-answer format. It is through these informalities that UNCITRAL's inner core produces consensus to the deliberations of UNCITRAL's working groups.

These informal methods of work create short cuts—efficiencies— in UNCITRAL's working methods. The risk, however, is that these informalities will get viewed as problematic by delegates not invited to dinners or expert working groups or roundtables, since delegations' perceptions matter. If UNCITRAL's methods of work are perceived as fair by the delegations themselves, delegates will confidently focus their attention on working group sessions. They will recommend UNCITRAL work product to their domestic legislatures and courts as legitimate and so something that should be followed. The confidence of delegate-participants is, also, crucial to the development of a perception of legitimacy by other national and local actors, who did not participate in UNCITRAL working group sessions.

4.3. What form do UNCITRAL's international texts take? Does form matter?

Over the past fifty years, UNCITRAL has adapted to enormous changes in economic and geopolitical environments: the fall of the Berlin Wall; the rise of the BRICS; two financial crises; epochal shifts in markets due to the Internet, smart phones and the digitisation of information, to name just a few. These changes prompted an increase in the demand for law, including international commercial law.

In reaction, UNICTRAL not only broadened the issue-areas on which it sought to resolve problems,[56] it also diversified the audiences to which it directed its lawmaking.[57] In addition, it invented a wide range of legal texts and rule types within these texts. Figure

[56] When UNICTRAL was originally founded in the late 1960s, it worked on four topics: international sales, arbitration, transport, and payments. By the 1980s, it expanded its range of issue areas to include procurement and e-commerce, and in the 1990s added insolvency and secured transactions laws to the list. More recently, UNCITRAL has worked on laws governing micro-small-and-medium sized enterprises and Internet based dispute resolution, as well.

[57] It also diversified the delegates through which it worked, enlarging the number of its member states, thus increasing the diversity of the delegates and delegations inside its legislative chamber.

2 summarises this increasing inventiveness in the form of the international legislation produced by UNICTRAL over the past fifty years.

Figure 2

	1970s	1980s	1990s	2000s	2010s	2020s	Total
Conventions	2	2	2		2		**8**
Rules or Contractual Texts	1	2			2		**5**
Model law provisions				1		1	**2**
Model laws, including ml revisions, revised guides to enactment, and guidance		2	4	3	9		**18**
Legislative guides, including supplements to LGs		1		3	5	1	**10**
Recommendations (unless designated as a legislative guide)				1	1		**2**
Legal guides		2	1				**3**
Secretariat's guide to a convention					1		**1**
Practice guides				1			**1**
Notes and Technical notes					3		**3**
Unspecified reports				2	2		**4**
TOTAL:	**3**	**9**	**7**	**11**	**25**	**2**	**57**

As demonstrated by Figure 2, UNCITRAL's rate of production increased over this period, from 3 to 25 texts in the decade before this year. Figure 2 also shows that its portfolio of international texts expanded from two types of texts (draft conventions and rules) in the 1970s to ten different types by the 2000s (recommendations; model laws and model legal provisions, often accompanied with guides to enactment; legislative guides; practice guides; and so on), although in the last year or so UNICTRAL has begun to cluster certain of these types of international texts as 'explanatory texts' (some but not all recommendations, guide from secretariat, legal guide, practice guide, notes and technical notes, and so on).

Over the past fifty years, most of the legal texts produced by UNICTRAL have been soft, not hard, international laws. To some degree, UNICTRAL has chosen to draft soft international law because it is easier to reach consensus on soft laws than consensus on hard international instruments, like a draft convention. But one sort of soft law would seem to be sufficient to ease the difficulties of reaching consensus. UNCITRAL's profusion of soft international laws are curious in that there are so many of them. Why invent nine different types of soft laws?

We learned that the answer to this question rests in the distinctions among these soft laws. UNCITRAL's range of soft laws differ from each other across three levels: these laws differ in terms of the language of obligation or prescription they rely on; in terms of how detailed and precise this language is; and in terms of the audience to which the text is directed.

4.3.1 What form do UNCITRAL's international texts take? Does form matter?

Draft conventions are almost always drafted with highly obligatory language. They leave no discretion for national actors other than 'take or leave it.'

Model laws, legislative guides, and UNCITRAL's recommendations[58] are drafted with much less language of obligation and much more discretion reserved for national and local actors, who it is hoped will implement the law.

[58] Other IOs may instead refer to recommendations as principles or high-level principles. For discussion of high-level principles promulgated by the G20, see Susan Block-Lieb and Terence C Halliday, 'The

4.3.2 Precision

UNCITRAL's legal texts also vary in detail. A draft convention like the Rotterdam Rules might be fraught with complexity. Legislative guides are always filled with detail, often running to hundreds of pages. Model laws are often less so. By contrast, UNCITRALs recommendations providing high-level principles are maximally open-ended: short and sweet.

4.3.3. Sovereignty

Different soft law instruments address different prospective audiences. To domestic legislatures with its legislative guides and model laws. To private parties in transactions with its rules and practice guides. To courts and arbitrators when enforcement is sought through litigation or other dispute resolution.

4.3.4. Inside and Out

All this variation in the language of precision and obligation creates options and flexibility for transnational actors sitting *inside* UNCITRAL's decision-making chamber. It is easier to find consensus within a working group—within an issue ecology—when drafting a text with less precision or detail, and also when drafting a text that reserves discretion for some national/local actor (and so sovereignty). This inventiveness in form also creates options and flexibility *outside* UNCITRAL's chamber, at different levels of national or local decision-making. Flexibility importantly allows UNCITRAL to direct its legal texts to different audiences within the state: legislative, judicial, contractual. Its flexibility in formal design allows UNCITRAL to anticipate resistance within sovereign

Macropolitics and Microeconomics of Global Financial Crises: Bankruptcy as a Point of Reference', forthcoming in *Sovereign Insolvency: Possible Legal Solutions* (Jasna Garasic and Nadia Bodiroga-Vukobrat eds, Springer Press forthcoming 2020). For discussion of principles put out by UNIDROIT and the Hague Conference on Private International Law, see Susan Block-Lieb, 'Soft and Hard Strategies: The Role of Business in the Crafting of International Commercial Law' (2019) 40 Michigan Journal of International Law 433.

national actors, and to allow for a reaction and, thus, enhances institutionalisation of behaviours on the ground. In addition, it distinguishes UNCITRAL from other lawmaking IOs and enables it a sort of competitive edge in the standing ecology of lawmaking IOs.

4.4 Who Came Out Ahead, and How?

The attendance data suggests that the high-attendance delegations—mostly from economically powerful nations—held the most influence in working group deliberations. While this prediction is mostly true, it is not uniformly so. UNICTRAL's preference that consensus be achieved in the working group sessions leaves open the possibility that a single delegation can get its way in these deliberations.

4.4.1 Powerful States.

Perhaps not surprisingly, our data shows that the US always got its most important wants. Somewhat surprisingly, perhaps, it also shows that the US did not get everything it asked for in the three working groups that framed our study. It conceded on some things in order to reach consensus on draft texts. Other economically powerful states got reservations or exceptions that privileged their own systems—Australia, Germany, France.

Often, these concessions were achieved by suggesting that UNCITRAL draft a permissive rule rather than imperative rule. There are many examples of permissive rules or recommendations in the Insolvency Legislative Guide, but also in the Secured Transactions Guide. Importantly, language of permission is also found in the Rotterdam Rules—the draft convention on transport of goods by sea and otherwise: its rules on volume contracts are drafted as default rules that allow for contractual deviations by private parties; unless states voluntarily opt-in to the provisions on jurisdiction and arbitration, these do not apply under the treaty; the rules on electronic bills of lading

employ broad statements of purpose but few details, thus enabling industry practices to develop over time.

4.4.2 States with Emerging and Transitional Economies.

The BRICS—Brazil, Russia, India, China and South Africa—did not feature in our observations of the three case studies, either in deliberations or outcomes.[59] Peripheral states in the world economy had one major victory, however—an African bloc of nations achieved a major victory in negotiating the terms of the Rotterdam Rules.

Negotiations on the Rotterdam Rules got stuck at one point during the working group's six years of deliberations. They got stuck when the US delegation insisted that the draft treaty must include provisions on what it referred to as volume contracts. These provisions would have allowed private parties—shippers—to contract around many of the otherwise mandatory rules in the Rotterdam Rules. The US wanted provisions on volume contracts because its shippers already enjoyed an ability to contract around its domestic law. The US delegation reported to the working group that it could not get less in an international agreement than what it already had under national law. But these sort of default rules were viewed by the working group as unheard of in international legislation. Many delegations objected, including delegations from many of the most powerful carrier nations.

As a result, the United States delegation was looking for allies in the working group and found them in the form of a handful of African nations. None in this bloc of countries were high-attendance delegations. They had come late to working group deliberations on the draft treaty. Nonetheless, they hoped to make a difference with their attendance. In working group sessions, this African bloc further stymied negotiations by insisting that liability limitations in the treaty should be higher than those in both earlier conventions (Hague-Visby Rules and Hamburg Rules). If the liability limits negotiated

[59] Indeed, China was defeated on its preferences regarding international transport.

in the Rotterdam Rules were set at levels that were higher than those in both earlier treaties, the African bloc of nations could say they had made a difference.

To try and resolve things, the US held an offshore roundtable to bring the African delegations up to speed on past deliberations on the negotiations over the draft Rotterdam Rules, but also possibly to try to make a deal. Over the weekend, a deal was struck: the Africans agreed to accede to the volume contract provisions and the US agreed to the higher loss limitation provisions, even though the Chinese delegation made clear its disapproval of the higher liability limits that got negotiated.

Why did the US delegation favour the demands of the African bloc over those of the Chinese delegation? It did so because the treaty would need twenty countries' ratifications to enter into effect. Each of the tiny, mostly land-locked African countries would count toward the entry into force of this treaty. China would count as just one country for this purpose, although it is an emerging economic powerhouse, especially in trans-oceanic shipping.

4.4.3 Non-state Actors

UNCITRAL looks to achieve consensus in its working group deliberations, but this is understood to be a consensus among state delegations, whether member states or observer states. This means, as a result, that objections raised by non-state delegations must secure the approval of at least some state delegations in order to shift deliberations.

The pre-eminence of state delegations over non-state delegations thwarted influence by representative of the European Union. At the United Nations, including in UNCITRAL deliberations, the EU is not a state. The EU objected to sitting in the back of the chamber with delegations of non-state actors—like the International Bar Association. As a result of this umbrage, the European Union never emerged as an actor of itself, and rarely influenced UNCITRAL working group sessions, with one exception. The EU figured in negotiations at end of deliberations on the draft Rotterdam Rules, but behind the scenes in the Working Group on International Transport. The US delegation wanted provisions in the draft Rotterdam Rules on arbitration and jurisdiction, but

delegations from European nations needed assurances that the provisions they agreed to would not violate their pre-existing EU treaty obligations. Although the EU had not attended any of the working group sessions, it got called in to observe at the last minute to observe negotiations on these provisions on jurisdiction. The observations took place in the hallways, outside UNCITRAL's legislative chamber, because the EU representative still objected to their non-state status in the room. The EU did not factor in negotiations over arbitration provisions, since there are no European laws on the topic of arbitration.

4.5 What Challenges Confront UNCITRAL's TLO Construction?

There were several instances of pushback during the period of our study of UNCITRAL. We focus on two anecdotes in this essay, each with implications for theory.

4.5.1 The French Proposal

Ecology theory tells us that actors within issue ecologies are potential competitors—for resources, for centrality, for the ability to influence the international standards set in an arena. Conventional IR, IL and IO theory would all agree that states hold the predominate edge in any exercise of international lawmaking—inter-national law is, after all, legal arrangement made between nations. But a proposal made by the French Delegation to UNCITRAL's governing Commission in July 2009, and its resolution, question this most basic of insights.

With this proposal, France questioned the control exerted by UNCITRAL's Secretariat over basic procedural matters—election of working group chairs; invitation of delegations of NGOs; scheduling of expert working group and other off-shore invitation-only meetings; conduct of these meetings in 'English only'. France questioned not only the UNCITRAL Secretariat's agency in making these decisions, especially its authority to associate and work on its own with professionals and delegates from non-state delegations. Moreover, France questioned the informality of many of the Secretariat's working methods. France disliked and distrusted this informality, and

wanted written rules regarding UNCITRAL's conduct. It also wanted these written rules to tighten practices. Implicitly, in the subtext of its proposal, France also questioned an American style of political interaction that it viewed as problematising decision-making within UNCITRAL's working group sessions.

Reaction to the French delegation's proposal was swift within UNICTRAL. The US delegation roundly condemned it at the annual meeting of the Commission at which the proposal had been put forward. But the fifty-eight other member states hung back to a large degree at that Commission meeting. By the end of the two-week meeting, a sort of consensus had been reached. The Secretariat would study its practices and the allegations that had been put forward in the French proposal and would report back at the next meeting of the Commission.

The UNCITRAL Secretariat took over the reins. In the next year or so, the Secretariat developed a lengthy written response to the proposal put forward by France. It based its response on a close historical reading of the Commissions' prior practices and of the historical practices of the General Assembly and other UN-related entities.

In the end, UNCITAL's governing Commission agreed to a set of written rules that should govern its working methods. But, nearly opposite to the proposal made by France, the formal rules that the Commission ultimately agreed to cement the authority of the Secretariat to work closely with non-state delegations and to work in these expert meetings in English only. France saved face but lost the battle. Fifty-nine of sixty of UNCITRAL's member states proved themselves to be pragmatists—survivors, if you will, in the harsh ecology for international lawmaking.

4.5.2 David and Goliath: UNICTRAL and the World Bank

Actors within lawmaking ecologies are potential competitors—for resources, for centrality, for emergence as the global standard-bearer. Our book investigates three sets of rivalries between UNICTRAL and another IO—one in each of our case studies. We focus in this essay on the struggle between UNCITRAL (David) and the World Bank (Goliath) for control over corporate insolvency law standards.

None of the IFIs (IMF, ADB, EBRD, World Bank) is a global lawmaker precisely like UNICTRAL in that lawmaking was not their primary mandate. Each is predominantly engaged in lending, balance of payment smoothing and other financial projects. After the Asian Financial Crisis in 1998, the G-20 and IFIs came to believe that law and legal institutions could have prevented Crisis—including strong corporate bankruptcy and secured transactions laws. They promoted the creation of something they referred to as their global financial architecture project.[60]

In 1999, after finishing their Model Law on Cross-Border Insolvency, UNCITRAL's governing Commission decided that it was the best place to create corporate insolvency law standards for the world consistent with the G20's global financial architecture. The International Monetary Fund and Asian Development Bank had both already commenced producing potentially competitive statements, but these IFIs saw the merit of rolling their work into UNCITRAL's attempt to create a Legislative Guide for all countries. They sent delegates to UNCITRAL. The World Bank seemed to agree with the IMF and ADB and sent its delegation to UNCITRAL. The World Bank participated alongside these other IFIs and other delegations to UNCITRAL's Insolvency Working Group for more than three years.

In January 2003 however, as UNCITRAL was finalizing its Legislative Guide on Insolvency Law, this illusion of cooperation was shattered. At a conference hosted at the Bank's headquarters in Washington DC, the World Bank legal staff announced to the conference that it had been at work throughout UNCITRAL's deliberations. They announced that Bank officials intended to get Board approval for their own *Principles and Guidelines*.

With the enormous resources and influence of the World Bank, UNCITRAL's work would have been marginalized. But Bank staff miscalculated. They thought that the tentative approval for their *Principles and Guidelines*, which they had received from the US Treasury Department, was enough to snuff out UNCITRAL's ongoing efforts.

[60] See United Nations, Department of Economic and Social Affairs, Retooling Global Development, World Economic and Social Survey, ch 5, 'Reforming the international financial architecture' (2010) <https://www.un.org/en/development/desa/policy/wess/wess_current/2010wess_chapter5.pdf> accessed 7 April 2020.

But US involvement in UNCITRAL working groups was not through the US Treasury Department but instead was supervised by career diplomats located at the US State Department. The State Dept wanted a corporate insolvency 'legislative product' that was developed through UNCITRAL precisely because an UNCITRAL 'product' would at least look to be representative, transparent, and democratic. The IMF's general counsel agreed with State, and behind the scenes pressed US Treasury to back away from supporting the World Bank project.

Resolution of this dispute took more than a year. The dispute eventually rose to the highest levels of the World Bank, IMF and United Nations, where the UN Under-Secretary in charge of legal affairs eventually worked out a face-saving division of labour. UNCITRAL's and the World Bank's products would be published side by side. Each would acknowledge the other. The World Bank would provide broad principles. UNCITRAL would provide detailed legislative proposals. The World Bank would implement and enforce this through its national monitoring and ROSC system—that is, its Reports on Observance of Standards and Codes.

It is a deal that holds to this day.

5. Conclusion

Major enterprises of global lawmaking are underway far from the public eye—their leaders, these legal entrepreneurs, seek to construct transnational legal orders. The United Nations is a central player in this arena. To read the headlines, it is easy to view the UN as a lumbering byzantine nest of international civil servants working at odds with US interests.

Our 12 year-long observation at the UN Commission on International Trade Law presents a distinct and far more nuanced story than this. We discovered that the United Nations can be highly adaptive. Over the past 50 years, global lawmakers like UNCITRAL have created international commercial laws for the world that cover a wide range of topics and affect every sort of market actor in the world: from large multi-national corporations to small mom-and-pop micro-enterprises.

Although UNCITRAL may have succeeded in adapting in order to be competitive and relevant, UNCITRAL nonetheless faces challenges of participation and processes. Whether these challenges will inhibit effective implementation of its global commercial law remains to be seen.