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in International Commercial Law*

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The Futility of Unification and Harmonization in International Commercial Law

*Paul B. Stephan**

The title of this symposium hints at a certain complacency about a venerable project. For more than a century, specialists in international and comparative law have gathered in various venues to promote convergence in those national laws that affect international commercial transactions. They have pursued, and in large part achieved, the promulgation of conventions and other legal instruments that states in turn have adopted to govern this commerce. Today, for example, international sales of goods, bank credits and payments, and contracts of carriage largely rest on these laws, as does a growing body of procedural rules regulating the disputes that arise when these transactions turn sour. Apparently international traders need unification and harmonization of the law and have embraced the efforts of lawyers to meet these demands.

I wish to sound a skeptical note. Much of the effort directed at unifying these laws is unnecessary, and some produces rules that hinder rather than promote international business. These deficiencies are due, I will argue, to inherent limitations in the process that generates international agreements for national implementation. The specialist community, and in particular scholars, have exacerbated the problem by a mistaken focus on what the project should produce. We ought to spend less time drafting rules to govern the substantive rights and duties of persons engaged in a transaction, and more on devising ways to encourage states to facilitate contractual choices made by parties in the course of transactions and in encouraging states to reveal how they propose to deal with private disputes arising out of international commerce.

I begin by asking what benefits may unification and harmonization achieve. I distinguish three goals—reduction of legal risk associated with international commerce, law reform, and enhancement of the role of legal advisers to international business people. Next I examine the process that generates international conventions and model laws. The political economy of this process results too often either in rules written for the benefit of particular industries and other interest groups, or in the suppression of conflict that in turn increases legal risk. Finally I speculate about other strategies for international lawmaking that might ameliorate some of the problems that lie embedded in the kinds of legal instruments that we currently produce.

I. THE BENEFITS OF UNIFICATION AND HARMONIZATION

The impulse to reduce diversity among the legal systems governing commerce has manifested itself for as long as people have traded across political boundaries. One of the glories of the Roman Empire and Byzantium was the coherence of Roman law, which unified the rules of commerce for

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large portions of the commercial world. The revival of Roman law in Western and Central Europe during the eleventh and twelfth centuries had much to do with the desire of the various market cities to acquire a single template for shaping the rules governing trade.¹ More recently and closer to home, the Supreme Court of the United States through Justice Story launched the body of federal common law as a means of providing common rules for interstate commerce.² The various Uniform Laws, and in particular the Uniform Commercial Code, continue this project. Similarly, groups now seek to develop a common private law for the members of the European Union.

These examples involve the imposition of a unified body of rules by an institution with at least some sovereign powers, or the creation of coherent rules in the absence of any nation state. What we have seen during the last century is a systematic effort to enlist sovereign nations in the unification of the law of international commerce. The effort's successes include, citing only the most prominent examples, the Vienna Convention on the International Sale of Goods (CISG),³ the Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (the Hague Rules),⁴ the Warsaw Convention on the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention),⁵ the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,⁶ the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,⁷ the Hague Convention on the Taking Evidence Abroad in Civil or Commercial Matters,⁸ and the International Chamber of Commerce's International Rules for the Interpretation of Trade Terms (Incoterms)⁹ and Uniform Customs and Practice for Documentary Credits (UCP).¹⁰ Many more projects remain in various stages of gestation.

What motivates us to produce these laws? Many explanations exist, only some of which reflect well on the process. To understand how unification and harmonization proceeds in the contemporary

¹ See generally Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT'L DISPUTE RESOL. 235 (1988).

² *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842).

³ Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. DOC. A/Conf/97/18, reprinted in 52 FED. REG. 6264 (1987) [hereinafter CISG].

⁴ Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, August 25, 1924, 51 Stat. 233 (1934) [hereinafter Hague Rules] implemented by Carriage of Goods at Sea Act, __ Stat. ____, 46 U.S.C. App. §§ 1300-15 (19__).

⁵ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) [hereinafter Warsaw Convention].

⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997 (1970).

⁷ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 261, T.I.A.S. No. 6638 (1969).

⁸ Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444 (1974).

⁹ International Chamber of Commerce, PUBLICATION NO. 460, INCOTERMS—INTERNATIONAL RULES FOR THE INTERPRETATION OF TRADE TERMS (1990).

¹⁰ International Chamber of Commerce, PUBLICATION NO. 500, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993) [hereinafter UCP].

world, consider first what a benevolent and public-spirited international lawmaker might wish to accomplish.

A. *Managing Legal Risk*

A benevolent lawmaker's first objective should be predictability and stability in international commercial relations. In a world of multiple legal systems and uncertainty about where things will go wrong, the parties must worry about divergent rules applying to their disputes. A carrier or goods may end up in one place, the parties may hold assets in another, and courts in any number of jurisdictions might both make it easy to sue foreign parties and refuse to apply another jurisdiction's substantive law. Knowing that this divergence exists, parties may act opportunistically, such as by claiming a default and filing suit in a jurisdiction known for its eccentric rules and practices. Expecting this, parties in turn will invest in ways to protect themselves from this opportunism, including at the margin turning away from otherwise profitable transactions. I will use the term legal risk to capture the concept of unpredictable rules applying to a business relationship.

Reduction of legal risk in turn increases the value of transactions. To understand this point, think of increased certainty as a form of information, for which businesses willingly would pay something. Minimizing the possibilities for opportunism also allows parties to cut back on their precautions, further adding value to potential deals. A legal system that allows people to form clear legal commitments with predictable consequences makes it easier for people to rely on each other and thereby extends the realm of productive cooperative behavior.

These benefits seem clear enough. Indeed, a substantial body of contracts law scholarship focuses on the particular capacity of law to assist people in dealing with the future.¹¹ What may not seem so obvious is that reduction in legal risk does not come without costs. There is, in other words, an optimal level of legal risk that is greater than zero.

This counterintuitive point becomes clearer if one considers what the reduction of legal risk entails. Greater clarity in legal rules means providing more precise instructions covering a greater number of eventualities. As these rules become more exact and all-encompassing, the odds increase that they will lead to outcomes that parties to a transaction would like to avoid. Even if the rules permit alternative results, as much of contract and property law does, the parties still must address all those instances where they would prefer alternatives. Forcing business people to tailor their own transactional relationships at some point becomes counterproductive. We commonly assume that in commerce people often prefer off-the-rack legal regimes, but these regimes work only if they do not cramp the relationships they govern with excessively detailed requirements. In commercial law we continually must make tradeoffs between flexibility and certainty, and business people within reasonable limits seem to want the former.¹²

¹¹ See Lon Fuller & Perdue, *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52 (1936); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980).

¹² See Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261 (1985). See also Clayton P. Gillette, *Harmony and Stasis in*

Imagine, for example, a legal regime that held that late deliveries voided a contract of sale, no matter what delayed the goods. This rule optimizes certainty by making the legal relations of the parties turn on an objectively knowable event, namely the moment of delivery. But many parties would prefer a more lenient if ambiguous rule that distinguished between serious delays and de minimus tardiness, with further refinements perhaps depending on the nature of the goods, the market in which the goods might be resold, and the preferred method of shipment. A legal regime that forced parties individually to negotiate each of these conditions would burden persons wishing to engage in repetitive standardized transactions, but saddling them with a rule of absolute liability for delay might force just such negotiations.

A related explanation for the costliness of legal risk reduction relies on general observations about risk preferences. Substantial evidence indicates that in general the taste for risk, like that for spicy food, varies considerably among people, and that many persons (often those who become entrepreneurs) prefer a certain amount of risk. There is no reason to believe that attitudes toward legal risk differ. Some traders will prefer undertaking a deal not knowing for sure what the legal consequences of a lapse might be to having to confront inevitable legal consequences of failure.

We thus must consider unification and harmonization as desirable to the extent it achieves a desirable reduction of legal risk, but not if it imposes such a highly developed and specific set of rules that a considerable number of transactions require substantial individualized negotiations.

B. Improving the Law

A second objective of unification and harmonization might be the substitution of better rules for those extant in the legal systems of individual states. By “better rules,” I mean rules that improve on the status quo with respect to some normative social goal, such as redistributive justice or enhancing economic welfare. Here the goals of harmonization and law reform blend. But disconcerting questions immediately arise. What distinguishes an international pursuit of good law from a domestic one? When might international law reform succeed where domestic efforts have failed?

Several possibilities exist. First, drawing from an international pool of legal talent might increase the quantity and quality of expertise available to address a problem, and better expertise might lead to better rules. Second, systematic study of the experience of different legal systems might provide law reformers with more and better data for drawing conclusions about which rules work best. These arguments have special appeal to academic specialists, who combine disinterest with expertise and tend to believe that their talents, properly applied, may improve the law.

But it does not seem obvious why international projects to unify and harmonize commercial law should enjoy any special advantage due to the quality of expertise and data available to inform the reformers. A purely domestic law reform project also can draw on a wide range of legal talent and employ comparative analysis to determine optimal rules. One need think only of the many efforts in

the former socialist countries to adopt new laws in support of a market economy. The array of multinational academic talent and detailed comparative studies of legal systems that these projects engage would be the envy of most international harmonization efforts.

Conversely, efforts simultaneously to reform the legal systems of many countries tends to require participants who have some multilingual, if not multicultural, talents. Persons working on the project must speak to and understand each other, something that proceeds more effectively if they can dispense with interpreters. This requirement cuts down on the pool of talent available for such projects.

A different argument for law reform through unification rests on the distinctive issues presented by international commerce in a world of national legal systems. Cooperative rulemaking by representatives of many states may solve collective action problems that deter individual states from enacting optimal rules. An example I discuss later in this paper involves the treatment of foreign claimants in a bankruptcy proceeding. An ideal system would specify clear and precise choice-of-law rules to allocate the authority to resolve legal claims to the jurisdiction with the greatest interest in each transaction and otherwise would discourage discrimination against foreign claimants that diminishes the overall efficiency of a bankruptcy system. But absent coordination among states, each nation has an incentive to adopt rules that, on the margin, favor nationals over foreigners in the disbursement of the bankrupt's estate. They can do so not only by transparently devaluing foreign claims, but also by applying local law to unravel contracts or property claims formed in a different legal environment. An international regime might increase overall welfare by giving every state a stake in a system that eliminates such discrimination.

A final opportunity for law reform through international harmonization concerns a narrow but significant category of cases. It rests on perceptions of political style in a world where national pride still carries considerable weight. During the last decade many countries that largely had eliminated formal market relations from their economies have decided, with varying degrees of enthusiasm, to embrace private commerce. Most approach the task with little or no suitable domestic law, and might do better simply to appropriate a well elaborated foreign body of commercial rules, such as that of New York or England. But however pragmatic such a move might be, few of these newly market-oriented countries feel secure enough in their national identities to permit a naked embrace of foreign legal systems.¹³ Instead, they wish to preserve the form of sovereign equality even as they struggle to meet needs created by distinctive gaps in their law. For these states, an international instrument can provide the right solution. It may permit the country in need of a legal tradition to embrace foreign commercial law while seeming to preserve its sovereign dignity and independence.

C. Developing Intermediaries

¹³ This insecurity by no means is limited to former socialist countries. Consider, for example, the mixture of amusement and dismay with which Justice Scalia, himself a former professor of comparative law, greeted the possibility that Article 17 of the Warsaw Convention required signatory states to incorporate French law concerning the definition of legally cognizable harm into their domestic legal systems. *Zicherman v. Korean Air Lines*, 516 U.S. 217, 222-23 (1996).

A third objective of unification and harmonization might be to give legal advisers in all parts of the commercial world a broader common fund of specialized knowledge. Whether the unified rules produce desirable results or not, lawyers will wish to master them and to work with other lawyers around the world in implementing them. Increasing the ability of advisers to understand and to communicate with each other enhances the value of the services they render independently of any improvement in the legal rules. Given the cultural, linguistic, and professional differences that otherwise divide lawyers located in different countries, the potential for bridging gaps among those working on commercial transactions within the international legal community is great.

Improving the position of lawyers of course generates rents for the profession, but it also can produce benefits for society as a whole. Specialized lawyers (or the firms to which they belong) tend to work on particular transactions more often than any one client does. They thus have the incentive common to all repeat players to develop a reputation for reliability and predictability. To protect this investment, specialized lawyers may work to reduce legal risk even where the rules themselves may seem to enhance it. In particular, they may become expert in producing predictable outcomes through settlement even where the results courts might generate remain highly variable. In the United States, for example, some lawyers who sue and represent insurance companies in personal injury cases have a reputation for reaching settlements in spite of the notorious unpredictability and instability of U.S. tort law. More generally, an important scholarly tradition tracing back to Janet Landa's seminal study of ethnic Chinese middlemen in the Malaysian rubber trade emphasizes the benefits that cohesive intermediaries can bring to unstable legal environments.¹⁴

This argument about the value of specialized legal expertise introduces a theme that I develop in the remainder of this article. Not all the benefits of unification and harmonization accrue to the general welfare. Indeed, we have a reason to fear that, like all lawmaking projects, efforts at unification may generate advantages for some discrete group at the expense of the overall public good. There is no reason to believe that the public choice dynamic so much studied in other areas of the law, where coherent and well-organized interest groups obtain legislation that serves their own ends, does not work in this field as well. We need to discuss the possibility that other, less benign forces may come into play when experts, seeking the reduction of legal risk, law reform, and the strengthening of the roles of specialist legal advisers, set off to develop unified and harmonized rules of international commerce.

II. THE UNIFICATION AND HARMONIZATION PROCESS

In the previous section I focused on idealized benefits derived from the substantive content of a unified international commercial law. I now focus on the process that may produce such law. I first discuss an idealized lawmaking process, and then review how the most significant instruments for unifying international commercial law have come about.

¹⁴ Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEG. STUD. 349 (1981); Robert Cooter & Janet T. Landa, *Personal Versus Impersonal Trade: The Size of Trading Groups and Contract Law*, 4 INT'L REV. L. & ECON. 15 (1984); Robert Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996).

A. *Process Ideals*

In a perfect world we would make laws in a way that blends complete democratic accountability with full realization of skilled technical expertise. We care about accountability because the persons affected by laws should have some kind of voice in how the rules laid down affect their lives. It is certainly just, and perhaps even conducive to the enactment of instrumentally good laws, for the actors who must comply with the legislative mandate to have some way of rewarding those who enact successful laws and punishing those whose laws prove hurtful. At the same time we care about technical expertise, both prospectively and retrospectively. Prospectively, specialists help lawmakers to anticipate the consequences of laws and to identify the choices that the lawmaking project must confront. Retrospectively, specialists help us to interpret the impact of legislation in a complex world and to specify the criteria for success and harm.

When it comes to lawmaking that aims at widespread unification of diverse bodies of national law, we must accept some adjustments of these ideals. In the absence of any international public legislature, we cannot expect the lawmakers to face the same kind of electoral accountability that national parliamentarians ordinarily confront. No mechanism exists for voters to pass judgment on the international lawmakers. At best they can vote for the domestic governments that in turn choose the drafters of international agreements.¹⁵ Nor is exit, the conventional alternative to voice for disciplining decisionmakers, an attractive option. Widespread rejection by national governments defeats the purpose of legal unification.

If the unification process necessarily must sacrifice something in the way of accountability, it may compensate by exploiting technical expertise more fully than national lawmakers normally do. Unencumbered by petty political obstacles, experts engaged in the drafting of unified laws may have the freedom to develop sophisticated and well-balanced drafts that anticipate and resolve a wide range of potential problems. We should expect them to produce legislation that achieves both elegance and a certain scientific soundness.

B. *The Lawmaking Bodies*

What kinds of organizations promote unification in the real, as opposed to an idealized, world? A survey of the field suggests that international institutions served mainly by technical experts dominate the process. None of these organizations directly enacts legislation, and hence political accountability remains largely absent. Rather, these bodies draft laws for national governments to adopt, either as treaties or domestic legislation.

At present a variety of groups engage in various kinds of international unification projects. Typical is the UN Commission on International Trade Law (UNCITRAL). This organization embodies thirty-six official delegations representing national governments chosen on a rotating basis

¹⁵ For a more extensive discussion of these problems, see Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NORTHWESTERN J. INT'L L. & BUS. 681 (1996-97).

by the UN General Assembly. It possesses a permanent secretariat that administers its work and provides publicity. It operates largely through working groups consisting of experts. UNCITRAL selects the members of the working group on the basis of its particular assignment. The secretariat enjoys substantial background influence over the composition of the group as well as selection of projects. The working groups develop a draft, which a conference of delegates from the various member states must approve. It is not unusual for the draft to go through several revisions in light of conference review, and for the entire process to consume many years.

UNCITRAL holds annual conferences to review and approve what the working groups have done. The delegates to the conferences, like the members of the working groups, typically are specialists in international law, often drawn from the academy, rather than politicians or civil servants. The end of the Cold war has seen some increase in UNCITRAL's activity. Since 1991 it has approved two conventions and four model laws, as compared to one convention and one model law between 1981 and 1991 and a total of seven conventions and five model laws during the entire thirty years of its existence.¹⁶

The International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law (Hague Conference) operate in much the same way as does UNCITRAL. UNIDROIT first appeared as an organ of the League of Nations, obtained formal status as an independent international organization in 1940, and then revived following World War II. Its membership consists of 58 nations whose governments send representatives to periodic conferences to review and approve the work of task forces. To date it has produced eight international conventions, two of which became largely obsolete upon the adoption of the Convention on Contracts for the International Sale of Goods (CISG). It also has done background work for a number of other unification projects, including the CISG.

The Hague Conference, which began work in 1893 but did not take on a permanent institutional character until 1955, has 45 members, most of whom also belong to UNIDROIT. Like UNCITRAL and UNIDROIT, it carries out its work primarily through task forces (called special commissions) that present their results to delegates from the member states that meet in quadrennial diplomatic conferences. Since World War II it has promulgated 33 Conventions, some of which have achieved widespread adoption.

At the regional level, the European Union and the Organization of American States also employ specialists in working groups to draft multilateral conventions involving international commercial law and otherwise to encourage unification and harmonization of commercial law. Both have developed, *inter alia*, laws affecting carriage of goods by rail and intermodal transport and transnational private litigation. The European Union has launched a more ambitious project to harmonize the civil law of all fifteen of its members.

¹⁶ This data reflects information posted on the UNCITRAL homepage and is current as of May 25, 1998. See <http://www.un.or.at/uncitral/status>.

In each of these cases, the technocratic model of lawmaking prevails. The persons who represent national members at the conferences that approve task force proposals are selected more for their reputation as specialists than because of political, bureaucratic, or industrial ties. Working groups have stable membership but a limited terms of reference, and not many people participate in more than one. Turnover is higher in the delegations sent to the periodic conferences that review what the working groups have produced.

The International Chamber of Commerce (ICC) differs significantly in its structural form from the public bodies mentioned above. It draws its membership from the private sector, and chooses its experts more on industry interest than academic prestige. It does not have to answer to national governments either in the choice of specialists assigned to drafting projects or in the approval of legal instruments. Rather, it forms commissions linked largely to industrial sectors (banking, telecommunications, and the like) which, among other things, promulgate standardized contractual terms for particular transactions. Unlike the other groups, the ICC also conducts an arbitration service that allows it to supervise the interpretation of its instruments. But the ICC also collaborates with the other international institutions in all areas of mutual interest. It maintains informal ties with the working groups and secretariats and normally sends observers to the various conferences that take up proposed legislation. It also coordinates its activities with industry-specific bodies of legal experts, such as the Legal Committee of the International Civil Aviation Organization or the Comité Maritime International.

Much distinguishes these organizations, which have their own histories, cultures and agendas, but what interest me are the common elements of their lawmaking process. At their heart is an interplay between an ad hoc task force consisting of academics and practitioners with great substantive command of the subject under consideration, and a broader body of lawyers, typically well-seasoned and distinguished, whose approval is necessary before the group will embrace a task force proposal as its own. Membership in the task forces tends to be stable but not overlapping, while the broader group has a less stable membership but a broader range of lawmaking authority. The members of both bodies, the task forces and the broader group, bring their own preferences and interests but do not belong to parties or coalitions that can impose discipline and develop collective programs. Even in those organizations where the members in the larger body have some sort of official status as representatives of their nations, such as UNCITRAL, UNIDROIT and the Hague Conference, rarely do national governments impose substantial political constraints on their emissary. Rather, the technical nature of the subject matter ensures the relative obscurity of the process.

What these bodies seem to represent, in other words, is a fairly complete realization of the technocratic ideal of lawmaking. Each nation's leading specialists convene to draft an instrument that ought to embody the best rules that they can devise for international commerce. National politicians participate only indirectly, mostly by retaining the final say over accepting the completed instrument. The technical experts have a relatively free hand to discover the common ground that can transcend differences in culture, history, levels of economic development, and social structure. While ideological and conceptual barriers may remain, the process should be free of less elevated distractions.

The converse also is true: we cannot blame political interference for any shortcomings in the instruments produced by these groups. Rather, their flaws must indicate some inadequacies in the technocratic ideal. Of course, even the finest experts make mistakes, but the issue is not whether measures meant to unify international commercial law fall short of perfection. What we must determine is whether the kind of technocratic lawmaking that these organizations promote has structural characteristics that lead to systematic problems with their products.

C. A Positive Model of Private Legislatures

Several intellectual traditions have advanced critiques of scientific-technical expertise generally and the use of technical ideals in lawmaking in particular. Some claim that what passes for technical expertise often represents only the current preferences of dominant elites and that technical skills serve mostly to mask the naked and irrational power that lies behind most legislation.¹⁷ Such arguments are fascinating but cut far too deeply for my present purposes. I do not consider my task to extend to debating the merits of post-industrial capitalism or the place of legal theory in the post-modern firmament. Rather, I wish to concentrate on one particular analysis of expert-group lawmaking that recently has appeared in the legal literature.

Scholars associated with the law-and-economics movement have studied the political economy of technical experts engaged in lawmaking. Their work suggests that these groups, no less than more conventional legislatures, confront the influence of interest groups and face systematic pressure to draft laws that fail to improve on the status quo and may produce overall welfare losses. Technocratic lawmaking, they argue, still has its own politics and is not necessarily improved by its freedom from broader political constraints.

This work studies what Robert Scott and Alan Schwartz call private legislatures.¹⁸ It focuses on two U.S. institutions, the American Law Institute (ALI) and the National Conference of Commissioners of Uniform State Laws (NCCUSL). Both bodies exist outside of normal political organs, choose their own membership, and carry out their legislative drafting through a process that begins with a specially selected working group and concludes with consideration by the whole membership of the working group's drafts. Their professed goal is both to unify and to improve the substantive law of the several States by producing instruments that legislatures then will adopt without modification.

Scott and Schwartz argue that these private legislatures have four significant characteristics that shape the kinds of the legislation they produce: (1) the costs of logrolling are high; (2) members of both the task forces and broader legislative body acts as individuals and have no political power that

¹⁷ See generally Mark Kelman, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); Thomas S. Kuhn, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970); Robert Mangabeira Unger, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); Herbert Marcuse, *ONE-DIMENSIONAL MAN—STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY* (1964).

¹⁸ Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595. For my previous discussion of these claims and their application to international commercial law, see Paul B. Stephan, note 15 *supra*, at 688-90, 700-02.

they can wield in the lawmaking process; (3) information asymmetries exist between task forces and the broader legislative body; and (4) members of the task forces tend to have a stronger preference for moving away from the status quo than does the median member of the larger body. Each deserves some elaboration:

Absence of logrolling: Those persons who are selected for particular task forces in most cases work exclusively on that drafting project. If they do other work, it comes at different times. As a result, they do not have the capacity to make deals across projects.

Absence of political agency: Membership in the groups and their organs depends on the individual's technical expertise, not his or her associations with political actors working in the background. The members do not form coalitions or submit to any other kind of substantial political discipline. They do not formally represent organized interests, although they may have some affinity or professional ties with particular groups.

Information asymmetries: The wider body meets episodically and normally does not have many subjects on its agenda. The members of the task forces, by virtue of their focused effort and research as well as the initial selection process, know more about the background and anticipated effect of the proposed legislation than do the persons serving in the broader body.

Preferences to alter status quo: Prominent professionals normally do not agree to spend a great amount of time on what is typically an undercompensated consultative project unless they have either a strong ideological commitment to some issue implicated by the project or expect to enjoy the benefits of an enhanced reputation as a result of the project's successful completion. Ideological commitment to preserving the status quo is possible but unusual, especially within the legal academic community. Similarly, few projects are seen as successful and reputation-enhancing if they conclude with a rejection of any change. The members of the broader groups that must approve the products of task forces, by contrast, do not have the same personal investment in the legislative projects and may have to answer to groups who prefer a known present to an uncertain future.

Having postulated these characteristics, Schwartz and Scott make a prediction about the relative influence of interest groups on the deliberations of private legislatures. They contend that, *ceteris paribus*, representatives of such groups will have greater credibility with the members of the larger body that will approve a completed project than will the experts who form the task force that produces a proposal. They base this claim on three generalizations about the behavior of interest groups, experts, and the members of the broader body: (1) unlike the members of the task force, an interest group must bear additional costs to develop alternatives to a task force proposal; (2) interest groups have an ongoing interest in the various projects undertaken by these organizations and in that sense are repeat players in the game of generating proposals, while the experts employed in task forces tend to concentrate more exclusively on the single activity in which they have a hand, which means that interest groups will bear greater future costs if they are caught out in exaggeration or misrepresentation; and (3) experts working on task forces tend to have, and are known by others to have, a greater preference for innovation than either interest group representatives or the members of the approving bodies.

Several consequences flow from the assumption that members of the approving bodies, in the face of their relative ignorance about what the projects will do, will have greater respect for the information provided by interest groups than that offered by their nominal subordinates, the members of the task force. Interest groups should be most effective in derailing proposed rules that their members would find harmful. Where a single interest group brings pressure to bear on a project and no other group participates, the group also has an advantage in shaping the project to benefit its members. In the more common scenario where well organized groups have conflicting interests, the pressure inside the lawmaking body to produce something will lead to the adoption of instruments that have the form of a legislative enactment but that contain few or no rules that will impose clear costs on any organized group. In practice such instruments must employ rules that postpone hard choices by leaving it to the discretion of future decisionmakers to make them.

Summarizing the argument, the new work on the political economy of private lawmaking by bodies of technical experts predicts that: (1) many rules will vest considerable discretion in decisionmakers, such as judges, rather than specifying outcomes that must flow from described circumstances; (2) those rules that are precise and constrain decisionmakers will largely reflect the preferences of particular interest groups, such as banks, broadcasters, common carriers, *etc.*; and (3) the rules taken as a whole will not constitute a clear and definite departure from the status quo, because interest groups will enjoy considerable success in blocking any rules that entrench on their particular preferences.

The various organizations active in the development of unified international commercial law seem remarkably similar to the ALI and NCCUSL. Their reliance on working groups formed on a per-project basis, as opposed to a permanent legislature involved in addressing a broad legislative agenda, discourages logrolling. Even though several of the organizations (UNCITRAL, the Hague Conference, UNIDROIT, the EU and the OAS) consist of official delegations chosen by national governments, as a practical matter political agency plays no role in their work. The technical nature of the task and the importance of professional reputation, as opposed to political connections, in the selection process means that the members act in accordance with their own views of what laws are best, not pursuant to instructions from a political body. The members of the working group typically possess far more information about the implications of their proposals than do the persons who attend the conference that adopt particular instruments. And the working group members, by the nature of their investment in these projects, tend to have stronger preference for altering the status quo than do the conference delegates.

The similarity is not complete. The ALI and NCCUSL have more stable memberships than the conferences or other broad bodies affiliated with the institutions that produce international commercial laws. Typically a member of the ALI and the NCCUSL serves without term, while the delegations to the various international bodies tend to turn over more frequently. But this distinction should accentuate, rather than diminish, the information asymmetries between the working groups and the conferences and thus enhance the tendency of the conference delegates to look to outsiders, especially those associated with interest groups, for help.

Does the similarities among these technocratic lawmaking processes extend to the content of laws they produce? If so, we can predict that the instruments intended to promote unification will display several characteristics. They often will increase legal risk beyond optimal levels. The increase will come from substituting an international standard that leaves considerable discretion to national decisionmakers, especially judicial bodies, for preexisting national rules that may be more developed and confining. Those instances where the instruments provide greater certainty than does prior national law often will represent victories for narrow economic interests rather than the general welfare. The triumphs of these interests should occur in cases where a single concentrated group with a coherent preference faces no opposition from other such groups and finds it possible to outmaneuver the reformist members of a task force when it lobbies the body that approves an instrument. More generally, we should not expect unification efforts to achieve a clear and definite break with the prior laws even when the status quo seems inadequate in light of broadly accepted normative criteria.

How accurate are these predictions? In the next section I review several important instruments that have emerged from the international unification process. My survey, while neither comprehensive nor systematic, does suggest that technocratic lawmaking does no better in that international arena than when it proceeds through the ALI or the NCCUSL. I raise enough questions about the overall value of past efforts to justify an attempt to develop alternative approaches to unification and harmonization.

D. Open-ended Discretion and Bright Lines in Unification Instruments

I examine six instruments. The selection rests not on any presumed criteria of typicality, as I remain unsure as to what constitutes a “representative” unification law. Rather, I concentrate on prominence and significance. Different unification organizations produced these laws, so they do not reflect only one group’s predilections. Four of the first five instruments—the Hague Rules, the Warsaw Convention, the CISG, and the UCP—today govern a wide array of international commercial transactions. The Hamburg Rules purport to replace the Hague Rules and thus deserves consideration alongside the preexisting law. The sixth, UNCITRAL’s Model Law on Cross-Border Insolvencies (UNCITRAL Insolvency Law), was adopted in 1997 and has not yet come into force, directly or indirectly, anywhere. But it represents one important group’s effort to wrestle with a growing problem presenting clear collective action difficulties. How the model law confronts these challenges suggests something generally about the ability of unification instruments to produce gains from international cooperation.

1. Sea Transport—The Hague and Hamburg Rules

Consider first the unification of the legal rules relating to one of the most ancient technologies in international commerce, namely carriage of goods by ship. The lion’s share of international sale of goods involves sea transport. Technological innovations such as containerization, advanced telecommunications, satellite-assisted navigation, and electronic storage and dissemination of shipping documents and information have affected the efficiency, cost structure and reliability of this industry, but the fundamental legal issues have not changed much since the time of the Phoenicians.

Once shippers and carriers get past the price issue, they look to commercial law to define the service provided. Shippers entrust their goods to carriers and want a timely delivery of undamaged goods. Carriers live with the vagaries of the sea and do not want to assume liability for its injuries. More specifically, carriers seek precision in the definition of their responsibilities to shippers, and wish to avoid open-ended liability rules such as responsibility for consequential damages and exposure to losses associated with goods of undeclared value. Shippers want to ensure that carriers have every reason to take all reasonable precautions for the safe delivery of their cargo in a timely fashion. More generally, repeat players (almost all carriers and most shippers) want a stable legal environment.

It seems reasonable to assume that at any given time, some countries might have stronger carrier industries than do others, and that the balance struck in commercial law between shippers and carriers might vary among countries. Extreme cases where countries have almost no domestic carriers and a heavy dependence on shipping might produce rules that redistribute wealth from carriers, and the reverse might be true in countries with an especially strong carrier industry. Thus one might expect significant variation among national legal regimes, with the applicability of any particular set of rules turning on unpredictable factors such as the location of ship or cargo at the time of dispute. Against such a background, a unification project might expect to realize substantial benefits simply by reducing legal risk.

During the early years of the industrial revolution general principles of contract law, albeit refined by specialization and the development of a distinct admiralty jurisprudence, governed the legal rights and obligations of sea carriers and their customers. Relying on contract law, international carriers tended to offer standard terms to most shippers, usually exculpating themselves from a wide range of legal liabilities. By the end of the nineteenth century, however, the industry faced the likelihood of legislative intervention. The emergence of powerful cartels in the industry, called conferences or rings, invited some sort of response. The United Kingdom launched an official inquiry into the industry in 1906, and a congressional investigation followed in the United States a few years later.¹⁹

To be sure, at the turn of the century the carrier industry would not have seen changes in commercial law as the greatest threat it faced. Price controls, discriminatory taxation and port charges probably seemed to present more serious problems. But, as the experience of the railroad industry illustrated, commercial law also could have a redistributive impact on carriers. Damage rules, for example, might expose them to substantial liability for consequential injuries caused by failures or delays of delivery.²⁰ The United States had enacted the Harter Act in 1893 with the purpose of imposing mandatory liability obligations on international sea carriers. Other states threatened to follow with their own approaches to the maritime contract of carriage. It seemed likely that, at a minimum, the legislative process would create a legal environment that varied substantially

¹⁹ See Timothy J. May, *The Status of Federal Maritime Commission Shipping Regulation under Principles of International Law*, 54 GEO. L.J. 794, 795-99 (1966). The U.S. investigation led ultimately to the enactment of the Shipping Act of 1916, which established the United States Shipping Board, the ancestor of today's Federal Maritime Commission, to regulate common carriers involved in international and interstate commerce. 39 Stat. 728, *as amended and codified at* 46 U.S.C. §§ 801-42 (19__).

²⁰ See generally Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEG. STUD. 249 (1975).

among jurisdictions, with carriers facing relatively favorable or unfavorable rules depending on where they found themselves in court.

In 1897, lawyers associated with both carriers and bulk shippers formed an international organization, the Comité Maritime International (CMI), to lobby for an international convention governing carriage contracts. The Belgian government, recognizing the importance of these issues to its great ports, in effect became the CMI's partner in this effort. In 1905 the Belgians convened the first of several diplomatic conferences intended to adopt conventions dealing with the maritime trade. In 1922 the CMI took over a draft that had emerged out of the Maritime Law Committee of the International Law Association. This document, after the CMI had revised it, became the basis for the Hague Rules, which a diplomatic conference approved in 1924. Almost all the major sea powers today recognize these Rules, either in their pristine form or as amended in 1968. The United States implemented the 1924 convention through enactment of the Carriage of Goods at Sea Act of 1936.²¹

Several aspects of this process are noteworthy. First, the parties pursuing unification bypassed both the Hague Conference and UNIDROIT, then an organ of the League of Nations. They apparently worried that working through preexisting bodies tied directly or indirectly to the League would deter nonmembers, especially the United States, from participating. As a major maritime nation and the world's foremost industrial power, the United States had to take part for the Hague Rules to have any significance, but its repudiation of the League meant that any new international engagement had to be approached with great delicacy.

Second, one should note the role of the CMI as the expert group responsible for drafting the Convention. Neither the CMI nor the various diplomatic conferences it served took on the character of a public legislature. Their narrowly defined competence—unification of private law rules relating to commercial sea carriage—made opportunities for logrolling rare if not nonexistent, and the technical nature of the project plus strong industry influence precluded any political agency from affecting their preferences except in the most general sense. The CMI members undoubtedly possessed better information about the implications of their proposals than did most of the official governmental representatives who reviewed their work.

Turning to the substance of the Hague Rules, one encounters many clear-cut rules give courts and other decisionmakers little room to maneuver. These tend to reveal the fingerprints of the carrier industry. Perhaps the most significant is Article IV(5), which relieves the carrier from liability for damages to goods in excess of \$ 500 per package, absent a declaration by the shipper of higher

²¹ Carriage of Goods at Sea Act, 46 U.S.C. App. §§ 1300-15.

value.²² The cap applies except when injury stems from the carrier's knowing or reckless misconduct.²³

This limitation is not absolute, as passengers and shippers remain free to negotiate for greater liability. But the drafters probably appreciated that a right to dicker over liability would have little practical effect. They easily could have expected that specialist insurance firms normally would provide this protection at a lower cost than could carriers. The cartelized nature of the industry made it likely that the shipper would bear the cost of additional coverage whether obtained from the carrier or a third party. At a minimum, the transaction costs associated with negotiating anything different from the standard liability term would deter shippers from seeking a departure except in cases where the benefit derived from carrier (as opposed to third party) liability exceeded by some substantial amount the difference in cost between procuring insurance and sharing the burden with the carrier.

Other provisions also reflect the carriers' interests. Article IV(2)(a) provides them with an complete defense for all liability caused by faults in navigation, even when the ship's captain serves as the carrier's employee.²⁴ Article IV(2) lists other conditions, such as war, weather, and labor unrest, that would free carriers from liability and forbids the imposition of liability without fault.²⁵ Finally, Article III(6) gives the recipients of cargo only a limited time to complain about damage after they take possession. Failure to complain immediately, in the case of apparent damage, or within three days, in all other cases, results in a legal presumption that the goods arrived in good condition. Shippers then have a year to sue.²⁶ As with Article IV(5), carriers remain free to contract for greater obligations than those imposed by the Hague Rules, but may not contract away those duties imposed by the Rules.²⁷

One could challenge my characterization of these provisions as pro-carrier. None may favor carriers as much as a legal regime that allows carriers an unrestricted right to contract out of most if not all liability. But by the end of the nineteenth century, freedom of contract with respect to sea carriage was waning and some form of industry regulation seemed inevitable. The limits on liability found in the Hague Rules seem at least as hospitable, and probably better, than those that carriers might have confronted had the international process not cut short national legislative developments.

Further evidence that the Hague Rules favor sea carriers comes from subsequent efforts by shippers to overturn the regime. At the initial suggestion of Chile, a country that relies heavily on

²² Hague Rules Art. IV(5). The Protocol to Amend the 1924 Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968 [hereinafter cited as Visby Rules], increased the monetary value of Article IV(5)'s limit. Many important jurisdictions, including the United Kingdom, Canada, South Africa, France and Belgium, apply the Visby Rules, but the United States still adheres to the unamended Hague Rules.

²³ Hague Rules Art. IV(5).

²⁴ Hague Rules Art. IV(2)(a). Carrier do have an obligation to exercise care in preparing the vessel for seaworthiness and in selecting their agents and servants, including the master. *Id.* Art. III(1).

²⁵ *Id.* Art. IV(2).

²⁶ *Id.* Art III(6). The Visby rules permits owners of damaged cargo to bring actions for indemnity after the one-year period has expired. Visby Rules Art. III(6*bis*).

²⁷ Hague Rules Arts. III(8), V.

exports but which does not have a substantial maritime industry, UNCITRAL in 1969 began to develop a new instrument to replace the existing regime. A working group approved a draft that, following their adoption by a diplomatic conference in 1978, became the Hamburg Rules.²⁸ In 1992 enough countries had joined this instrument for it to go into effect, but as a practical matter it has little significance. Participation remains limited to twenty-five countries distinguished by their lack of shipping industry and, for the most part, weak economies. The only members of the OECD to have adopted the Hamburg Rules are land-locked Austria, Czech Republic and Hungary.

The Hamburg Rules change or supplement several Hague Rules affecting carrier liability. Carriers lose their immunity for injuries caused by nautical fault, as well as the other Hague Rules Article IV(2) exemptions from liability, and must compensate shippers for losses attributable to delay in delivery, over and above damage to the cargo. The Hamburg Rules normally presume the carrier's fault, with the burden of proof on the carrier to show it did everything possible to prevent injury.²⁹ The carrier becomes liable for any injuries occurring while the goods remain in the carrier's charge, whether on board the vessel or not.³⁰ The cap on liability for damage to cargo has increased, with recoveries for delay counting against that cap.³¹ If the carrier subcontracts the carriage to another carrier for any part of the voyage, it will remain liable to the shipper for any resulting injuries unless its carriage contract specifies the subcontractor and guarantees the shipper a right to relief against that carrier.³² The shipper receives a longer statute of limitations for bringing its claims.³³ Finally, the Hamburg Rules, where they have taken effect, apply to a wider range of transactions than do the Hague Rules.³⁴

I do not mean to suggest that the Hamburg Rules represent an optimal allocation of risk between carriers and shippers, or that the Hague Rules necessarily have disserved international commerce. The point, rather, is that both instruments contain precise rules that purport to alter the preexisting legal order, and that in both cases these rules seem to serve one particular interest group. Different processes representing different forces produced these two instruments, making their apparent inconsistency more understandable. Carriers seemed to have won most of arguments about what should go into the Hague Rules, while shippers largely prevailed during the UNCITRAL process that produced the Hamburg Rules. In both cases, special interests got largely what they wanted.

What we have, then, are examples of international agreements that unify the private law of carriage by sea in a way that benefits a discrete and coherent industry. In each case one industry led the effort to create an international instrument, and its experts played a central role in the drafting

²⁸ Convention on the Carriage of Goods by Sea, Mar. 31, 1978, A/Conf.89/13, U.N.T.S., U.N. Doc. 1978 [hereinafter Hamburg Rules].

²⁹ *Id.* Art. 5. An exception exists for fire, on which case the shipper must prove the carrier's negligence contributed to its injuries.

³⁰ *Id.* Art. 4.

³¹ *Id.* Art. 6.

³² *Id.* Art. 10.

³³ *Id.* Art. 20.

³⁴ *Id.* Art. 2.

process. As predicted, the instrument takes the form of clear and precise rules that constrain future decisionmakers, and in substance the constraints favor the interested and involved industry.

What, then, should we make of the current legal regime for carriage of goods by sea? Adoption of the Hague Rules no doubt reduced legal risks, one of the principal objectives of unification projects, but at what cost? It seems unlikely that the Hague Rules substituted “good” law for bad rules, and from the perspective of passengers and shippers the reverse may have been true. Nor is it likely that they helped to build up a cadre of specialist intermediaries whose expertise in sea carriage law allowed them to act more broadly as brokers for the transportation industry. To the contrary, the Convention if anything seemed to strengthen the position of lawyers tied to the carriers relative to everyone else.

This assessment may seem too harsh. To identify the Hague Rules as special interest legislation is not necessarily to condemn it. Imposing the costs of accidents on passengers and shippers, rather than concentrating them on the carriers, may have helped in the development of new technologies. The net gains that passengers and carriers have derived from improvements in air service may have outweighed the burdens that the Hague Rules imposed on them. Perhaps no better way existed to deal with the problem.

But another story also suggests itself. Where government regulation limits entry into an industry, price competition among its members, and the prices charged consumers, the industry may turn to mandatory rules of contract as the only convenient means for extracting monopoly rents. By the time the Hague Rules appeared, such regulation existed at least in the United States and the United Kingdom, two of the leading maritime nations of the day. The carriers surely anticipated that within their government-maintained cartel, they could gouge consumers through shoddy service, but not by raising prices. The Hague Rules may have served to implement this strategy.

The broader point is not that the technocratic process necessarily produced bad legislation. Rather, it seems that the use of technical experts at the center of an international process resulted in a kind of legislation that we might expect from the most venal of domestic political bodies. The best we can say is that the international technocrats did not produce a law that is provably worse than what any other lawmaker might have enacted. This claim, however, falls far short of a ringing endorsement of the process.

2. Air Transport—The Warsaw Convention

Once the commercial possibilities of air transport became clear, carriers had to confront the consequences of breakdowns in service. Airplane accidents, when they occur, tend to result in greater damage to passengers and cargo than when ships, trains, or trucks encounter trouble. In the early years of the industry, the legal consequences of these accidents remained unclear. Was a carrier liable for all injuries caused by its activity because it engaged in an ultrahazardous activity? Did passengers and shippers proceed at their own risk when they contracted with an air carrier, given the obvious dangers? What would be the appropriate standard of care applicable to air carriers, if any?

Neither U.S. law nor that of the other major industrial countries offered clear answers to these questions back in the 1920s, when the industry first emerged.

These problems were exacerbated by the uneven spread of aviation technology around the world. The industry reasonably could anticipate that for some period of time firms based in only a handful of countries would carry out most commercial air transport, but that their services would extend to a large portion of the globe. As a result, for a substantial number of potential destinations there existed the risk of a pro-shipper bias that, in ways not easy to anticipate, might result in anti-carrier laws.

With the recent experience of the maritime shipping industry before them, air carriers also could anticipate significant government involvement in their prices and other terms of business. In many countries, and particularly in the United States, government contracts to carry mail provided the principal source of revenues for the nascent airlines. Along with these contracts came government control over entry into the industry, revenues, and other aspects of doing business. Full-blown regulation did not come until later, but the shape of the future seemed apparent.³⁵

As early as 1922, various groups representing the air carrier industry, including the Air Transport Committee of the International Chamber of Commerce, began lobbying for an international effort to confront these issues. The French government convened a diplomatic conference in 1925, with 44 states represented and another three, including the United States, present through official observers. That conference created an International Technical Committee of Aerial Legal Experts, which in 1926 began work on the text that, following its 1929 approval at another diplomatic conference, became the Warsaw Convention. The United States acceded to the Convention in 1934, the same year that it created the regulatory structure for the industry that largely survives to this day.³⁶

The parallels between this process and that which produced the Hague Rules seem remarkable. A private industry formed a group of technical experts and found a convenient host government to sponsor an international conference. The expert group outlasted the conference and became the principal forum for international discussions of legal aspects of air carriage, much as the CMI has carried out that role for sea transport. The participants in the 1925 conference created a special institution for the unification of commercial air law, the International Technical Committee. This industry-dominated group, which continued to work until its absorption by the International Civil Aviation Organization in 1946, operated as a standing working group unattached to any permanent institution. It instead served at the call of any international conference that might be convened to address subjects within its competence.

As with the CMI and the Hague Conference, the International Technical Committee and the Paris Conference did not take on the character of a public legislature. They also had few opportunities for logrolling and remained largely free of political agency, and enjoyed an information advantage relative

³⁵ See ANDREAS F. LOWENFELD, *AVIATION LAW 1-2* (1972); PAUL S. DEMPSEY & WILLIAM E. THOMS, *LAW AND ECONOMIC REGULATION IN TRANSPORTATION 26-27* (1986)

³⁶ *Id.*

to the bodies to which they reported. That the Committee remained active long after the adoption of the Warsaw Convention, and throughout a period of unprecedented international economic and political disruption, says something about the strength of its members' commitment to further changes in the international legal environment. That the countries interested in international aviation adopted no other unification instruments after 1929 also indicates that the Committee's preference for new law was greater than that of the broader aviation community.

The Warsaw Convention contains a number of clear-cut rules that give courts and other decisionmakers little room to maneuver. Particularly striking are its strict monetary limits on the carrier's liability for injury to passengers and cargo. Article 22(1) of the Convention sets a cap of 125,000 French francs, valued in terms of gold pursuant to the formula found in Article 22(4), for injuries to a passenger, and 250 francs a kilogram for cargo.³⁷ These limits do not apply in cases where the carrier's "willful misconduct" causes injury.³⁸ Carriers may not propose lower limits but may negotiate higher ones.³⁹ As with the Hague Rule's similar provisions, these Articles at a minimum allowed carriers to unbundle insurance from shipping, and probably enabled them to procure additional income from their customers. We similarly in no position to prove that this outcome necessarily departed from efficiency, because it allowed carriers to concentrate on their core business and to let others deal with the challenge of predicting accident rates during their industry's developmental period.⁴⁰ But, in the presence of governmental regulation, we also can regard Article 22 as consistent with the indirect extraction of monopoly rents by an industry that enjoyed unusual protection from competition.

Other Convention provisions seem both clear and pro-carrier. For example, Article 26(2) give shippers of hand luggage three days, and other shippers seven days, to complain about damage to goods after taking possession of them from the carrier.⁴¹ Failure to notify the carrier within those time periods results in a forfeiture of all rights to compensation.

The provisions defining the scope of the Convention also indicate a commitment to precision. All flights that, "according to the contract made between the parties" (*i.e.*, the face of the ticket)

³⁷ Warsaw Convention Art. 22. The 1955 Hague Protocol to the Convention doubled the limit for personal injuries. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, September 28, 1955, Art. XI. The 1966 Montreal Agreement, which applies only to flights that have connecting points in the United States, further raised the personal injury limit to \$ 75,000. U.S. courts, perhaps in recognition of the pro-carrier premises underlying these provisions, have enforced these limits rigorously. *See, e.g.*, *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984) (U.S. court will convert Article 22 limits into dollars using the gold value of dollars at the time of the Convention's adoption).

³⁸ Warsaw Convention Art. 25.

³⁹ *Id.* Art. 23.

⁴⁰ The recent efforts of international air carriers to relax these limits indicates that the freedom to unbundle insurance from carriage serves means less to a mature industry with stable and predictable accident rates. Finnair now publicizes the fact that it will accept unlimited liability for personal injuries. Perhaps to thwart competition over this service and to make it easier for airlines to pass on the cost of coverage to their passengers, the Legal Committee of the ICAO in 1997 recommended a major overhaul of Article 22's personal liability cap. Under its proposal, no absolute limit would exist for carrier liability, although states could award only \$150,000 per person without a determination of fault.

⁴¹ Warsaw Convention Art. 26(2).

begin in one party to the convention and has its destination in another, regardless of stopping points, come under the Convention. All flights that have a beginning and destination in a single party's territory and that have "an agreed stopping place" in some other country, whether a party to the Convention or not, also come within its provisions. The Convention does not apply to any other flights.⁴² The Convention's limits on liability for personal injuries applies to any harm suffered while embarking or disembarking from such flights or while on board, even if the plane never takes off.⁴³ None of the terms on which application of these provisions depends leaves much room for interpretation.

One might object that the Warsaw Convention represents a particularly unfair example of unification legislation because it involved a completely novel technology, and thus an untested environment for the application of preexisting legal principles. There was no status quo to defend or reform, because no one had a clear idea of what rules applied to this new industry. Under these circumstances, industry insiders had a clear informational advantage that they could exploit during the lawmaking process. But once a legal system matures along with the industry it governs, perhaps possibilities for reform will emerge.

But this argument fails, both as a historically complete account and as an effort to interpret the context of the late twentieth century. Maritime shipping did not involve radically new technologies, yet the international regime for that industry became the template for the Warsaw Convention. And in broader terms, law has played a game of catch up with new and economically significant technologies since the onset of the industrial revolution at the end of the eighteenth century. The challenge of adopting old rules and institutions to new business patterns seems even greater today. Computerization and improved telecommunications means that a wide range of traditional commercial law systems must adapt to a new world of paperless transactions and more sophisticated information processing. Thus we cannot exempt the Convention without providing a ready excuse for the inadequacies of almost all unification efforts.

3. International Sales Law—CISG

In a world economy dominated by trade in primary and manufactured products, the contract for the sale of goods serves as a fundamental unit of legal status. It facilitates exchange, permits shifts in risks tied to future events, and specifies the collateral obligations that follow from a change in ownership of goods. Transparency and uniformity of the rules governing these contracts have obvious appeal. Parties can control legal risk by making their legal rights and obligations independent of their business locations or the places where their goods wend their way in the course of exchange. In addition, the law of international sales contracts might promote other social goals, such as economic development or redistribution of wealth to victims of past first-world exploitation. Finally, unification of the law of international sales can strengthen bonds among lawyers in different countries who specialize in import and export transactions.

⁴² *Id.* Art. 1(2).

⁴³ *Id.* Arts. 17, 22.

Other, less benign ends also might prompt unification in this area. Nations that mostly consume primary products and sell finished goods (in other words, the first world) might want to confront developing countries with a set of rules that discourages redistribution or independence from the global economy. Specialists in international trade might want to maximize the value of their services by promoting a legal regime that requires their participation for the consummation of the most ordinary transaction. Experts in contract law might regard the international lawmaking process as an end in itself, leading to travel, research opportunities, and the stature that comes with a personal link to an international instrument.

For whatever reasons, the effort to produce a unified set of rules for international contracts began in the 1920s, not long after the start of the process that led to the Warsaw Convention and Hague Rules. UNIDROIT began work on a draft treaty in 1930 but, distracted by the Great Depression and World War II, achieved nothing until the 1960s. A diplomatic conference convened in 1964 to consider UNIDROIT's efforts adopted a convention on the formation of international sales contracts and another on the content of such contracts, but the newly decolonized and developing states roundly declared these instruments unacceptable. Seeking to keep the process alive, the promoters of unification shifted its venue to UNCITRAL. This proved a wise choice.⁴⁴

The Convention on the International Sale of Goods (CISG) became the most widely adopted and influential of UNCITRAL projects. Following another decade of deliberation, a Working Group published a draft in 1978, and UNCITRAL convened a conference to adopt a final version in 1980. It went into force for the first eleven signatories, including the United States, in 1988. As of May 1998, fifty-six countries, including most major trading nations other than Japan or the United Kingdom, had adopted the CISG.

The CISG epitomizes a unification agreement for which legal academics played the dominant role in shaping the agenda and content of the instrument. At the 1980 conference, a law professor presided. Many of the most important delegations, including that of the United States, had academics at their head or as members. No particular industry or interest group had an obviously distinct stake in the outcome of the negotiations. Most business both buy and sell goods, making them largely indifferent among rules that favor buyers or sellers. And the Convention does not single out niche activities where a particular group would care about the applicable rules.

The CISG contains few if any provisions that would annoy any particular interest group. Its rules do not transparently promote exploitation of primary product exporters, although in the most general sense the CISG does bolster and sustain a capitalist trading system based on (perhaps false) assumptions about arms-length exchange. Nor does it encourage redistribution or restitution for past

⁴⁴ See generally John O. Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 201 (1979); John A. Spanogle, *The Arrival of International Private Law*, 25 GEO. WASH. J. INT'L L. & ECON. 477 (1991). The two instruments generated by the UNIDROIT process, the Convention Relating to a Uniform Law on the International Sale of Goods, 834 U.N.T.S. 107 (1972), and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 834 U.N.T.S. 169 (1972), did go into effect but only with respect to a handful of states.

imperialist abuses. None of its rules, for example, expressly addresses the question of whether the law should modify contracts in light of any inequalities between the parties.

What the CISG contains are a great many rules of a sort that allow virtually unbounded discretion to the decisionmaker who must apply them. The very extent of the convention, as well as the rules applicable to contracts within its coverage, remains sufficiently unclear to allow decisionmakers to make almost any choice they wish. Moreover, even when the language of the CISG follows that of preexisting rules, such as those of Article 2 of the UCC, it effectively displaces the clarifying glosses that national courts have given to domestic law.

Consider, for example, a U.S. corporation that buys textiles from a Russian manufacturer. If the U.S. purchaser has a representative office in Russia that places orders, does the CISG apply? Article 1(1)(a) states that the Convention governs contracts “between parties whose places of business are in different states,” each of which has joined the Convention.⁴⁵ Russia and the United States each belong, but do the parties have places of business in separate countries? Article 10(a) states that if a party has more than one place of business, that “which has the closest relationship to the contract and its performance” is the one that counts.⁴⁶ Does this mean that, because the U.S. company uses a Russian representative office, both parties have a Russian place of business, in which case the Convention does not apply? Nowhere in the CISG do we find a definition of a place of business, except in the negative sense that, according to Article 1(3), “the civil or commercial character of the parties . . . is [not] to be taken into consideration in determining the application of this Convention.”⁴⁷

Suppose a U.S. company sells a Russian firm the equipment for manufacturing compact disks, and the sales contract contains an obligation to train the Russian personnel, customize the equipment to meet the customer’s requirements, and a three-year commitment both to repair the equipment and to modify it in light of technological changes. Would this be a contract for the sale of goods or for services? Article 3(2) states that the Convention “does not apply to contracts in which the preponderant part” of the seller’s obligation consists of services.⁴⁸ How do we determine what is preponderant? Do we consider, for example, potential costs of future services, or the period over which they must be rendered?

Suppose instead a U.S. company contracts with a Russian firm to purchase photocopiers assembled in Russia. The purchaser contracts with another Russian firm for the toner cartridges, which it then supplies to the Russian photocopier assembler. Article 3(1) states that the Convention does not apply if the purchaser supplies “a substantial part” of the materials necessary for producing the purchased good.⁴⁹ Does the purchaser supply the cartridges when it buys them from one Russian

⁴⁵ CISG Art. 1(1)(a).

⁴⁶ *Id.* Art. 10(a).

⁴⁷ *Id.* Art. 1(3). See also Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 274-81 (1984).

⁴⁸ CISG Art. 3(2).

⁴⁹ *Id.* Art. 3(2).

firm and then sells them to the producer for installation in the finished product, and, if so, are the cartridges a substantial part of the finished product?

A further source of indeterminacy involves the distinction made in Article 4(a) between, on the one hand, issues of contract formation and rights and obligations arising from a contract and, on the other hand, questions involving the validity of contractual provisions. According to Article 4(a), the CISG has no bearing on validity issues, which local law must resolve.⁵⁰ But what distinguishes the effectiveness of a contractual provision from its validity? If national law, for example, requires sales prices to be stated in local currency and a contract covered by the Convention refers only to U.S. dollars, does local law invalidate the agreement or may we consider this an acceptable formulaic price provision under the Convention?

A final issue of coverage involves the right of parties under Article 6 to exclude the application of the Convention altogether or on a provision-by-provision basis.⁵¹ The CISG nowhere indicates what process the parties must undertake to achieve such an exclusion. Does adoption of a manifestly inconsistent provision do the trick, or must the contract refer to the CISG to disavow it? What about the case where one party supplies a form (say a purchase order) saying the CISG does not apply, and the other party's form (say an invoice) does not address the issue?

None of these problems about the uncertain scope of the CISG would matter so much if parties could freely opt into the Convention. But the CISG does not purport to obligate its signatory states to permit parties to noninternational transactions to choose to apply CISG rules. What we have instead is a world where parties who wish to come under the CISG face considerable uncertainty as to whether they do and in any event have no power to guarantee that the Convention will apply, and where parties who wish to avoid the CISG have no guidance as to what they must do to get out from under it.

Also consider how the CISG deals with problems of determining what commitments an otherwise valid contract contains. Suppose a seller and buyer send purchase orders and invoices that purport to specify the terms of the agreement, that these forms differ significantly in their content, and that the seller ships, and the buyer takes possession of the goods without either advertent to the conflict between their forms. Article 19 of the CISG follows almost verbatim Article 2-206 of the UCC, which offers one much-criticized solution to this dilemma.⁵² The UCC, however, deals both with cases where the discrepancy between the conflicting forms is significant and where it is not, and provides rules in both situations to determine which terms apply. Article 19, by contrast, is silent as to what happens if the offeree (such as a seller dispatching an invoice in response to an earlier purchase order) proposes materially different terms.

⁵⁰ *Id.* Art. 4(a).

⁵¹ *Id.* Art. 6.

⁵² Compare *id.* Art. 19 with UNIFORM COMMERCIAL CODE § 2-207. See generally Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217 (1982).

Another problem that the UCC resolves but that the CISG does not involves open quantity and price terms. Article 14(2) states that an offer must “make provision for determining the quantity and the price,” but does not indicate whether leaving quantity open for the buyer (“requirements”) or seller (“output”) or price to be agreed at a later date is a permitted practice.⁵³ Article 55, which states that the parties who fail to state a price will pay the generally prevailing price at the time of performance, does not help in cases where the parties want to leave the matter for future negotiations.⁵⁴

Finally, consider a fairly straightforward problem, namely the time of delivery in cases where the parties do not advert to the issue. Both the UCC and the CISG state that in the absence of an express agreement, a course of dealing between the parties, or a customary industry practice, the seller must deliver the goods within a “reasonable” time.⁵⁵ One might argue that where the CISG duplicates the language of national law, it neither adds nor subtracts from legal stability and risk management. But if national law contains a body of practice and authority that refines the meaning of “reasonable” and gives the term some precision, decisionmakers must wrestle with the choice between using local law to interpret the CISG and following CISG Article 7(1) admonition’s to promote “uniformity” among national interpretations.⁵⁶

In all these examples, the CISG enhances, or at least does not restrict, the autonomy of those persons who must apply the Convention in subsequent disputes over international sales contracts. The decisionmaker often can choose to apply the CISG or not, given the ambiguities in the Convention’s coverage. Where it does choose to follow the Convention, the decisionmaker may select among a wide range of possible solutions to particular problems. This autonomy comes at the cost of predictability and hence increases the legal risk associated with a contract.

Suppose, for example, that before adoption of the CISG the law of country A clearly permitted requirements contracts, and the law of country B clearly regarded them as unenforceable. Legal risk would exist to the extent that either country might gain jurisdiction over a dispute. But once that issue were confronted, perhaps with a (possibly valid) choice-of-law or -forum clause, a course of conduct that avoided any contact with either country A or country B, or by fatalistically accepting the possibility that the contract might fail, the parties would have covered all bases. Now suppose both countries entered into the Convention. The parties would have to worry whether a court would apply the Convention to their agreement, if so whether a court would enforce their requirements contract under the Convention, and if not whether the local law of country A or B would apply. Adding the CISG increases legal risk.

This augmented legal risk might be desirable, of course, if it enhanced party flexibility or gave greater sway for variances in risk preferences among potential parties. But this does not seem likely.

⁵³ CISG Art. 14(2).

⁵⁴ *Id.* Art. 55. See also Arthur Rosett, note 47 *supra*, at 288-89.

⁵⁵ Compare CISG Art. 33(c) with UNIFORM COMMERCIAL CODE § 2-.

⁵⁶ See CISG Art. 7(1). For a more general critique of the CISG’s interpretative rules, see Arthur Rosett, note 47 *supra*, at 286-88. For a defense of these rules, see Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998).

The kinds of questions that the CISG leaves open or reopens seem unrelated to the kinds of issues that parties might want to leave unsettled. The most one can argue is that the existence of CISG might help in cases of fierce national hostility where parties would refuse to contract altogether unless they could avoid submitting to the other's laws. In such cases, the Convention might a way out, albeit at the cost of considerable legal indeterminacy.

If the CISG has an overall effect of increasing legal risk and does not seem to advance any other substantive social goal, what must remain in the way of potential benefits involves the creation of a class of CISG specialists who will promote international sales through their mediation and involvement in these transactions. Since the Convention has been in force only for ten years, it may be premature to ask whether it has produced such a cadre, and if so whether their existence promotes international sales in spite of legal indeterminacy. But some skepticism seems in order.

Before the adoption of the CISG, we had specialists in comparative law and international commercial arbitration, both of which may add value to transactions. The CISG may diminish, but does not destroy either area of expertise. Whatever the reasons prompting the United Kingdom, the country with the oldest and richest body of case law governing international sales transactions (and a specialist court in London set up to apply it) and Japan, with perhaps the most distinct (and least transparent) body of applicable law, to hold out from the CISG system, the continuing incompleteness of the system will mean that the need to master commercial arbitration and comparative law will remain with us for some time. Why we also need CISG specialists then becomes unclear.

How, then, should we assess the CISG? We have good reason to suspect that the good things it does, especially in providing a way around nationalist preferences in contract law, do not explain why so many states have adopted it. The costs from increased legal risk seem more than sufficient to offset the desirable aspects of the Convention. One then must speculate what other, less general benefits flow from its adoption. Given that the CISG seems to produce no particular return to discrete groups, other than to legal specialists involved in its development, we must suspect that the Convention may exist primarily because those involved in its production, especially in the Working Group, preferred an agreement that offended no one to no instrument at all.

This claim, if true, does not impeach the motives of those who worked on the CISG or suggest that unification projects of the type it represents necessarily harm the world economy. Rather, one comes away with the sense that the Convention inflicts no great injuries, but also seems a somewhat hollow accomplishment. Perhaps the process that produced it may serve as a model for serious and sustained international cooperation in other, more difficult areas, and perhaps those who took part came away with intellectual insights that they then could employ to the benefit of local contract law. But it seems hard to shake off a sense that the game hardly seems worth the candle, at least if one wishes substantially to improve the legal environment for international transactions. There must be a better way of doing this.

4. International Bank Credits—UCP

In any international sale where carriage of the goods will take some time, the buyer and seller face a dilemma with respect to payment. The buyer can pay in advance and risk never getting the goods; the seller can wait until the buyer receives the goods to obtain payment and risk never seeing the money. Either party accepting such a risk will seek a price adjustment, thereby detracting from the value of the exchange. Parties that contract with each other on an ongoing basis do not have as great a problem, but many international sales involves parties who deal with each others as strangers.

An institution that ameliorates the dilemma is the letter of credit, which commits a third-party issuer to make payment to the beneficiary (the seller) against the account of the bank's customer (the buyer) upon the receipt of documents indicating that the seller has performed its obligations. The solution is not perfect. The documents (normally a bill of lading provided by the carrier) do not guarantee that the seller has fully performed. Nonetheless, the credit device goes a long way toward bridging the gap between the buyer' and seller's needs. While precise figures remain unattainable, observers have estimated that letters of credit figure in international sales transactions worth \$ ___ billion annually.

Banks wish to minimize the extent of their obligations under a credit and their liability for mistakes made while performing such obligations as they have. Clear rules that set precise boundaries on their duties and liability suit their interests. The customer and the beneficiary would prefer that the bank show some flexibility and that it assume responsibility for injuries caused by its negligence. As compared to banks, they probably prefer somewhat more open-ended contractual terms. They then could fall back on judicial outrage in cases where banks mishandle the transaction in a way that causes them serious injury.

National letter-of-credit law has tended to wobble a bit on these issues in spite of the considerable say banks have had in drafting the legislation on which credits rest. Some jurisdictions in the United States seem to have moved toward a regime that holds a bank liable for consequential injuries to customers in cases where they negligently perform their tasks, but this trend has not yet clearly manifested itself in letter-of-credit law. At the international level, not all countries have a substantial financial industry, and those that do not may either lack rules clarifying the parties' rights and duties under a credit or discriminate against issuers.

Since 1930, the International Chamber of Commerce has responded to these potential problems in domestic letter-of-credit law by issuing the Uniform Customs and Practice for Documentary Credits. This publication provides a detailed description of the rights and duties of the issuing bank, which credits may incorporate by reference. Because banks typically draft the credit documents, most international letters stipulate that the UCP applies. National courts in turn tend to respect these contractual terms. New York, an international financial center where banks have particular influence, has gone so far as to authorize by statute the wholesale substitution of the UCP for the statutory rules normally applicable to letters of credit.⁵⁷

⁵⁷ See N.Y. U.C.C. § 5-102(4).

The ICC committees responsible for drafting the UCP have represented only one group involved in letter-of-credit transactions, namely the banks. Until the latest revision, completed in 1993, the committee never had incorporated lawyers from outside the industry. Even in the latest iteration, the additional participants included only academics, not representatives of other interest groups.⁵⁸ Not surprisingly, the UCP seem largely to contain precise rules that benefit banks. They do not invite judicial innovation to compensate customers or beneficiaries injured by careless or overly formalistic conduct on the part of banks.

The provisions that favor banks fall into two categories. The first provide sweeping immunity from liabilities that national legal systems otherwise might impose. For example, Article 14(c) gives the bank sole discretion as to whether to approach the customer to obtain a waiver of discrepancies in documents presented on behalf of the beneficiary.⁵⁹ Article 15 relieves banks of liability for the “form, sufficiency, accuracy, genuineness, falsification or legal effect” of the documents accepted against payment, and for the bad faith, acts or omissions of “the consignors, the carriers, the forwarders, the consignees or the insurers of the goods, or any other person whomsoever.”⁶⁰ Article 16 relieves the banks of responsibility for delays or mistransmission of any message, including telecommunications, and permits banks to transmit documents without translating them.⁶¹ And Article 17 absolves banks of responsibility for any untoward consequences arising from their use of other banks “for the purpose of giving effect to the instructions of the [customer].”⁶²

Some of these waivers leave some issues for future decisionmakers to resolve. Does the exemption from liability apply to intentional or knowing misconduct, or does the reasonable care standard of Article 13(a) govern a bank’s conduct?⁶³ In particular, does a bank that accepts a document after receiving extrinsic information indicating its fraudulent nature violate its duty under Article 13(a), or may it rely on the same provision’s statement relieving it of any obligation to examine anything other than the documents stipulated in the credit?⁶⁴ Under what circumstances is the use of another bank “for the purpose of giving effect” to the customer’s instructions?

But the drift is clear enough. Banks have the right to make payment against documents or not, and bear little if any liability for the harmful consequences of mistaken acceptance or rejection. To the extent possible, the UCP tries to do away with bank liability for wrongful payment or nonpayment. What indeterminacy remains involves only the extent of this ambition, not its direction or fundamental achievement.

⁵⁸ Ross P. Buckley, *The 1993 Revision of the Uniform Customs and Practice for Documentary Credits*, 28 GEO. WASH. J. INT’L L. & ECON. 265, 267 (1995).

⁵⁹ UCP Art. 14(c).

⁶⁰ *Id.* Art. 15.

⁶¹ *Id.* Art. 16.

⁶² *Id.* Art. 17.

⁶³ *See id.* Art. 13(a): “Banks must examine all documents stipulated in the Credit with reasonable care”

⁶⁴ *See id.*: “Documents not stipulated in the Credit will not be examined by banks.” Can “documents” be read to embrace all extrinsic information?

The second category of pro-bank provisions contains rules that set precise boundaries on what the banks must do.⁶⁵ The bank pays only against the delivery of documents, and the customer may not specify a nondocumentary condition.⁶⁶ Presentation of the documents will trigger the bank's obligation to pay only if made to that bank or its nominee, even if the issuing bank acts as a confirming bank for another issuer.⁶⁷ Time limits for examination of the documents are fixed, rather than left to an open-ended reasonableness standard.⁶⁸ Each of these rules diminishes uncertainty about the bank's responsibility and provides clear guidance to bank employees.

Identifying pro-bank rules within the UCP and noting the influence of banks over their drafting does not establish that the UCP have the purpose or effect of gaining economic rents for the banks. It may be that the UCP achieve an ideal allocation of risk and responsibility, and that burdening banks with additional obligations would dissipate the benefits of industry standardization by assigning obligations to the party that generally cannot perform them most efficiently. But a basis for reasonable suspicion exists. Banks presumably engage in credit transactions more often than most customers or beneficiaries, and this greater experience might enable them better to detect indicators of faulty transactions. Imposing a higher duty on banks to inquire into the validity of documents, coupled with substantial liability for failure to honor this duty, might encourage banks to undertake a function that they might perform efficiently. At a minimum, leaving greater indeterminacy in the law might give courts greater flexibility to respond to egregious cases of bank misbehavior.

Of course, if banks really could produce welfare gains by policing credit documents more thoroughly, why don't they do so and capture some of those gains as profit? Two arguments, each suggestive but not overwhelming persuasive, might explain their lack of ambition. First, banks traditionally have enjoyed a certain amount of protection from competition, and bank executives might exploit this position to prefer more leisure and less risk. Second, the benefits derived from standardization of contractual terms might be so great as to make departures costly even in those cases where a modification might produce some welfare gains. It is at least plausible that leisure-seeking bank officials might have enough clout in the formulation of the UCP to impose their preferences on the group, and that the cost of departing from the UCP remains too great to justify pursuit of the benefits that defecting banks might realize.

All this is speculative. What seems clear enough is that the international standard for bank-issued documentary credits seems to favor banks, that banks had the dominant role in drafting the standard, and that the clear gains in legal certainty achieved by the standard come with unwanted baggage of potentially redistributive outcomes. As with the Warsaw Convention and the Hague Rules, we must worry about the costs of legal risk reductions and the seeming inevitability of interest group influence over clear and specific international rules.

5. UNCITRAL Model Law on Cross-Border Insolvency

⁶⁵ Here I draw on my prior analysis of the UCP. See Paul B. Stephan, note 15 *supra*, at 715-16.

⁶⁶ *Id.* Art. 13(c).

⁶⁷ *Id.* Art. 9(b).

⁶⁸ To be precise, article 13(b) gives the issuing bank "a reasonable time, not to exceed seven banking days following the receipt of the documents," to reject nonconforming documents.

In the last six years UNCITRAL has adopted four model laws dealing various aspects of international commercial relations. UNCITRAL does not intend for these instruments to enter *verbatim* into the law of adopting countries, as its conventions do. Rather, they serve as a list of recommendations for domestic legislation, more of a wish list than a mandate.⁶⁹ This burst of activity, all occurring since the end of the Cold War, deserves more general treatment. I will concentrate, however, on the most recent UNCITRAL proposal, the Model Law on Cross-Border Insolvency.

The last decade has witnessed a number of spectacular international bankruptcies, including that of the Bank of Commerce and Credit International, the Maxwell publishing empire, and the Reichman family real estate business. Much distinguishes these and other, less publicized international business failures, but they do share several common elements. Each business had assets and creditors in multiple jurisdictions, and the proportions between assets and credits varied significantly among jurisdictions. Some countries controlled significant assets, against which its citizens possessed relatively few claims, while other states had many creditors but few assets. In no case did a single court obtain control over the global resources of the debtor. While these cases have not all reached their conclusion, it appears typical for one state to release assets to other jurisdictions only after looking after the interests of its resident creditors. As a result, creditors' recoveries have varied substantially among jurisdictions.

Over the last twenty years we have become used to looking at bankruptcy rules primarily as *ex ante* bargains that, the law assumes, debtors and creditors would want to negotiate in advance of any financial distress to maximize the value of their investments. Seen from this perspective, it seems implausible that an international firm and its creditors would want a state-by-state, as opposed to global, determination of creditors' rights. Allowing the debtor to impair or enhance any creditor's rights simply by moving assets across borders creates insecurity. When dealing with international businesses, creditors should respond to this problem by demanding either credible covenants or a higher rate of return as compensation for absorbing this risk. Debtors in turn should regret either having to reduce their freedom of action, which might result in missed business opportunities, or paying more for capital.

Ideally firms and their creditors might negotiate their way out of this dilemma by committing themselves to a global bankruptcy regime, under which creditors could convene to claim against the debtor's worldwide assets. But in a world of national bankruptcy systems, no one state has a reason to defer to any other. We have, in other words, a classic collective action problem. Were states able to commit themselves to some mechanism for coordinating their approaches to international bankruptcy, we should expect substantial welfare gains.⁷⁰

⁶⁹ *Cf.* United Nations Commission on International Trade Law, Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, A/CN.9/442, ¶ 12 (1997).

⁷⁰ *See* Paul B. Stephan, Don Wallace Jr., & Julie A. Roin, INTERNATIONAL BUSINESS AND ECONOMICS—LAW AND POLICY 369-83 (2d Ed. 1996). For a recent paper developing this point at greater length, see Lucian Arye Bebchuck & Andrew T. Guzman, An Economic Analysis of Transnational Bankruptcies (Working Paper July 1998).

Does the UNCITRAL Model Law realize this potential by creating a credible mechanism for enforcing bankruptcy regimes on a global basis? One comes away from the legislation more with a sense of missed opportunities and frustration. The statute largely expands the range of action of bankruptcy courts without imposing substantial obligations that those bodies must honor. The result is a regime that, if implemented, would decrease the predictability of outcomes in international bankruptcies without achieving any clear improvements in the legal regime.

At the heart of the Model Law is a procedure that, in theory, allows one jurisdiction to take control over a debtor's global assets and obligations. The Model Law attaches legal significance to the place where an insolvent business has "the center of its main interests" (a term taken from the EU Convention on Insolvency Proceedings) or an "establishment."⁷¹ In either case, the Law requires a state to "recognize" an insolvency proceeding under way in either place absent the applicability of a narrow public policy exception.⁷² Upon recognizing such a proceeding, a court normally must stay all local claims against the debtor's assets and suspend the debtor's right to dispose of its property.⁷³ But at this point the mandatory obligations of the local proceeding end, and discretion takes over. The local court may transfer assets to the foreign jurisdiction or give effect to determinations made by that tribunal, but it does not have to do either.⁷⁴ In particular, the local court retains full discretion to determine the priority of local claims against local assets, and, where national law permits, to discriminate against foreign claimants.⁷⁵

Were a substantial number of states to enact the Model Law, creditors would face greater uncertainty about their rights in a bankruptcy proceeding than they currently do. Under the status quo, creditors understand that their eventual payoff turns to a large extent on where assets happen to end up when a debtor becomes insolvent. Through covenants, they can protect themselves to some extent against cross-border transfers that might impair their claims. But under the Model Law, location of the assets no longer has the same clear significance. Local courts might still favor local claimants, but they also remain free to defer to foreign tribunals. No precise standards govern which choice they must make. Rather than solving the coordination problem that exists under current law, the Model Law makes it worse.

If the Model Law regime has the potential to increase, rather than lower, the cost of capital to firms operating internationally, why has UNCITRAL advanced this legislation? The official commentary notes that bankruptcy practitioners, both in the private bar and the judiciary, had an important role in developing the Law, both during the drafting process and through an international meeting held to review the Working Group's draft.⁷⁶ The expansion of discretionary authority of bankruptcy tribunals doubtlessly appealed to this group. Judges would have more power, thereby enhancing the prestige and satisfaction of their work. Lawyers who specialized in the field could charge more for their skills as a result of the more challenging legal environment.

⁷¹ UNCITRAL Model Law on Cross-Border Insolvency, A/52/17/Annex 1, Arts. 2(b), 2(c).

⁷² *Id.* Arts. 6, 17.

⁷³ *Id.* Art. 20.

⁷⁴ *Id.* Arts. 19, 21.

⁷⁵ *Id.* Art. 13(2).

⁷⁶ United Nations Commission on International Trade Law, note 69 *supra*, at ¶¶ 4-7.

I do not mean to suggest anything so sinister as naked self-aggrandizement by an interest group. Rather, we understandably should expect skilled professionals to value their talents and to believe in good faith that the world would be a better place if society relied on them even more. The Model Law seems to reflect this conviction, unchecked by the concerns of those who might have to pick up the tab for their work.

Of course, enhancing the position of bankruptcy professionals might push this group into the position of an international intermediary. As they invest in their reputations through repeated dealings with one another, the bankruptcy lawyers might develop unstated but clearly understood norms for dividing an international bankrupt's estate that could function as effectively as a transparent and precise set of legislatively mandated rules. The professionals might have persuaded the drafters to give them greater discretion not to increase their incomes, but rather because a middleman group might provide a better solution to the coordination problems inherent in international bankruptcy than would an explicitly global system of administering bankrupt estates.

The problem is that nothing in the model law rewards bankruptcy professionals specifically for facilitating successful global settlements. The broad discretionary powers enjoyed by national tribunals might work either to promote international cooperation or to tear away at local assets for the benefit of local creditors. Most successful middleman systems, by contrast, reward the intermediary for promoting welfare-enhancing outcomes. The Model Law does not do this.

III. ALTERNATIVES TO THE UNIFICATION PROJECT: CONTRACT AND COMPETITION

The project of unifying substantive international commercial law necessarily depends on a technocratic legal process. I have raised at least a reasonable suspicion that this process has its own political economy with predictable and unattractive implications for what it produces. International unification instruments display a strong tendency either to compromise legal certainty or to advance the agendas of interest groups. In either case they offer no obvious welfare gains as compared to rules produced through the national legislative process. In particular, we have no reason to expect these instruments to achieve substantial improvements in the law, if we may disregard what the interest groups get out of their adoption. Nor can we detect evidence that these instruments bolster cadres of middlemen whose investments in reputation, group coherence and discipline will substitute for clear and desirable legal rules. And what reduction of legal risk the instruments achieve comes mostly, if not entirely, through conceding the field to specific interest groups, whether carriers, bankers, or other cohesive minorities.

In addition, my critique of technocratic lawmaking necessarily implies that we cannot correct these tendencies by redirecting the focus of the unification project. If the drafting of substantive laws results in either compromised and largely empty content or clear-cut victories for special interests, we should not expect international efforts aimed at reforming adjectival law—*e.g.*, a harmonized system of choice of law—to do any better. The problems we have observed reflect the nature of the process itself, not its agenda. No matter what the task of technocratic reformers, we must expect interest groups to have the capacity either to thwart rules that they find threatening or to capture the process for their own purposes.

If technocratic law reform does not work especially well, does it follow that we should not try to improve international commercial law? I think not. Developments in U.S. law (and perhaps in other jurisdictions about which I know less) point toward another path, one that largely bypasses international bodies, the professariat and legislatures. Increasingly, U.S. law has allowed national legal systems to compete among themselves as to the terms they will offer commercial actors, and business people to choose among the competitors. Those concerned with improving the law to facilitate international commercial transactions should applaud this tendency and seek ways to extend it.⁷⁷

Imagine a world where persons engaged in international commerce had virtually unlimited power to choose by agreement which law would apply to disputes arising out of their relationship, including claims based on tort as well as contract and property law. Individual nations would remain free to develop their substantive law, including the adoption of rules that advance the redistributive goals of particular groups, but would have limited authority to prevent persons subject to their jurisdiction from contracting out of such rules. States thus could compete for legal business on the basis of the attractiveness of their rules and dispute resolution procedures, rather than coerce their subjects to follow any one system of commercial law.

Four Supreme Court cases decided in the last few decades, echoed and extended by a number of lower court decisions, have taken the United States toward such a system. The first, *The Bremen v. Zapata Off-Shore Co.*,⁷⁸ enforced a provision in a towing contract between a German carrier and a U.S. towee that required all disputes to be heard before an English court. The contract contained a clause exculpating the carrier for damages to the towed object, which English courts would enforce and U.S. courts would not. The Court refused to hold that the forum clause violated U.S. public policy even though it amounted to a choice of materially different liability law. A decade later *Mitsubishi Motors v. Soler Chrysler-Plymouth*⁷⁹ held that a clause requiring a U.S. car dealer to arbitrate in Japan all its disputes with a Japanese manufacturer applied to antitrust claims brought under federal law, and as such was enforceable. In *Carnival Cruise Lines, Inc. v. Shute*,⁸⁰ the Court enforced a choice-of-forum clause found in a small-type form contract appended to a cruise ticket. It rejected the passenger's argument that the absence of any opportunity to bargain over this provision rendered the clause unenforceable. Finally, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*,⁸¹ the Court ruled that an agreement to arbitrate in Japan a carrier's liability for damage to cargo did not violate Article III(8) of the Hague Rules by diluting the carrier's mandatory obligations

⁷⁷ Several of the papers in this symposium, and in particular that of Andrew Guzman, seem to point in this direction. See Andrew T. Guzman, *Developing Capital Markets in a Global Economy—Choice of Law and Arbitration in Developing Country Financial Markets*, __ VA. J. INT'L L. __ (1999). See also Arthur Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, 40 AM. J. COMP. L. 683 (1992). For similar approaches taken by Commonwealth scholars, who confront a somewhat more intractable judiciary, see Michael J. Whincop & Mary E. Keyes, *Statutes' Domain in Private International Law: An Economic Theory of the Limits of Mandatory Rules*, 20 SYDNEY L. REV. 435 (1998); *Putting the 'Private' Back into Private International Law: Default Rules and the Proper Law of the Contract*, 21 MELBOURNE U.L. REV. 515 (1997).

⁷⁸ 407 U.S. 1 (1972).

⁷⁹ 473 U.S. 614 (1985).

⁸⁰ 499 U.S. 595 (1991).

⁸¹ 515 U.S.528 (1995).

to the shipper. Each case involved an international commercial transaction, and in each the Court upheld contractual forum clauses that had either a direct or indirect effect on the underlying substantive law.

Of course, none of the Supreme Court cases held that parties had an unqualified right to contract out of mandatory statutory rules.⁸² *The Bremen* noted that the British law, although different from that of the United States, did not violate U.S. public policy. *Mitsubishi Motors* emphasized the difference between enforcing an agreement to arbitrate and enforcing an arbitral award, and indicated in dicta that an arbiter's failure adequately to address the antitrust claims would render its award a nullity in the United States. *Carnival Cruise Lines* held that the law of Florida, the forum chosen in the form contract, did not oppress passengers. *Vimar* left open the possibility that the Japanese arbitral award would not be enforced if the arbiter applied substantive law that differed substantially from the requirements of the Carriage of Goods at Sea Act. In every case the Court invoked its right to retain control over the substantive law that would result from enforcing the contractual choice of forum. But the Court also indicated that the foreign law need not serve as a perfect substitute for U.S. rules, and it upheld the principle of freedom of contract even when a transaction involved a consumer and a small-print standard form. The tendency to prefer contractual choices over regulatory norms exists, even if it has not blossomed into an unequivocal commitment.

What we have seen is a fundamental shift in the terms of debate over homemade law in international commercial relations. Before *The Bremen*, the relevant question is whether persons involved in international commerce had any right to choose which legal system would govern their relations. After *Vimar*, the issue has become what limits remain on the exercise of this right. A world of possibilities has opened, even though its boundaries remain undetermined.

Analogical strategies in related areas of commercial law exist. As many observers have noted, U.S. corporate law allows states to compete over the terms under which corporations will be allowed to govern themselves. This competition exists only because in the United States, unlike Europe, a consensus accepts that the law of the state of incorporation, a voluntary contractual choice, will govern most issues arising out of a firm's internal decisionmaking. Academics have argued for decades whether this competition is virtuous or malign, but the best recent evidence supports the proposition that corporate managers decide where to incorporate largely on the basis of which jurisdiction's laws are most likely to maximize the firm's value.⁸³

Could a similar approach in international commercial law produce a virtuous race to the top? I cannot offer a definitive response. Too much depends on debatable assumptions about the political economy of the many branches of international commerce. We simply do not know enough about

⁸² Lower courts have enforced contracts for the sale of securities that have the effect of replacing U.S. securities regulation with the comparable laws of the United Kingdom. *See, e.g.,* *Richards v. Lloyd's of London*, 135 F.3rd 1289 (9th Cir. 1998); *Haynsworth v. The Corporation*, 121 F.3rd 956 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3rd 923 (4th Cir. 1996); *Shell v. R.W. Sturge, Ltd.*, 55 F.3rd 1227 (6th Cir. 1995); *Bonny v. Society of Lloyd's*, 3 F.3rd 156 (7th Cir. 1993), *cert. denied*, 510 U.S. 111 (1994); *Roby v. Corporation of Lloyd's*, 996 F.2nd 1353 (2nd Cir.), *cert. denied*, 510 U.S. 945 (1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2nd 953 (10th Cir.), *cert. denied*, 506 U.S. 1021 (1992).

⁸³ For a review of the literature, see Roberta Romano, FOUNDATIONS OF CORPORATE LAW 87-99 (1993).

how particular legal rules operate in different business environments to make any claims with confidence. I do contend, however, that the experiment seems worth pursuing a bit further. The arguments for doing so fall into several categories.

Legal Certainty and the Volume of Law. I began this paper by positing that commercial actors, given the opportunity to do so at a reasonable cost, will pursue legal risk reduction up to some level of acceptable risk. All other things being equal, one of the best strategies for reducing legal risk is to work within a fully developed legal system with a long history of fairly consistent and elaborate dispute resolution resting on reasonably stable principles of jurisprudence. In commercial law, this means specifying a particular national system, such as English law, New York law, or the Swiss Civil Code.⁸⁴

I do not mean to argue that more law necessarily is better law, or that one can expect fundamental coherence and consistency in any legal system. Rather, I believe that the tendency of business contractors to gravitate toward particular jurisdictions, when given the freedom to do so—Delaware in the case of corporate charters, New York or England in the case of international financial and commercial transactions—to some extent reflects a reasonable belief in, and preference for, the relative density and stability of their legal systems. It is possible to characterize national legal systems as more or less developed, and at least some businesses seem to prefer developed systems to those of their home base.

Density and stability in law cannot be manufactured overnight. Publishing rules in a statute is not enough. The persons to whom the rules will apply need to know how they work in practice, how decisionmakers fill in the inevitable gaps and react to particular fact patterns. They can acquire this information only by observing the system over time on the basis of many iterations of the dispute resolution process. National legal systems all have to varying degrees histories and traditions that can be cultivated and enhanced. Any new internationally unified system, whether involving a few jurisdictions or many, must involve a break with the past, and thus sacrifices density and stability. Thus national systems seem the best venues for the pursuit of legal risk reduction.

Laboratory Effects. The prior argument rested on the profoundly conservative assumption that, all things being equal, business people fear change and prefer predictable legal rules. It seems equally plausible, however, that some commercial actors would want an opportunity to innovate in their legal relationships. The question then becomes whether it is easier to adopt innovative rules through establishing an international consensus, or instead by permitting individual nations to enact such rules and then enabling business actors to select them to govern their relations.

The case for national rather than international experimentation seems unassailable. The variety of nation states means that many experiments may proceed at once, while any international innovation requires the exclusion of all other alternatives. It also seems likely that enlisting a single country in the implementation of a novel legal rule would be much easier than establishing an international

⁸⁴ For fuller discussion of the problem of novelty in commercial law terms, see Steven Walt, *Novelty and the Risks of Uniform Sales Law*, __ VA. J. INT' L. __ (1999).

consensus. Confining an experiment to one jurisdiction reduces the costs if the idea turns out to cause unanticipated harm, although concededly it also reduces the value of the experiment by limiting the generality of its results.

Avoidance of Rentseeking. An essential element of the critique of technocratic lawmaking at the international level rests on the premise that interest groups can influence the process both to defeat rules that they find threatening and to foist on the lawmakers rules that distribute wealth in their favor. These concerns about international lawmaking seem plausible precisely because a substantial body of evidence suggest that such rentseeking takes place with some frequency at the national level. We anticipate international special-interest outcomes because we know that national lawmaking often veers in this direction.

But if some states enact laws that benefit interest groups to the cost of those who must deal with them, we might consider ways of facilitating exit from such traps. Here freedom of contract might offer a way out. A business would not have to abide by special-interest legislation simply because it happened to operate in a jurisdiction where some group had prevailed on the legislature. Instead, it could insist on using another, more neutral set of rules as a condition of its contracts.

This argument suffers from at least one serious inconsistency. If interest groups have enough power to shape national legislation towards their ends, why would they submit to contracts that snatch away these gains? Or even worse, why wouldn't powerful groups abuse their contractual freedom to foist these special-interest laws on parties located in other jurisdictions?

The plausibility of these concerns turns on two issues. First, local influence over a legislature may or may not translate into superior bargaining power. We already have detected areas where different groups with adverse interests have relatively greater influence in different countries, *e.g.*, shippers in Austria and Chile, marine carriers in Belgium and the United States. This pattern suggests the existence of at least some instances where parties may contract out of, rather than into, one-sided national legal regimes. How frequently such opportunities will arise, and how often dominant firms instead will use their contractual power to impose their own legal preferences becomes a matter for empirical research.

Second, one must confront the inevitable question of why persons with superior bargaining power would employ this advantage to obtain friendly legal rules instead of better price terms. Absent information asymmetries between the parties (as might be the case if one party engaged in many international transactions and the other in few), we should expect bargaining power to translate first of all into a better money return on the deal. Again the question reduces to an empirical issue: how often do international commercial transactions involve one party with great bargaining power and experience and another with little power and experience?

Taken together, these reservations suggest grounds on which local law might base limitations on the power to contract into different legal systems. We might want to preserve, for example, some public policy exception to enforcing contractual choices of forum or law, even though the existence

of such arguments introduces an element of legal risk. But they do not provide a rationale for an absolute prohibition on free choices of law.

More to the point, these reservations indirectly support my critique of international lawmaking. If certain interest groups have enough influence not only to capture national law but to force their business partners to submit to the law they have shaped, surely they can dominate any international process. And we should regard an international standard that serves the redistributive ends of an interest group as the worst possible outcome, because it makes evasion of rentseeking even more difficult.

Expanded Choice. One of the bedrock assumptions of contract law has been that, all other things being equal, giving parties as many legal possibilities as possible increases the likelihood that people will construct relationships that best suit their needs. This tenet coexists with the belief that, within reason, people also benefit from committing in advance to restrictions on their freedom of action. A core conviction that unites these two propositions is that business people, if not burdened by any disability or victimized by fraud, largely can make effective choices about the scope, strength and content of the legal obligations they need to assume to pursue their objectives. And allowing them to make these choices in turn provides society as a whole with more and better information about their preferences and how to implement them.

Few would argue today that limitless expansion of contractual choices necessarily benefits contractors. Some desirable solutions to collective action problems result in coercive rules, and in any event people in the real world operate under a wide range of disabilities and information deficits. We also recognize a large number of contractual choices that generate negative externalities, such as commitments to form cartels or to pollute the environment. Only unreconstructed libertarians would reject the need to restrict freedom to contract in these instances.

But none of these reasons for limiting contractual choices undercuts the fundamental point. The arguments in favor of expanded freedom of contract seem sufficiently appealing, at least in the commercial world, to justify a presumption in its favor, with the burden of justification resting on those who would restrain it. Allowing business people to elect in and out of national commercial law systems follows from this general proposition. The issue then becomes what specific objections might one raise to these particular choices.

The most obvious category of arguments against expanded choice rests on fears about races to the bottom. Jurisdiction might compete for businesses not by offering them legal rules that generally add value, but rather by tolerating arrangements that generate negative externalities. A country might allow itself to become a haven for cartels, con artists, or polluters, in part by allowing firms engaged in these practices to contract out of liability for the harms they produce. States might be especially prone to compete in this fashion if others outside of their jurisdiction were to bear the brunt of the harms. If we augment this story with fears about powerful firms imposing contracts of adhesion on helpless consumers, the problem becomes even greater. Predators will force those with whom they contract to accept national legal regimes that contain malignant rules.

We should take these stories seriously, but also understand what they do and do not indicate about unification of international commercial law. A race to the bottom requires the existence of interest groups sufficiently influential to bend national laws toward their own ends. Unless groups can reward states who enact attractive laws, no country has any particular reason to enter into the competition. Yet our review of the international lawmaking process suggests that at least some interest groups have succeeded in influencing the content of unification instruments. There is no particular reason to believe that groups capable of triumphing at the national level necessarily would fare worse in an international arena.

In sum, arguments against expanded contractual choice do not point in the direction of constraining businesses by imposing a single international regime. Rather, if we worry about interest groups capturing national law for their own purposes, we ought to recognize the power of other states to forbid persons subject to their jurisdiction from contracting into those laws. To guard against bad laws, in other words, we still should want a system with pluralism at the national level, albeit with less than complete freedom on the part of private parties to pick and choose among national laws.

IV. CONCLUSION

The unification project of the past century has served as a useful means for promoting comparative research and scholarship and deepened our understandings of the institutions of international commerce. Whether the project has also produced laws that improve on what existed before remains less clear. Confusion of the intellectual merits of the exercise and its practical implications may have distracted us from confronting this question.

In formulating a critique of the unification project, I have had several goals. First, I have tried to show how arguments drawn from the field of political economy can illuminate important issues in international law. Second, I have tried to shift the focus of private international law scholarship from substantive law to the lawmaking process. Third, I have tried to ruffle the complacency of the scholarly community, which too often confuses the beautiful with the good and its own best intentions with society's best interests.

In using arguments drawn from political economy to address international law questions, I do not claim to have broken any new ground either in the development of legal theory or in the analysis of international law. Others have done the basic work in proposing a model for private legislatures. And while international law scholarship remains behind other fields in its willingness to incorporate the methodologies and insights of the law-and-economics movement, in the last five years it has begun to catch up. What I have sought to do here is sustain and support that tendency in the only way I know how, which is to demonstrate how the application of theory to concrete problems makes both the theory and the problems more interesting.

My emphasis on the lawmaking process in turn reflects a desire to move international law toward a range of inquiry that has taken center stage in other disciplines, especially U.S. constitutional law. Who decides and what gets decided are related but separate issues. Our colleagues in these fields

have proven that one can learn a lot by isolating the lawmaking process and then looking at its effect on what gets produced. Those of us who work on international law problems need to follow their lead.

Finally, my desire to disrupt our complacency about the unification project should not be mistaken for an effort to trash the serious and important work of those engaged in that process. The project deserves a critique precisely because it lies at the center of a sustained practical effort to improve international law. It is the nobility of the project's aspirations that makes a critical analysis both challenging and worthwhile. My critique, if it succeeds, should not end that effort. At best, it will move the agenda.