Introduction

This book had a serendipitous beginning. In June 1999, we found ourselves seated next to each other in an enormous chamber at the United Nations headquarters in New York. Our seats were made available to us at the invitation of the UN's Commission on International Trade Law (UNCITRAL).[1] We had been invited as observer delegates to UNCITRAL's Working Group on Insolvency and, between 1999 and 2004, stayed to participate and observe in the making of what would become UNCITRAL's Legislative Guide on Insolvency Law.[2] This participation became not Act 3 but Act 1 of a much larger research enterprise on lawmaking by UNCITRAL and other global lawmakers.[3]

[1] What UNCITRAL calls "trade law," and why insolvency law belongs as a part of the "trade laws" over which UNCITRAL asserts competence, is itself a long and complex conversation, which we explore more fully in Chapter 2. Many practitioners view "trade law" as the laws and customs governing trade between countries, prohibitions on "unfair trade" practices, and more recently the pronouncements of the WTO on such norms on trade. But the UN General Assembly created its Commission on International Trade Law in 1966, well before the World Trade Organization was formed. The General Assembly Resolution constituting UNCITRAL provides that the Commission "shall have for its object the promotion of the progressive harmonization and unification of the law of international trade." UN General Assembly Resolution 2205 (XXI), Establishment of Commission on International Trade Law, Art. I (17 Dec. 1966). In 1966, then, the UN's General Assembly was defining any laws creating obstacles to global trade as "trade laws" that UNCITRAL should strive to reform. But creation of the World Trade Organization in 1995 altered this parlance considerably. In current terminological usages, UNCITRAL produces commercial law to govern transactions, mostly among private parties.

[2] Our observations of UNCITRAL's Insolvency Working Group extended well beyond its completion of the Legislative Guide on Insolvency Law. Indeed, one of us continues to attend Working Group sessions to this day.

[3] This book treats lawmaking as a subset of normmaking, and focuses exclusively on transnational lawmaking. Transnational lawmaking refers to activities that produce laws for the world in varieties of hard and soft law as elaborated below and consistent with the expansive definition of law adopted in scholarship on transnational legal orders (Halliday and Shaffer 2015: Ch. 1). "[F]rom a socio-legal perspective, law establishes generalized normative

Invitations to UNCITRAL were wrapped in the diplomatic protocol characteristic of an inter-governmental organization (IGO). We were invited to observe the proceedings, but couldn't sit just anywhere. The location of seats had been pre-assigned and alphabetically arranged by delegation: the American Bar Association sent three participating delegates to UNCITRAL (one of them, Susan Block-Lieb); the American Bar Foundation ostensibly sent only one (Terence Halliday), although his pseudo-status as a delegate was a convenient fiction to regularize the observations of a nonparticipating social scientist.

This happenstance of alphabetical arrangement got us talking, mostly about what was going on around us. The UN chamber where we found ourselves was as large as a half a football field and maybe 50 feet tall. It contained semi-circular rows of desks and seats organized in parallel fashion to face a central dais with a large, raised desk where several seats faced the room as a whole. In the forward semi-circles sat the sixty state delegations that were current members of the Commission.[4] In the mid-section sat all other state delegations invited as observers, but which actually participated pretty much on the same terms as the UNCITRAL sixty. And in the longest arc of delegations in the back rows were the non-state observer delegations of professional associations, industry groups, international financial institutions, and other delegations from international organizations (IOs).[5] The chair of the working group, a Thai bankruptcy judge ceremonially appointed by acclamation of the group, was seated at the dais together with the working group secretary and several other international civil servants from UNCITRAL's Secretariat.

One by one, delegates to the working group raised their "flags" – the placards that identified the delegation they represented, whether the United Kingdom, Republic of Korea, Holy See, or International Bar Association – to speak about a text that had been prepared by the UNCITRAL Secretariat. Once recognized, the room was technologically enabled to permit delegates to interact in the six official UN languages[6] by pressing a button that activated earphones, the microphone to the front of their desk, and the services of the simultaneous interpreters who sat in the glass-enclosed booths forming a ring in a second story overlooking the proceedings from the back of the room. Although state delegations were seated in the front of the

expectations understood and used by actors within a particular context for purposes of constraining and facilitating particular behaviors" (Id.:11). Normmaking refers to all other activities that result in cultural prescriptions for social behavior.

4 UNCITRAL is an IGO, whose membership has changed over time: there were twenty-nine member states when UNCITRAL emerged in 1968, to thirty-six members in 1996, and its current sixty member states since 2003 (Chapter 2).

5 There are differing usages for the term "international organizations." In this book, the term designates all non-state organizations which embrace intergovernmental organizations (e.g., World Bank, International Institute for the Unification of Private Law), professional and industry associations (e.g., International Bar Association), clubs of nations (e.g., OECD), among others. When we seek to be more precise and refer to sub-sets of IOs, we explicitly label them as industry associations or inter-governmental organizations, as the case may be.

6 Arabic, Chinese, English, French, Spanish, Russian.

room and non-state delegations to the rear, the chair recognized all delegates' requests, one by one, in the order they raised their flags.

Delegates sought permission to speak on the lengthy pre-prepared text before them, often paragraph by paragraph, until the working group had commented on the draft in its entirety during the course of week-long meetings. After listening to the delegates, the chair would intervene to suggest his reading of the room, sometimes to remark that he thought that consensus had been reached; at other times, when consensus still eluded the group, he might offer a summary of the various positions that had been voiced. By the end of the week, the working group's secretary – a lawyer-international civil servant in UNCITRAL's permanent Secretariat – would publish her report on the group's meeting and the delegates' progress toward reaching consensus on their draft text. Her written report often combined the many interim oral summaries and conclusions of the chair.

In this way, we observed, delegations sought to reach consensus, which involved not voting so much as expressing views until no delegate wanted to voice further criticism. Consensus might take years on some portions of the text, but might be reached quickly on other paragraphs. The quasi-legislative process was both tediously slow and filled with the significance and symbolism of diplomatic agreement.

Hundreds of attendees from around the world circulated through the UN chamber during the working group's deliberations on corporate insolvency law. Many delegates were experts on corporate insolvency law: judges from France, Denmark, Thailand, and the US; practicing lawyers from North America, Latin America, and throughout Europe; government regulators and civil servants with expertise with the regulation of financial services, the drafting of corporate insolvency laws or the administration of national insolvency systems, whether from Poland, Canada, Croatia, China, Australia, Colombia, or Israel. Other delegates were not so much experts on insolvency law, as experts on the political processes of the UN – members of the national delegations to the United Nations who might be sent to observe the UN's Commission on International Trade Law one week and the UN's Atomic Energy Commission the next. Some delegates spoke, often and at length; most others were silent the entire week.

But speaking was not limited to the UN chamber itself. We also quickly learned that among the side benefits of UNCITRAL attendance were the lively conversations to be had at the coffee breaks and lunches that punctuated lengthy working group meetings, and the after-hour dinner parties and other social events organized to entertain delegates who, like us, found themselves located in either New York or Vienna twice a year for a week at a time. New York or Vienna law firms or professional associations put on cocktail parties or dinners in historic or gustatory sites. In addition, one of us was invited from time to time to observe expert working group sessions – informal meetings of a small group organized by the working group's Secretary at the conclusion of a working group meeting to assist her in

converting a written report of the decisions reached at that meeting into revisions to the draft text for consideration at the next meeting.

Nevertheless, we were at UNCITRAL for different reasons. Block-Lieb, as a law professor and specialist in bankruptcy law, joined in the proceedings of the Insolvency Working Group as a delegate from the International Business Law Section of the American Bar Association. Halliday, a specialist in the globalization of law, was invited as a participant-observer thanks to the generosity and openness of the UNCITRAL Secretariat. Our fortuitous contiguity in the seating chart led to an interdisciplinary conversation that has expressed itself in a line of articles[7] on the road to this book.

Our integration inside the "black box" of global lawmaking permitted us to follow all its twists and turns in real time. No longer were we entirely reliant on published final outcomes, which are the most usual source of materials for writing on international law, or to retrospective reconstructions and their attendant fallibilities based on ex post interviews. We could observe in real time agenda setting and jump-starting, formal and informal proceedings, social occasions, written drafts, hopes realized, and hopes thwarted, without any of the biases attendant on reconstructing events once actors know the outcome of proceedings. In all these ways, we were both observers and participants embedded in a micropolitics on the writing of international commercial laws. We came to observe the practices that are a central finding of this book: *how* international commercial law is made influences *what* law is made.

PRAGMATICS OF GLOBAL TRADE AND COMMERCE

Why should the enormous energies of hundreds of delegates and delegations from state and non-state organizations incur the significant costs of creating commercial laws for the world?

Our immersion in UNCITRAL revealed more fully what international diplomats and discerning national policymakers acutely perceived: national economic fortunes and international competition turn, in substantial part, on the rules of the market and specifically on international commercial laws, which UNCITRAL was either writing *de novo* or rewriting for twenty-first century circumstances.

Consider three sets of market challenges.

A German car manufacturer with subsidiaries and assets in forty-five countries gets into financial difficulties and can no longer pay all its bills on a timely basis in Germany and twenty-five other countries across Europe, Asia, and Latin America. To save itself it needs protection from its creditors – the individuals, companies, and

[7] (Block-Lieb and Halliday 2006; Block-Lieb and Halliday 2007a; Block-Lieb and Halliday 2007b; Halliday 2007; Halliday, Block-Lieb and Carruthers 2009b; Halliday, Block-Lieb and Carruthers 2012).

governments to which it owes money. Saving the business will require a restructuring of its finances and a reorganization of its operations and company group in order hopefully to survive this corporate crisis. How might it do this in an orderly way and re-emerge as a competitive multinational corporation? Transnational and national laws on corporate bankruptcy offer a solution.

Next, consider a Chinese manufacturer located in an inland city, Chongqing in China's west, which sends high-end electronic equipment worth $30 million to its distributor in another inland city, in Oklahoma City, in the middle of the US. The goods are loaded into a standardized container and put on a train to China's east coast. Later, the same container is loaded onto a ship, which makes the sea journey from China across the Pacific, where the container is unloaded at the Port of Los Angeles, loaded again onto a train, and shipped to Oklahoma City. Along the way, the goods in the container suffer $15 million of damage. Whose fault is it? Who pays? How much do they pay? Transnational commercial laws governing transport of goods by sea or otherwise offer answers for the parties involved in the commercial transaction.[8]

Finally, imagine a corporation in Brazil that has developed an innovative solar panel and wants to expand its business rapidly to capture market share. It needs money. It decides to borrow. Potential lenders want to be protected if the company gets into financial difficulties so they ask for property rights or security over assets of the company. What assets can the company use for security? Its buildings? Its manufacturing machines? Its intellectual property such as patents on the solar panel? The money that it is due to receive from buyers who have received the goods but have not yet paid? The personal assets of its owners? Secured transactions law is designed to make credit available to businesses to finance their operations and expansion.

Each of these situations is ubiquitous within and between national markets. Obtaining credit and shipping goods are daily practices of business enterprise. In regional economies and global trade, vast flows of capital fuel domestic and international commerce. A large proportion of this trade – from China to the US, US to Europe, Japan to Asia, to mention a few – crosses oceans and thus puts at risk the transport of goods in international waters.

A generic solution to these business challenges, believe the hundreds of delegates to UNCITRAL, can be found in the crafting and adoption of commercial laws that rescue companies, expand credit, and protect shippers of goods, to mention only several of the fundamental components of market activity. Commercial laws like

[8] Although multilateral conventions exist to govern transport by sea, inland waterway and rail, the governing laws in China and US are styled as domestic legislation modeled after the conventions. For distinct political reasons in each case, neither China nor the US is party to the conventions themselves (see, e.g., Sturley 1991). Because we view these uniform national laws as a part of the transnational law governing liability for loss in transport of this sort, we leave aside this legal detail as otherwise unimportant to our analysis.

these, according to delegates, will remove obstacles, stimulate investment, spur market activity, enhance the wealth of nations and their peoples, and, implicitly, improve the quality of life worldwide. Put another way, markets matter, believe these lawmakers, because they affect individual lives, corporate behavior, national fortunes, and international relations.

And more pointedly, *law* matters for these markets and their expansion. This book might therefore be considered an encounter between *an economic sociology of law* (Swedberg 2003; Swedberg 2006; Frerichs 2009) or an empirical contribution to *international economic law* (Perry-Kessaris 2013). Our interior portrait of global economic lawmaking reveals the intricate interplay of economic lawmakers and how their actions aspire to shape a world of trade and commerce, of global finance and credit (Carruthers and Kim 2011).

But *law* can matter for *markets* both adversely and constructively. When does law present an obstacle to trade and finance, and when does it enable such commerce? In part, the answers respond to problems of diversity and problems of fit.

With respect to diversity, it is a too seldom examined premise of global lawmaking that extreme diversity in the rules of trade inhibits both domestic and international economic growth. There is a powerful impetus among global lawmakers to codify, simplify, and harmonize laws, thereby, they say, lowering the transaction costs of doing business and opening up markets by the reduction of uncertainties and risks.

With respect to fit, an asymmetry persists between law and politics, on the one side, and law and commerce on the other. Law and politics overwhelmingly remain dominated by the nation-state. Laws, legal institutions, and legal occupations primarily are creations of sovereign states. Trade and markets, by contrast, have overflowed national frontiers, spilling over into adjacent states and reaching those very far removed from them, not only in geographical terms but also into states whose norms for trade and commerce are deeply rooted in long histories of difference. The League of Nations and the United Nations signify only the most notable of endeavors in the last almost-century effort to elevate law and politics into a more symmetrical relationship with markets. One consequential, yet neglected, means of bringing transnational and national politics and laws into symmetry with economic activity have been global lawmakers such as UNCITRAL.

Which sharpens the question: Can a tiny UN entity such as UNCITRAL alter world commerce and domestic markets through law? Although this question has attracted far too little empirical examination, a retrospective on UNCITRAL's products since its founding in 1966 reveals that amid its several failures there are outstanding instances of global impact (Chapter 2). Some of this impact exists in the form of multistate treaties, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which was drafted before UNCITRAL emerged but over which UNCITRAL now asserts authority) and the UN Convention on the International Sale of Goods (which was drafted by UNCITRAL). Both conventions have been widely adopted (by 157 and 85 states, respectively), and are

the two most widely adopted treaties pertaining to the actions and behaviors of private actors (that is, conventions on international private law). UNCITRAL's model laws are also widely influential, including its Model Law on International Commercial Arbitration (implemented in seventy-five states), Model Law on Electronic Commerce (in sixty-nine states, and 145 jurisdictions overall), and Model Law on Cross-Border Insolvency (in forty-three states)(id.).

The potential market-shaping ripples of the three lawmaking episodes in this book point to far-reaching potential consequences of law in economic action over the next decades. If law matters for markets, and UNCITRAL's lawmaking matters in particular, this book demonstrates that *how* UNCITRAL's law is made affects *what* law is made.

A SOCIOLOGY OF LAW AND INTERNATIONAL ORGANIZATIONS

The issues of diversity and fit that pervade the "trade enabling commercial laws" that UNCITRAL's global lawmakers seek to produce raise two major sets of questions conventionally raised by lawyers and social scientists focused on the international.

1 *International Law*

Positivist theories of international law (IL) narrowly view IL as enforceable against sovereign states only, if at all, on the basis of their tacit or express consent – that is, only when framed as international or multinational treaties, international "custom," or "general principles of law."[9] In the latter half of the twentieth century and opening years of the twenty-first century, two significant turns occur in studies of international law and IOs' involvement in international lawmaking. We build on both.

First, there was recognition that not only were IOs extensively involved in the making of the conventional hard law of multilateral conventions (e.g., Szasz 1995a; Szasz 1995b), but also that IOs and transnational regulatory networks (TRNs) were increasingly engaged in normmaking of a softer variety, producing resolutions, standards, model laws, principles, best practices, legislative guides, codes, and so on (see, e.g., Abbott et al. 2000; Brummer 2015). Scholars began to study lawmaking by IOs that are IGOs, especially organizations affiliated to the United Nations (e.g., Alvarez 2005; Boyle and Chinkin 2007; Higgins 1963). Some of these studies

[9] See, e.g., Statute of the International Court of Justice, Art. 38 (1945). Some self-described "enlightened" positivists in this arena accept the possibility that international custom may be impacted by the adoption of resolutions by the UN General Assembly and modern treaty-making practices (see, e.g., Simma and Paulus 1999), paving the way for subsequent research on international lawmaking.

mention UNCITRAL briefly (Alvarez 2005: 312-14); a very few focus exclusively on UNCITRAL (e.g., Gillette and Scott 2005a). Some of this commentary notes that the constitutions of a number of IGOs explicitly permit lawmaking (Alvarez 2005), and that IGOs increasingly take advantage of their constitutional mandates to provide inventive and creative ways to collaborate with lawmakers and assist states in international treaty-making and policy-making (e.g., Higgins 1994). Scholars also study standard-setting and quasi-regulatory activities of networks of regulators (Slaughter 2004) and even of private actors (Peters, Förster and Koechlin 2009). While it is still an issue for some IL specialists whether or not this IO activity constitutes the making of law per se, the recognition of IO involvement in production of law or law-like products is fully acknowledged.

Alongside the type of law or legal norm being produced, IL scholars began to attend to processes of international lawmaking. Alvarez (2005) details the treaty-making activities of a range of IGOs. Boyle and Chinkin (2007), similarly, "outline" a "variety of international processes" for "the negotiation and adoption of treaties, decisions, and soft law instruments of various kinds," including processes involving coordination with a wide range of non-state actors and "the use of consensus-negotiating techniques" (Boyle and Chinkin 2007: 41-93, 160-61). While international law scholarship generally remains intent on resolving *whether* IOs are actually making "law" in their terms, these scholars concomitantly pointed in a new direction of inquiry that dug more deeply into the *how* of international lawmaking.

It will immediately be seen that quite apart from conceptual specifications and judgments, normative and other judgments about law emanating from a global lawmaker rest on empirical foundations. Who sits at the lawmaking table? What qualities of deliberation occur inside the lawmaking chambers, in the corridors outside those chambers, and in distant government institutions, and far-flung congeries of social organizations and public opinion? And it is at this point that the second turn in IL/IO studies becomes particularly salient.

Second, while the first turn recognized the fact of IO activity and the need to inquire into processes of IO involvement in lawmaking in all its varieties, international law scholarship took another turn, most notably toward empirical inquiry, infused by social science sensibilities, methodologies, and theory, to move IL scholarship into a fully dynamic mode. Two leaders of this movement, Gregory Shaffer and Tom Ginsburg (2012), identify quickening waves of inter-disciplinary research over the past fifteen years on adjudication by international and regional tribunals, including the WTO,[10] on business regulation,[11] on norm production by

[10] See, e.g., (Alter 2001; Helfer and Alter 2013; Stone Sweet and Brunell 1998; Hagan 2003; Meernik and King 2003; Meernik 2003). For commentary on adjudication in the World Trade Organization, see also, e.g., (Shaffer 2003b; Maton and Maton 2007; Colares 2009).

[11] Mostly notably, the magisterial volume on *Global Business Regulation* by (Braithwaite and Drahos 2000).

policymaking IOs,[12] on private standard-setting,[13] on bureaucratic-like global governance by IOs,[14] and on global governance more broadly. In this rapidly expanding empirical enterprise, the mapping of global laws in all their manifestations is accompanied by an insistence that the behaviors that produce and result from these laws must be drawn into a dynamic concept of international law in engagement with IOs as they are understood by the sciences of social behavior.

Our book rides this wave, but in new directions. Rather than treat international tribunals or global regulatory bodies, we focus on a global lawmaking arena, specifically those focused on the production of international private law. Rather than take for granted that an IO produces a given type of lawmaking or standard-setting product, we problematize why global lawmakers choose one kind of "legal technology" over another. And, most importantly, rather than contribute to IL debates over *whether* IOs make international law or not-law, we examine intensively *how* such global norms are produced: we seek to unveil processes of global lawmaking.

Methodologically, this book rests on empirical foundations less common in IL or IO research. Rather than rely as outsiders on formal IGO or IO constitutions, by-laws, and legal products, we engaged in the lawmaking itself as participant-observer insiders. Rather than attempt a broad overview of regulatory bodies, which have contributed richly to the development of theory in IOs and IL, we undertook an intensive case study of a particular understudied species of IO, a global legislature engaged in international lawmaking. And rather than proceed retrospectively, by asking participants to reconstruct past behaviors and perceptions, we combined studies, observation, and analysis in real time, over many years, together with complementary interviews that sought perspectives both retrospective and prospective. Moreover, while our principal focus is one understudied UN commission, we sought variation within the UN's Commission on International Trade Law by studying three working groups that deliberated on different issue-areas and outside the Commission by studying its organizational environments, including not least its potential allies and competitors.

Theoretically, rather than privilege political science debates on IL and IO, which have contributed much insight on normmaking and lawmaking by international organizations, we develop a sociological theory of IOs. We adapt and reconstruct for the international the longstanding theory of social ecologies (see Chapter 1). We bring this new application of ecology theory into an encounter

[12] For examples, see, on gender violence (Merry 2006a), human rights (Simmons 2009), biotechnology (Pollack and Shaffer 2009), and corporate insolvency law standards (Halliday and Carruthers 2009; Block-Lieb and Halliday 2006).

[13] (Mattli and Büthe 2003).

[14] Cf. Barnett and Finnemore's work on IOs as bureaucratic entities including empirical work on three entities: the International Monetary Fund; the UN's High Commissioner for Refugees; and the UN's policies on genocide and peacekeeping within the Security Council and UN Assistance Mission for Rwanda (Barnett and Finnemore 2004).

with the currently emerging interdisciplinary theory of transnational legal organizations (TLOs)(Halliday and Shaffer 2015c).

All of these perspectives encounter the fundamental questions posed when social scientists ask *who governs*? What is common to otherwise conflicting schools of theorizing on international lawmaking is their manifest or tacit convergence on the exercise of more or less legitimate power and authority through lawmaking beyond the state. Theories of international political economy, world systems, IOs, hegemony, and counter-hegemony in the world system, of command and capitalist economics, of world polity and world society, of law and development all turn in substantial part on *who* they believe or demonstrate to be driving legal change through transnational lawmaking and whether these actors are perceived as legitimate participants in this sphere of activity.

Thinking about who governs can be sharpened by an overly stark but nonetheless useful contrast of polar opposite hypotheses. One hypothesis predicts that IOs are ciphers and proxies for the expression of raw economic or political power projected by dominant states. A contrasting hypothesis posits that IOs as arenas and actors are sites for interaction and emergent properties in which non-state actors and interactional processes contribute to deliberative outcomes not predictable, indeed, beyond those that follow from the raw economic and geopolitical power of states entering the legislative arena. Between these imaginary opposites lie variations emphasizing non-state actors, the epistemological power of professions, the legitimating cultures of world society, and the emergence of IOs as institutional actors of significance in their own right.

We therefore pursue the question of who governs, but with a much stronger emphasis on the interactional processes that add up to influence beyond the dominant states central to realist and structuralist views of global power. While our precise inside data demonstrate who chose issue-areas for lawmaking, who set agendas, who attended and spoke, who exerted more or less influence in various sites of interaction, who had resources and who provided resources, who struck the Big Deals, and whose interests ultimately were served by the lawmaking, we show that the *who* of lawmaking is inseparable from the *how*. The processes within this global lawmaking body, we demonstrate, allowed some actors to dominate while others remained subordinate, permitted some measure of consensus when dissensus seemed inevitable, enabled cooperation when competition threatened to be insurmountable, and permitted production of global norms when stalemate seemed imminent.

These processes display the surprising emergence of a tiny, resource-constrained IO as both an arena and actor whose impact on markets through law far exceeds its deceptive appearances of relative insignificance. Indeed, it may be that its shadowy impact follows precisely because its miniscule administrative apparatus and relative obscurity in a sea of highly visible IOs enable it to construct markets largely invisible to most market players themselves. This emergent reality in the