

THE POLITICS OF INTERNATIONAL ECONOMIC LAW: LEGITIMACY AND THE UNCITRAL WORKING METHODS

*Claire R. Kelly**

The process of international lawmaking is, in part, a function of politics. States assert their interests and values and strive to have them reflected in the resulting substantive law. The ability to control the process of international norm generation—i.e., who participates, how decisions are made, and when agendas move forward—is the power to control the substance of international lawmaking. But States also use process to generate legitimate norms. Good procedures enable representative, transparent, and effective rules. Whether process serves politics or legitimacy (or both) is not always easy to determine.

This paper considers a recent controversy over the methods of work (Working Methods) at the United Nations Commission on International Trade Law (UNCITRAL) and examines whether it represents a political struggle or a debate over the best means to achieve more legitimate rules. UNCITRAL develops international norms that affect a variety of trade issues.¹ It has had considerable success. As an organ of the United Nations, it operates under the procedures set forth by

* Claire R. Kelly, Professor of Law, Associate Director of the Dennis J. Block Center for the Study of International Business Law. I am grateful to Dean Joan Wexler and the Summer Research Stipend Program at Brooklyn Law School for their generous support. I appreciate the comments of Neil B. Cohen and Dana Brakman Reiser and I am also thankful for the very helpful research assistance of Victoria J. Siesta (BLS '09).

¹. The issues addressed “include dispute resolution, international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, procurement and sale of goods.” U.N. COMM’N ON INT’L TRADE LAW, THE UNCITRAL GUIDE: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW at 1, U.N. Sales No. E.07.V.12 (2007) [hereinafter UNCITRAL, GUIDE: BASIC FACTS].

the General Assembly.² While it has not adopted its own rules of procedure as have some other U.N. organs,³ it has, in practice, developed Working Methods that are customarily followed.⁴ Its Working Methods are currently the subject of debate over the degree of agreement necessary to achieve consensus and the participation of nonmembers.

I will examine the current controversy over UNCITRAL's Working Methods using a legitimacy analysis to assess the substantive and political attributes of the proposals under consideration. Various paradigms have evolved to assess the legitimacy claims of international norms. I will consider the UNCITRAL controversy using these paradigms and assess whether legitimacy claims are strengthened by the various proposals under consideration or whether these proposals are more likely the function of politics aimed at influencing the content of the substantive law.

Part II will explain UNCITRAL's work and its Working Methods. It will also explain the current proposals to clarify or change these Working Methods. Part III will briefly describe the political challenges to international lawmaking, as well as some useful paradigms that provide criteria for assessing the legitimacy claims of standard-setting bodies, such as UNCITRAL. Part III will also apply these paradigms to the current controversy. Part IV will conclude by exploring what this analysis can tell us about international law-making efforts more generally.

². Rule 161 of the Rules of Procedure of the General Assembly states that any procedural rules applicable to General Assembly committees, as well as Rules 45 and 60, will apply to subsidiary bodies unless otherwise specified. U.N., RULES OF PROCEDURE OF THE GENERAL ASSEMBLY, at 44, U.N. Doc. A/520/Rev.17 (2008) [hereinafter U.N., RULES OF PROCEDURE].

³. U.N. Comm'n on Int'l Trade Law [UNCITRAL], *UNCITRAL Rules of Procedure and Methods of Work*, ¶ 10, U.N. Doc. A/CN.9/638 (Oct. 17, 2007) [hereinafter UNCITRAL, *Fortieth Session Secretariat's Note*]. Some bodies, such as the U.N. Conference on Trade and Development, are instructed in their founding resolutions to "adopt [their] own rules." G.A. Res. 1995 (XIX), ¶12, U.N. Doc. A/5815 (Dec. 30, 1964). For an example of a U.N. body with its own rules of procedure, as provided in the commission's statute, see e.g., Statute of the International Law Commission, G.A. Res. 174 (II), U.N. Doc. A/519 (Nov. 21, 1947).

⁴. See UNCITRAL, *Fortieth Session Secretariat's Note*, *supra* note 3, ¶ 13–17 (describing the Commission's responsibility to set its own working methods and the development of general parameters which the Secretariat can supplement and define as necessary for each working area); *id.* ¶ 27 (describing the general parameters of the working methods of UNCITRAL's working groups); *id.* ¶ 32 (noting that the Commission has allowed each working group to determine its own methods of work, but that they usually follow the aforementioned general parameters).

I. UNCITRAL AND ITS WORKING METHODS

THE WORK OF UNCITRAL

UNCITRAL is an organ of the United Nations, formed in 1967 with twenty-nine Member States.⁵ It derives its authority from the United Nations,⁶ and its membership now includes sixty states. Its mandate is to harmonize and modernize the law of international trade.⁷ It pursues these goals by preparing both legislative and non-legislative instruments for use in commercial law including, *inter alia*, bankruptcy, transport law, sales, and securitization.⁸ As its documents proclaim:

These instruments are negotiated through an international process involving a variety of participants, including member States of UNCITRAL, which represent different legal traditions and levels of economic development; non-member States; intergovernmental organizations; and non-governmental organizations. Thus, these texts are widely acceptable as offering solutions appropriate to different legal traditions and to countries at different stages of economic development. In the years since its establishment, UNCITRAL has been recognized as the core legal body of the United Nations system in the field of international trade law.⁹

UNCITRAL conducts its work through: (i) the Commission, (ii) Working Groups, and (iii) the Secretariat. The Commission, at its annual plenary sessions, sets the agenda including future work topics, monitors the work of the Working Groups, reviews technical assistance efforts, and finalizes texts prepared by working groups. Working Groups draft

⁵. G.A. Res. 2205 (XXI), U.N. Doc. A/6396. (Dec. 17, 1966).

⁶. *Id.*

⁷. UNCITRAL, GUIDE: BASIC FACTS, *supra* note 1, at 1.

⁸. See the full list of original topics including international sale of goods; international commercial arbitration; transportation; insurance; international payments; intellectual property; elimination of discrimination in laws affecting international trade; agency; and legalization of documents. *Report of the United Nations Commission on International Trade Law on the Work of its First Session*, 23 U.N. GAOR Supp. (No. 16), ¶¶ 40, 48, U.N. Doc. A/7216 (1968), reprinted in [1968–1970] 1 U.N. Comm’n on Int’l Trade L. Y.B. 77, 78–81.

⁹. UNCITRAL, GUIDE: BASIC FACTS, *supra* note 1, at 1.

the substantive instruments for specific issue areas.¹⁰ UNCITRAL constitutes these groups with official state delegations from a worldwide geographic and economic cross-section of its sixty Member States.¹¹ UNCITRAL also invites nonmember States to attend (and, to some degree, participate) in the Working Groups.¹² The Secretariat, with the help of experts, performs preparatory work prior to the establishment of the Working Groups.¹³ In addition, the Secretariat assists both the Commission and the Working Groups. UNCITRAL's substantive work happens at the Working Group level.

THE WORKING METHODS

UNCITRAL's Working Methods have evolved in part out of the flexible and adaptive approach that UNCITRAL has taken to its procedures. UNCITRAL has no official rules of procedure.¹⁴ It operates, to some extent, under the Rules of Procedure of the General Assembly

10. *Id.* at 39–41 (listing Working Groups); *id.* at 45–48 (listing UNCITRAL texts).

11. *Id.* at 2–4 (describing the composition of both UNCITRAL's membership and other Commission participants). The resolution that established UNCITRAL provided that it consist of twenty-nine members. That number has since increased to sixty (first to thirty-six in 1973, and then to sixty by resolution in 2002, with memberships effective in 2004), and the members are elected by the General Assembly for six-year terms, with half of the members terms ending every three years. The group of members is limited for the purpose of facilitating deliberations, and the members are supposed to be representative of different regions and economic and legal systems. Origin, Mandate, and Composition of UNCITRAL, http://www.uncitral.org/uncitral/en/about/origin_fa.html (last visited Nov. 1, 2008).

12. UNCITRAL, *UNCITRAL Rules of Procedure and Methods of Work*, ¶¶ 13–19, U.N. Doc. A/CN.9/638/Add.5 (Oct. 22, 2007) [hereinafter UNCITRAL, *Fortieth Session Secretariat's Note: Addendum 5*] (noting that nonmember States are invited to observe working group sessions and may be allowed to participate).

13. See UNCITRAL, *UNCITRAL Rules of Procedure and Methods of Work*, ¶ 33, U.N. Doc. A/CN.9/638/Add.1 (Oct. 17, 2007) (stating that work done by UNCITRAL's working groups "should, as a general rule, be preceded by the Secretariat's preparatory work"). At the Commission's eleventh session, it created an ad hoc working group specifically to recommend working methods to be followed whenever new subject-matters are given to working groups. UNCITRAL, *Fortieth Session Secretariat's Note*, *supra* note 3, ¶ 20. The recommended methods, which were all adopted, provide that the Secretariat should only give a new issue to a working group where it has done sufficient preparatory work indicating that the matter is "suitable" and would allow the "working group to commence work in a profitable manner." *Id.* Furthermore, the Secretariat's preparatory work should include consultations with international organizations (IOs). *Id.* See also UNCITRAL, *UNCITRAL Rules of Procedure and Methods of Work: Observations by the United States*, ¶ 24, U.N. Doc. A/CN.9/639 (Nov. 22, 2007) [hereinafter UNCITRAL, *U.S. Observations*] (discussing preparatory work and experts).

14. UNCITRAL, *France's Observations on UNCITRAL's Working Methods*, ¶ 2, U.N. Doc. A/CN.9/635 (May 24, 2007) [hereinafter UNCITRAL, *France's Observations*].

(RPGA).¹⁵ The RPGA have general provisions addressing a variety of matters including, *inter alia*, delegations,¹⁶ adoption of agendas,¹⁷ official and working languages,¹⁸ discussion of reports,¹⁹ and voting rights.²⁰ In particular, Chapter XIII of the RPGA addresses the functioning of U.N. Committees and Commissions such as UNCITRAL.²¹ Although the RPGA references commissions generally, it does not provide for substantive business conducted by UNCITRAL.²² UNCITRAL has proclaimed that the principles of the RPGA shall apply where appropriate, unless UNICTRAL makes a specific change.²³ This framework employs the RPGA as a backdrop and UNICTRAL has

15. UNCITRAL, *Fortieth Session Secretariat's Note*, *supra* note 3, ¶ 4 (noting that the U.N. Charter provides that the General Assembly's Rules of Procedure apply to all "subsidiary organ[s] unless the Assembly or the subsidiary organ decides otherwise"); *id.* ¶ 10 (stating that UNCITRAL has not developed specific rules of procedure, but has applied those of the General Assembly).

16. Rule 25 is based on a provision of the U. N. Charter and provides that Member delegations may have up to five representatives, as well as alternate representatives, and an unlimited number of advisors and experts. U.N., RULES OF PROCEDURE, *supra* note 2, at 7.

17. Rules 12 through 24 describe the procedures by which the Secretary-General develops and distributes agendas for both regular and special sessions, and they list required and supplemental criteria. *Id.* at 4–7. Rule 21 states that the provisional and supplemental agendas should be presented "to the General Assembly for approval as soon as possible after the opening session." *Id.* at 6.

18. According to Rule 51, there are six official and working languages used in the General Assembly and all committees: English, French, Spanish, Chinese, Arabic, and Russian. *Id.* at 15. Subsequent rules state that speeches and documents must be written or translated into each of the official languages and that documents may be published in other languages, as the committees or General Assembly deem necessary. *Id.* at 15–16.

19. Rule 66 states that discussion of reports will only occur if deemed necessary by at least one-third of the present and voting members. *Id.* at 18.

20. Rule 82 simply states: "[e]ach member of the General Assembly shall have one vote." *Id.* at 22.

21. See UNCITRAL, *France's Observations*, *supra* note 14, ¶ 2.2.

22. When establishing certain committees or commissions, the U.N. has specifically provided that each should adopt their own rules of procedure. Other times, as with the resolution establishing UNCITRAL, it has not mentioned rules of procedure at all. UNCITRAL, *Fortieth Session Secretariat's Note*, *supra* note 3, ¶ 7. When the General Assembly neither provides rules of procedure nor specifically instructs the individual committee or commission to adopt its own, the rules of the General Assembly apply to the subsidiary organ's functions unless the organ decides to formalize its own set of rules. *Id.* ¶ 8.

23. Initially, when UNCITRAL first considered whether to adopt rules of procedure, it "decided that the rules relating to the procedure of committee of the General Assembly as well as rule 45 and 60 [62] would apply to the procedure of the Commission, until such time as the Commission adopted its own rules of procedure." Where these rules do not address an issue, the General Assembly Rules would apply *mutatis mutandis*, as appropriate. UNCITRAL, *Fortieth Session Secretariat's Note*, *supra* note 3, ¶ 9.

adapted specific procedures as necessary. This flexibility in procedure has led to the evolution of UNCITRAL's Working Methods. Recently, in response to queries concerning these Working Methods, UNCITRAL compiled a Note by the Secretariat on *UNCITRAL Rules of Procedure and Methods of Work*.²⁴ Two of the particular subjects discussed in response to queries were: (i) consensus, and (ii) participation by nonmembers.²⁵

Consensus

The Secretariat's Note provides, and no one disputes, that Working Groups and the Commission act by "consensus."²⁶ At issue, however, is what it means to have consensus. The Commission views consensus as a means of achieving "a larger cooperation."²⁷ Recalling prior UNCITRAL discussions the Secretariat notes:

It was stated in that body that this would permit the Commission, whose members were States with different social-economic systems, different levels of development and different legal systems and historical traditions, to base its work on careful regard for proposals submitted and respect for mutual interests. In the opinion of these representatives, the consensus method was conducive to achieving a larger cooperation among countries having different legal, economic and social systems and would ensure that the uniform rules derived from the work of the Commission were generally acceptable.²⁸

²⁴. *Id.*

²⁵ Other issues raised include the languages used by the working groups as well as the use of in camera proceedings. *Observations, supra* note 14, ¶ 7

²⁶. *Id.* ¶ 6. See also UNCITRAL, *UNCITRAL Rules of Procedure and Methods of Work: Practice with the Implementation of the Applicable Rules of Procedure*, ¶¶ 6–15, U.N. Doc. A/CN.9/638/Add.4 (Oct. 18, 2007) [hereinafter UNCITRAL, *Fortieth Session Secretariat's Note: Addendum 4*] (discussing consensus in UNCITRAL).

²⁷. UNCITRAL, *UNCITRAL, Fortieth Session Secretariat's Note: Addendum 4, supra* note 26, ¶ 7.

²⁸. *Id.* ¶ 7 (citation omitted).

Still, the term consensus does not mean complete unanimity.²⁹ Indeed those times where unanimity was achieved, the Commission specifically used the term “unanimous” to refer to “a higher degree of agreement.”³⁰ Thus, the Commission viewed consensus as possible even where States articulated “explicit reservations” regarding the decision.³¹ According to the Secretariat, “[t]he basis of consensus is that efforts are made to address all of the concerns raised by participants so that the final text is acceptable to all. It should not be understood as giving any State the power to veto what is otherwise the prevailing view of the meeting.”³² Nonetheless, a State may make a formal objection which would block consensus. But UNCITRAL would not view such an objection as a veto; the proposal could still move forward and the members could then take a vote on it.³³ Under the General Assembly rules, votes only require a simple majority. (As discussed more below, no matter has been put to a vote and the Commission has always reached decisions through the consensus method.) The Secretariat notes that, as a result, a practice has evolved where “consensus [is] based upon what was sometimes described as ‘substantially prevailing view.’”³⁴ In other words, the idea is to get agreement beyond a simple majority vote.

Participation

UNCITRAL also prides itself on its openness.³⁵ To some extent, its success relies on its ability to bring together not only States, but

²⁹. *Id.* ¶ 8 (noting that “consensus . . . [does] not necessarily imply universal consensus”).

³⁰. *Id.* ¶ 10.

³¹. *Id.* ¶ 11. In its report, the Secretariat discusses instances where, although consensus was reached, members maintained objections or reservations to specific paragraphs, or even to the document as a whole. *Id.* (referencing the objections by African countries to paragraph 2 of the 1961 European Convention on International Commercial Arbitration and France’s opposition to the draft convention on international bills of exchange and international promissory notes).

³². UNCITRAL, GUIDE: BASIC FACTS, *supra* note 1, at 6.

³³. UNCITRAL, *UNCITRAL Rules of Procedure and Methods of Work*, ¶ 17, U.N. Doc. A/CN.9/653 (Mar. 19, 2008) [hereinafter UNCITRAL, *Forty-first Session Secretariat’s Note*].

³⁴. *Id.* ¶ 17.

³⁵. UNCITRAL, *Report of the United Nations Commission on International Trade Law*, ¶ 378, U.N. Doc. A/63/17 (June 16–July 3, 2008) (noting that UNCITRAL’s practice of including observers, while possibly presenting its own set of problems, has helped the Commission to achieve positive results and “universal acceptability of its standards”).

experts and interest groups to solve difficult commercial law problems.³⁶ Various entities have different levels of access to UNCITRAL and its Working Groups. Naturally, delegations from each member nation attend the Working Group meetings.³⁷ These delegations “include Government officials, academics, experts or private sector lawyers.”³⁸ The Commission has maintained a flexible and inclusive approach to the role of observers.³⁹ It has developed a practice of inviting experts to attend meetings.⁴⁰ For example, despite objections raised by France (discussed below) the Commission sees no problem with observers circulating documents in Working Groups.⁴¹ Observers have the same rights as Member States to make statements and respond to proposals.⁴² Thus, observers, whether they are nonmember States, inter-governmental organizations (IGOs), or non-governmental organizations (NGOs), are

³⁶. See *id.* (citing “broad openness” to observers “as a key element in maintaining the high quality and the practical relevance of the work of the Commission”). See also UNCITRAL, GUIDE: BASIC FACTS, *supra* note 1, at 1 (noting that broad inclusion of States and non-State organizations allows the Commission to develop standards adaptable to the spectrum of international legal traditions, as well as varying levels of economic development).

³⁷. UNCITRAL, GUIDE: BASIC FACTS, *supra* note 1, at 5.

³⁸. *Id.* at 6.

³⁹. As used by the Commission and each of its working groups, the term “observer” refers both to nonmember States as well as “non-State entities.” UNCITRAL, *Report of the United Nations Commission on International Trade Law*, *supra* note 35, ¶ 378. See also UNCITRAL, *Fortieth Session Secretariat’s Note: Addendum 5*, *supra* note 12, ¶ 2 (delineating the difference between “representative” States and “observer” States).

⁴⁰. Each intergovernmental body has the authority to invite whichever non-State organizations that it wants to participate in its meetings. Furthermore, observer status may also be granted pursuant to each organization’s established rules. UNCITRAL, *Fortieth Session Secretariat’s Note: Addendum 5*, *supra* note 12, ¶ 3. The Secretariat compiles and maintains mailing lists of organizations whose expertise is relevant to issues addressed by the various working groups. Invitation letters are sent to each organization whose presence is requested for either a particular working group meeting, or general meeting of the Commission. Although the Secretariat uses the same mailing lists for both types of meetings, it condenses them when inviting nonmembers to Commission sessions so that only those organizations whose work is directly relevant to issues under consideration are invited. *Id.* ¶ 26. Non-State organizations may request placement on the mailing lists, subject to the approval of the Secretariat and Member States. *Id.* ¶ 27. Observer organizations will continue to receive invitations to participate so long as their work remains relevant. *Id.* ¶ 28.

⁴¹. UNCITRAL, *Report of the United Nations Commission on International Trade Law*, *supra* note 35, ¶ 378.

⁴². UNCITRAL, *Fortieth Session Secretariat’s Note: Addendum 5*, *supra* note 12, ¶ 49 (“[O]bservers have been given the right to make statements to the same extent as States members.”); *id.* ¶ 55 (referencing observers’ rights to respond to proposals, and to occasionally make proposals).

acting as participants.⁴³ Not surprisingly, observer States applaud their inclusion in the consensus-building process.⁴⁴

The participation of non-state entities, whether experts, NGOs, IGOs, or private lawyers traveling as part of an official state delegation, depends upon their ability to have their attendance funded by someone other than UNCITRAL. UNCITRAL does not pay participants' expenses.⁴⁵ To the extent that experts or organizations participate, they must either have their own funding or have a State fund their participation.⁴⁶

In responding to recent queries concerning participation, the Secretariat notes that the Commission may wish to compile a list of organizations, categorize them, and "authorize the Secretariat to issue a standing invitation to them."⁴⁷ The Commission might also identify other organizations that have special competence and develop criteria for their involvement in particular sessions.⁴⁸

⁴³. *Id.* ¶ 13–19.

⁴⁴. As an observer, "Turkey strongly supports the Commission's practice of taking into account the view of the observer States" for purposes of consensus. UNCITRAL, *UNCITRAL Rules of Procedure and Methods of Work: Compilation of Comments by Governments (Australia and Turkey)*, at 4, U.N. Doc. A/CN.9/660/Add.1 (June 3, 2008) [hereinafter UNCITRAL, *Comments by Australia and Turkey*]; accord UNCITRAL, *UNCITRAL Rules of Procedure and Methods of Work: Compilation of Comments by Governments (Belgium)*, at 2, U.N. Doc. A/CN.9/660/Add.5 (June 20, 2008) (advocating for observer participation, but also noting that clear distinctions should be made between States and NGOs). Member States also find observer participation beneficial to determinations of consensus, as well as facilitation of debate on substantive issues. UNCITRAL, *UNCITRAL Rules of Procedure and Methods of Work: Compilation of Comments by Governments (Spain)*, ¶ 7, U.N. Doc. A/CN.9/660/Add.2 (June 6, 2008) (referencing consensus); UNCITRAL, *UNCITRAL Rules of Procedure and Methods of Work: Compilation of Comments by Governments (El Salvador)*, at 4, U.N. Doc. A/CN.9/660/Add.3 (June 10, 2008) (referencing substantive debate).

⁴⁵. UNCITRAL, *France's Observations*, *supra* note 14, ¶ 3.1.

⁴⁶. *See id.* ¶ 3.1.

⁴⁷. UNCITRAL, *Forty-first Session Secretariat's Note*, *supra* note 33, ¶ 32. With this suggestion, the Secretariat calls upon the opinion of the Secretary-General, as proposed at the first UNCITRAL session, which stated that the Commission could create two lists of observer organizations. The first would consist of those organizations whose expertise is relevant to all of the Commission's work, while the second would be limited to organizations with "special competence in topics that are of a particular concern." *Id.* ¶ 30. Organizations on the general list would have a standing invitation to participate at any Commission meeting. *Id.* The Commission would retain ultimate authority over the list and could include or exclude groups as necessary. *Id.* ¶ 32.

⁴⁸. The names of these organizations would appear on a second list suggested by the Secretariat, and they could only attend those sessions to which they are specifically invited. *Id.* ¶¶ 30, 33. The secretariat also suggests that the Commission create requirements that organizations must fulfill for

II. OBSERVATIONS ON UNCITRAL'S WORK METHODS

a. FRANCE'S CHALLENGE

Recently, France has challenged UNCITRAL's Working Methods. It objects to UNCITRAL's general lack of procedures for its "legislative" process.⁴⁹ And it has some particular concerns with respect to consensus and participation.

Consensus

France seeks clarification of UNCITRAL's decision-making process. As discussed above, UNCITRAL operates by consensus. France recognizes that UNCITRAL decisions may be adopted without a vote and, indeed, "[a]t UNCITRAL there has never been a vote."⁵⁰ France's observations suggest that the atmosphere of collegiality and consensus-driven decisions may no longer be able to persist as UNCITRAL's membership grows.⁵¹ Perhaps as a result, France seeks clarification on the meaning of consensus.⁵² While acknowledging that consensus does not require the absence of any and all objection, it contends that "there cannot be a consensus without the consent of all delegates."⁵³ Specifically, it opines that a consensus cannot exist where:

- a simple majority of delegates supports a proposal and more than one other expresses a divergent opinion;

inclusion on this list. Generally, the Secretariat recommends that the work of these organizations be both "in conformity with the spirit, purposes and principles" of the U.N., and supportive of UNCITRAL's work. *Id.* ¶ 34. More specifically, the organizations should be "international, regional or subregional [in] nature," and should have both recognized expertise in a given field and the ability to meaningfully add to the work of the Commission based on membership and sectorial or industrial representation. *Id.* ¶ 35.

⁴⁹. UNCITRAL, *France's Observations*, *supra* note 14, ¶ 1 (stating that the French delegation believes it is necessary to clarify UNCITRAL's rules of procedure by either specifically referring to the U.N. rules applicable to all subsidiary organs, or by adopting rules unique to UNCITRAL); *id.* ¶ 3.1 (referring to UNCITRAL's drafting stages as its "'legislative' process").

⁵⁰. *Id.* ¶ 5.1.

⁵¹. *Id.* ¶ 5.2.

⁵². *Id.*

⁵³. *Id.*

- a proposal presented as a compromise by the chair of a working group has not received the approval of all its members;
- a formal objection is presented by a delegation.⁵⁴

France is particularly concerned that the definition of consensus not expand to include an understanding of consensus as “a ‘substantially prevailing view’ within a working group.”⁵⁵ Finally, France contends that if, in particular instances, UNCITRAL can not operate by consensus (based upon its understanding of consensus) despite persistent efforts, then resort should be had to General Assembly Rule 125 which permits a decision by a majority vote.⁵⁶ Australia echoes France’s concerns regarding the meaning of consensus, and, in particular, reliance on the idea of a “substantially prevailing view.” Australia notes that “on occasion in certain Working Groups, consensus has been deemed to have been reached when the room was clearly divided on the decision in question.”⁵⁷

Participation

France also challenges the degree and nature of NGO participation in the UNCITRAL decision-making process. According to France, at UNCITRAL, “NGOs play a major role because of the expertise they possess in the areas under discussion.”⁵⁸ The role of NGO experts permeates the entire process,⁵⁹ and NGOs “participate on a de facto equal basis with Member States in the sessions of the working

⁵⁴. *Id.*

⁵⁵. UNCITRAL, *UNCITRAL Rules of Procedure and Methods of Work: Compilation of Comments by Governments (France)*, at 2–3, ¶ 2, U.N. Doc. A/CN.9/660 (May 28, 2008) [hereinafter UNCITRAL, *Comments by France*].

⁵⁶. UNCITRAL, *France’s Observations*, *supra* note 14, ¶ 5.2.

⁵⁷. UNCITRAL, *Comments by Australia and Turkey*, *supra* note 44, at 2.

⁵⁸. UNCITRAL, *France’s Observations*, *supra* note 14, ¶ 3.1.

⁵⁹. Of particular concern to France is the fact that when UNCITRAL undertakes to draft an instrument, experts, or the groups that they represent, often initiate the process and provide most of the technical information considered by the respective working groups. Yet, these experts are neither representatives nor delegates of any Member. Furthermore, the working groups generally operate without any guidelines and the draft instruments that they submit to the plenary session are only altered “if there is a strong current of opinion in favour of such changes.” *Id.*

group to produce the draft instrument.”⁶⁰ UNCITRAL’s funding constraints compound NGOs’ influence. As France acknowledges, which experts attend is a function of which ones the States want to bring and whether they can afford to bring them.⁶¹

France not only complains of the level of NGO participation but of the expansion of the number of NGOs that participate. It notes that “[i]n the past the [NGOs] active within UNCITRAL were the small number that had a stated interest in the field of international trade. More recently, UNCITRAL has opened up to a larger number of NGOs that are more obviously national in nature.”⁶² These groups have influence over UNCITRAL’s work-product.⁶³ That work-product can have national effect, even when it is not binding, i.e., legislative guides. France contends that the reality is such that the current participation of NGOs is far greater than that permitted by Resolution 1996/31 of the U.N. Economic and Social Council which provides “the general framework” for NGO activities.⁶⁴ France specifically proposes that these entities are more properly called “non-state entities” or “professional associations” rather than NGOs.⁶⁵ To limit the influence of these non-

⁶⁰. *Id.*

⁶¹. *Id.*

⁶². *Id.* ¶ 6.1 (footnote omitted).

⁶³ For example, UNCITRAL’s *Legislative Guide on Insolvency Law* “implicitly blesses insolvency laws providing for the cramdown of classes of claims[.]. . . [an] approach followed under American bankruptcy law but none other.” Susan Block-Lieb & Terence C. Halliday, *Legitimation and Global Lawmaking* 38–39 (Fordham L. Legal Studies Research Paper No. 952492, 2006), available at <http://ssrn.com/abstract=952492>. NGOs participating in the Working Group on Insolvency Law included both the American Bar Association and the American Bar Foundation. E.g., UNCITRAL, *Report of Working Group V (Insolvency Law) and Working Group VI (Security Interests) on the Work of Their Second Joint Session*, at 3, ¶ 7, U.N. Doc. A/CN.9/550 (Mar. 31, 2004). The preface to the *Legislative Guide* also acknowledges that “[NGOs] participated actively in the preparatory work.” U.N. COMM’N ON INT’L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW at iii, U.N. Sales No. E.05.V.10 (2005) (emphasis added).

⁶⁴. UNCITRAL, *France’s Observations*, *supra* note 14, ¶ 6.1. Resolution 1996/31 makes specific reference to provisions of the U.N. Charter distinguishing the roles of nonmembers and those of NGOs insofar as nonmembers may “participate” in deliberations while NGOs may only “consult.” ECOSOC Res. 1996/31, ¶ 18, U.N. ESCOR, Substantive Sess., 49th plen. mtg., Supp. No. 1, at 53, U.N. Doc. E/1996/96 (July 25, 1996). The Resolution further states that the consultative role of NGOs should not be expanded to the point where it “overburden[s] the Council or transform[s] it from a body for coordination of policy and action . . . into a general forum for discussion.” *Id.* ¶ 19.

⁶⁵. UNCITRAL, *France’s Observations*, *supra* note 14, ¶ 6.2.

state entities, France seeks a process by which working groups can determine who can attend its meetings and also provide for “in camera” meetings where requested by a Member State.⁶⁶

Among its other proposals to change the current system is the suggestion that experts’ sphere of influence in the process should be limited to informal events, colloquia, seminars, and meetings, and in no case should expert views at these events be considered binding on members.⁶⁷ Nor should any NGO or expert group be permitted to block a proposal that would otherwise have achieved a consensus of support from Member States.⁶⁸ France proposes that the information provided by experts should not form the basis of drafts of documents; rather, only Member States should be permitted to draft and circulate documents.⁶⁹

France also objects to the blurring of the distinction between Commission members and observers; a blurring the Secretariat readily admits has occurred.⁷⁰ This blurring, according to France, undermines Member States because it dilutes the consensus-building process with the views of observers. France proposes that observers should not be permitted to circulate working documents on their own initiative and should be given the opportunity to speak either before or after the members have spoken.⁷¹

Ultimately, France made nine proposals, four of which are most relevant for this paper:⁷²

⁶⁶. *Id.*

⁶⁷. *Id.* ¶ 3.2.

⁶⁸. *Id.* ¶ 5.1.

⁶⁹. *Id.* ¶ 3.2 (stating that NGOs should only be permitted to circulate information documents unless otherwise requested or authorized by Members).

⁷⁰. UNCITRAL, *Comments by France*, *supra* note 55, at 4, ¶ 4. *See also* UNCITRAL, *Forty-first Session Secretariat’s Note*, *supra* note 33, ¶¶ 44–45 (concerning deliberative participation); *id.* ¶¶ 48–49 (concerning circulation of documents and written proposals).

⁷¹. *Id.* at 4, ¶ 4.

72. The other five are:

a) Give the working groups precise mandates, and resubmit to the plenary session or consult Member States in writing if any change is envisaged to those mandates.

b) The Secretariat to inform Member States in advance of the international colloquia it intends to convene on topics addressed by one or more working groups, and to provide Member States with all necessary information.

f) For decision-making processes, reassert that no consensus exists when a simple majority of delegates approves a proposal, that a working group chair's compromise proposal must always be approved by the working group, and that a formal objection presented by one or more delegations blocks the consensus and must be reported in the minutes.

g) Establish an observer status for non-governmental organisations, to be divided into two categories, namely those institutions with a general interest in international trade, which may be granted permanent status, and those organizations with expertise on a particular topic, which may be approved only for the duration of the work on that topic.

h) Specify the rights of these non-state entities: to be consulted and speak at the start of a session in order to give their views on the topic under debate, but not to take part in the discussion or decision at the end of the debate; to circulate information documents but not working documents.

i) Authorize a working group meeting to be held in camera if one or more delegations belonging to the group request it.⁷³

The Secretariat has already proposed drawing a distinction among non-state observers by suggesting a listing and categorization process for organizations that might be invited to participate in UNCITRAL's

c) Hold formal consultation with States whenever necessary, in particular if controversial points have been raised at colloquia or seminars, and produce reports on the proceedings of these meetings.

d) For informal meetings of expert groups, seek the agreement of the plenary session when the annual timetable of sessions is established, taking care to achieve a balance between these meetings and working group sessions.

e) Ensure simultaneous translation into English and French of the documents submitted to the expert groups, and apply the principle of parity between these two UN working languages in UNCITRAL's official activities.

UNCITRAL, *France's Observations*, *supra* note 14, ¶ 7.

⁷³. *Id.* ¶ 7.

work.⁷⁴ France supports this proposal, but is apparently concerned with the influence that some States may have because of their ability to bring or fund experts, and it seeks further clarification concerning the independence of these entities from States.⁷⁵

b. THE U.S. RESPONSE

The United States has countered France's concerns. As a threshold matter, the United States differs in its view regarding the applicability of the RPGA.⁷⁶ The United States points to the Secretariat's explanation that, while some of the RPGA applies, the Commission "[is] guided by the general principle that the rules of procedure of the GA [will] apply *mutatis mutandis* to the Commission,"⁷⁷ subject to the Commission's discretion "to alter specific rules."⁷⁸ Thus, in the U.S. view, UNCITRAL neither operates exclusively under the RPGA, nor does it need to draft a new set of rules.⁷⁹

The United States steered away from France's attempt to have consensus defined stating that:

The opinions of the United Nations Office of Legal Affairs (quoted in the Secretariat paper) conclude that there is no definitive or authoritative interpretation of consensus and it is somewhat difficult to arrive at an exact definition of the term. The Office of Legal Affairs has concluded that a decision may be considered as having been made "by consensus" if the decision was "arrived at

⁷⁴. UNCITRAL, *Forty-first Session Secretariat's Note*, *supra* note 33, ¶ 32.

⁷⁵. UNCITRAL, *Comments by France*, *supra* note 55, at 3, ¶ 3. Here, France references ECOSOC Resolution 1996/31, which requires that all NGOs seeking (or previously granted) observer status derive all of their funding from their individual members or from national affiliates. All such voluntary contributions must be reported to the Committee on Non-Governmental Organizations and, to the extent that NGOs receive funding from other sources, those contributions must be sufficiently explained to the Committee. ECOSOC. Res. 1996/31, *supra* note 64, ¶ 13. Further, "[a]ny financial contribution or other support, direct or indirect," by a government must be fully disclosed to the Committee, recorded in the books of the NGO, and used solely in furtherance of the goals of the United Nations. *Id.*

⁷⁶. UNCITRAL, *U.S. Observations*, *supra* note 13, ¶ 4.

⁷⁷. *Id.*

⁷⁸. *Id.*

⁷⁹. *Id.* ¶ 5.

as a result of a collective effort to achieve a generally acceptable text and consequently the participating delegations are considered to be more closely associated with the decision.”⁸⁰

The United States also sees no problem with the use of experts in preparing materials for the working groups. The working groups request assistance from the Secretariat which determines what assistance it will provide to the working groups.⁸¹

In light of the limited resources available to the Secretariat, the Commission and its working groups have vested the Secretariat with a measure of discretion in the implementation of its tasks. It is also common practice for the Commission and the working groups to authorize the Secretariat to have assistance of outside experts in the completion of its preparatory work, as in most other UN bodies. Such assistance may take various forms, most commonly as intersessional informal expert group meetings. This practice should continue. Any preparatory work of the Commission is, of course, subject to the review of the Working Group, and ultimately the Commission.⁸²

Nevertheless, the United States agrees that no State can have a consensus imposed upon them and any member can insist upon a vote on any issue.⁸³

With respect to the participation of NGOs, the United States emphasizes the technical nature of UNCITRAL’s work and the need for

⁸⁰. *Id.* ¶ 9 (footnotes omitted).

⁸¹. *Id.* ¶ 24.

⁸². *Id.* (footnotes omitted). The United States agreed that the Commission should give advance notice to all members regarding the date and location of colloquia to facilitate their attendance and participation. However, the U.S. delegation further stated that it would be inappropriate to require the Secretariat to either pre-approve or preside over such colloquia in order to identify any controversial points that NGOs may raise, and to subsequently convene formal meetings to discuss these points. *Id.* ¶ 24 n.33. See also UNCITRAL, *France’s Observations*, *supra* note 14, ¶ 7(c)–(d) (proposing that UNCITRAL both pre-approve informal meetings involving experts and require formal consultations to discuss controversial points).

⁸³. UNCITRAL, *U.S. Observations*, *supra* note 13, ¶ 11.

the participation of experts.⁸⁴ It also opines that the process of selecting and inviting such experts is one that is well-controlled by the Secretariat.⁸⁵ Again, the United States reiterates that new rules are not necessary, but it admits some clarifications are in order:

(a) having the relevant standards and expectations about participation of non-member states, international governmental organizations, specialized agencies, and non-governmental organizations restated in the letter of invitation to the observer delegation or in the Commission's report;

(b) handling participation by non-governmental observers according to two categories of nongovernmental observers, i.e. those with a "general interest for international commerce" which can be granted a permanent status, and those with "special expertise" in one of the topics discussed, which should not be admitted beyond the duration of the particular subject in which they have expertise;

(c) continuing to remind observer organizations of their role as contributors of technical information, information on practices of an affected economic or commercial sector, and other relevant information, and that they do not participate as decision makers.⁸⁶

The United States also rejects the view that there be nonpublic meetings. First, the General Assembly Rules provide for public meetings,⁸⁷ and moreover:

One of the hallmarks of the Commission's successful work methods has been its open and public process. Transparency and participation by knowledgeable and

⁸⁴. *Id.* ¶¶ 12–13.

⁸⁵. *Id.* ¶ 13 (discussing that the Secretariat identifies relevant experts and invites them to Working Group sessions, but that it only does so when the NGOs have "specific expertise on the issues under consideration").

⁸⁶. *Id.* ¶ 14.

⁸⁷. *Id.* ¶ 19.

affected groups, including international and non-governmental organizations and private sector representatives, in working group meetings are key to UNCITRAL's success.⁸⁸

c. WHERE THE TENSIONS LIE

France is particularly concerned with the combination of the role of non-State members, and in particular non-State entities, and confusion over the meaning of consensus.⁸⁹ In other words, it appears that France objects to the dilution of Member State control over the decisions ultimately adopted by UNCITRAL. Participation of observers permeates the process and necessarily dilutes Member States input over proposals that are eventually put up for “consensus” consideration. Further, the stretching of the term “consensus” to include a level of agreement that is less than full acceptance by each Member State further diminishes state control over decisions ultimately adopted under the label consensus.

The United States seems more open to retaining the flexibility it believes is inherent in the UNCITRAL process, even though the increase in UNCITRAL membership may make a high level of agreement more difficult than it has been in the past. While it agrees that no State can have a consensus imposed in the face of an objection, it seems to have a broader view of consensus as reflecting the support of the participating nations. The United States views the participation of experts as essential, although it also is willing to categorize experts by the nature of their expertise. Unlike France, it does not seem concerned with the fact that some States may be in a better position to fund expert participation.

⁸⁸. *Id.* ¶ 20.

⁸⁹. UNCITRAL, *Comments by France*, *supra* note 55, at 2, ¶ 1. France stresses that consensus does not equate to unanimity, but rather that it is an attempt “in good faith to find a compromise,” and notes that all members have the right to record their dissent. *Id.* at 3, ¶ 2. Further, France seeks to clearly distinguish the rights of members and nonmembers, primarily to ensure that nonmembers do not contribute to determinations of consensus and that only members are afforded the right to vote, if necessary. *Id.* at 3–4, ¶ 4. In addition to status distinctions, France also believes that observers should not be permitted to state their opinions until after all members have done so, and should not circulate documents for discussion unless requested by the working group. *Id.* In other words, France objects to any participation by observers that could be confused with that of members and thus improperly influence the consensus-building process. *See id.*

One may view these different positions through a political lens. Both the United States and France have an interest in the resulting norms, as those norms, if widely adopted, will affect their power. The States may want UNCITRAL to adopt rules that look like their rules, or function like their rules, or at least function *with* their rules. Any alternative, other than one of these three, may be perceived as a political disadvantage.

Or these tensions may be seen as a disagreement over the best means to achieve the most legitimacy for the norms eventually espoused by the organization. Essentially, the tensions between these positions reflect two views concerning the efficacy of UNCITRAL's work. On the one hand, France casts the process as one connected to state sovereignty, centrality, and consent. Important to France's position is that UNCITRAL's legitimacy stems from the authority of its Member States. Conversely, one can view the U.S. position as reflecting a more pragmatic view of efficacy, one that stems from success. According to this view, UNCITRAL needs to actually develop norms that are useful and will be used, even if there is a diminished level of agreement, so long as there is enough agreement to achieve adoption and implementation. It needs this flexibility. Tying the organization to a strict version of state consent will only impede flexibility and thus efficacy. UNCITRAL also needs experts to do its work and their expertise should not be affected by who brings them. Under this view, UNCITRAL's legitimacy can be viewed as a function of its success.

III. LEGITIMACY AND POLITICS IN INTERNATIONAL ORGANIZATIONS

In order to assess the various proposals for change to UNCITRAL's standard-setting process, it is useful to evaluate whether they improve UNCITRAL's legitimacy criteria, in light of the alternative possibility that these proposals are aimed at political concerns. Legitimacy and politics go hand-in-hand, especially in IOs.⁹⁰ Authority

90. See Tomer Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO*, 45 COLUM. J. TRANSNAT'L L. 221, 225 (2007) (discussing the World Trade Organization (WTO) and referring to legitimacy as "the elixir of political

is derived, in part, from politics and in part from legitimacy. IOs are empowered by the States that wish them to act on their behalf.⁹¹ They are further empowered if they are perceived as legitimate. But politics also operates on the state level where the States compete for power within the IO.⁹² Thus, it is not always clear whether state proposals are aimed at improving the legitimacy of the organization, or at increasing the power of the individual State, or diminishing the power of another State. Legitimacy is important for global governance institutions because it enables effectiveness. If we want these institutions to successfully develop and promote useful norms that will be followed, we necessarily want legitimacy. Legitimacy claims can be assessed in a variety of ways. Ultimately, IOs need a mix of legitimating criteria.

a. POLITICS AND LEGITIMACY ANALYSIS FOR GLOBAL GOVERNANCE INSTITUTIONS

IOs exert authority through the rules they develop. These organizations face two separate challenges. First, various groups compete to have the greatest influence over that authority. They compete for power within the organization. This is a political struggle. At the same time, IOs struggle to achieve legitimacy for themselves, both to secure greater implementation and compliance with their norms, and to secure more influence than other organizations. Thus, when one considers various procedural proposals regarding how international norms are generated, one must necessarily query whether those proposals serve the struggle for power within the organization, the struggle for the legitimacy of the organization, or possibly both.

Politics involves the struggle for authority or power.⁹³ In IOs, the role of politics can be as stark as a State pushing for a particular subject

governance”). See also Inis L. Claude, *Collective Legitimation as a Political Function of the United Nations*, 20 INT’L ORG. 367, 368 (1966) (noting that although international politics is a struggle for power, it is also one over legitimacy).

91. Robert O. Keohane, *The Contingent Legitimacy of Multilateralism 2* (GARNET Working Paper No. 09/06, 2006), available at http://www.garnet-eu.org/fileadmin/documents/working_papers/0906.pdf (“Multilateral institutions by no means supersede states as the most important actors in world politics. On the contrary, they are created by states, and states dominate their decision-making.”).

92. *Id.* at 5-6 (discussing power politics in IOs).

93. HANS J. MORGANTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 25 (1967).

to be governed by international norms. It might involve a push for legal harmonization or even legal transplantation. Or, it may reflect a policy preference for one method of accomplishing an objective rather than another. IOs that develop norms have choices: What situations need norms? Which or whose norms? How should norms be implemented? Those choices may privilege one State over another. Thus, where States push various processes in international law-making organizations, there is always the possibility that they are doing so because the processes will affect the policy choices available to the organization. At the same time, these quests can be seen as (and can in fact be) tools to achieve greater legitimacy for the organization and the rules it develops. Accordingly, legitimacy is important for the power of the organization itself.

Legitimacy is important for effective institutions. IOs have always faced a compliance challenge.⁹⁴ Without the traditional power of a sovereign, IOs need to secure compliance by other means.⁹⁵ States may follow rules because of instrumental reasons—they are rationally motivated to obey rules that are in their self-interest⁹⁶—or because of legitimacy—they feel that the rules ought to be obeyed.⁹⁷ Obviously, States may follow rules because of one or some combination of both of these factors.

Global governance institutions need legitimacy.⁹⁸ Some global governance institutions, such as the World Bank or WTO develop rules that they impose on States with some measure of success.⁹⁹ They, “like

⁹⁴. See Ian Hurd, *Legitimacy, Power, and the Symbolic Life of the UN Security Council*, 8 GLOBAL GOVERNANCE 35, 35 (2002) (noting that IOs seek legitimacy in part because they have difficulties securing compliance); Claire R. Kelly, *Legitimacy and Law-Making Alliances*, 29 MICH. J. INT’L L. 605, 606–07 (2008) [hereinafter Kelly, *Legitimacy*] (stating that one reason for which IOs seek legitimacy through law-making alliances is to secure greater compliance with their norms).

⁹⁵. Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT’L ORG. 379, 379 (discussing that “the international social system does not possess an overarching center of political power to enforce rules,” thus there must be other explanations for compliance with international norms).

⁹⁶. IAN HURD, *AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL* 37–40 (2007).

⁹⁷. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24–26 (1990) (describing the “compliance pull”).

⁹⁸. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 407 (2006).

⁹⁹. *Id.* at 406.

governments . . . issue rules and publicly attach significant consequences to compliance or failure to comply with them—and claim the authority to do so.”¹⁰⁰ Since these rules are not completely self-enforcing (although they may have some self-enforcement power)¹⁰¹ these institutions need legitimacy in order to aid their effectiveness.¹⁰² Legitimacy is equally as important for global norm-generating institutions.¹⁰³ Institutions such as UNCITRAL, the International Institute for the Unification of Private Law (UNIDROIT), or the Hague Conference on Private International Law generate norms that may or may not be adopted by States.¹⁰⁴ One might conclude that because the norms generated in these institutions must ultimately be adopted by States to have any force, legitimacy is less relevant or adequately supplied by the consenting States. But, as others have pointed out, in a world of undemocratic or weakly democratic states, consent is a poor measure of legitimacy.¹⁰⁵ Moreover, these norm-generating institutions develop norms, in part, to aid States that have not developed norms in a particular area of law.¹⁰⁶ Therefore, certain States will have no real

¹⁰⁰. *Id.*

¹⁰¹. See Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT’L L. 545, 575–76 (2004) (discussing that as international institutions evolve into constraining regimes, so do their levels of legalization and enmeshment, making it increasingly more difficult for members to abandon the benefits from the institution, thus becoming “self-enforcing” to an extent).

¹⁰². Buchanan & Keohane, *supra* note 98, at 407

¹⁰³. See, for example, Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 BROOK. J. INT’L L. ____ (forthcoming 2009), for a discussion on the importance of legitimacy in international securities regulation.

¹⁰⁴. G.A. Res. 2205 (XXI), *supra* note 5, ¶ II.8(b)–(d) (stating that UNCITRAL’s function is to prepare and promote new standards, uniform interpretation of those standards, and greater participation in, and acceptance of, pre-existing laws and conventions); Statute of UNIDROIT, art. 1, Mar. 15, 1940, available at www.unidroit.org/mm/statute-e.pdf (as amended Mar. 26, 1993) (stating that the function of UNIDROIT is “to examine ways of harmonising and coordinating the private law of States and groups of States”); *id.* art. 14 (providing that the Governing Council submit any approved drafts to member governments and facilitate conferences to discuss the drafts, if desirable); Statute of the Hague Conference on Private International Law, art. 1, July 15, 1955, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=29 (as amended Jan. 1, 2007) (“The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law.”); *id.* art. 8 (authorizing the creation of “Special Commissions to prepare draft Conventions or to study all [relevant] questions of private law”).

¹⁰⁵. Buchanan & Keohane, *supra* note 98, at 413 (stating that the “Pedigree View” of legitimacy fails to account for nondemocratic states); *id.* at 414 (discussing weak democratic states).

¹⁰⁶. See, e.g., G.A. Res. 2205 (XXI), *supra* note 5, pmb1. (reasoning that a U.N. organ specifically dealing with the unification of international trade is necessary because discordant norms serve as barriers to trade, and NGOs and IGOs alone cannot effectively promote broader participation partly

choice but to either adopt the law developed by these institutions or have inadequate norms for a particular issue area.¹⁰⁷ Thus, state preferences are shaped by the norms developed in these institutions.¹⁰⁸

Determining whether a standard or rule is legitimate involves assessing the legitimacy claim of the organization that promulgates the standard or rule. As others have explained, legitimacy can be viewed as “an actor’s normative belief that a rule or institution ought to be obeyed.”¹⁰⁹ One cannot attempt to truly assess a subjective belief, but one can attempt to assess the objective criteria upon which that belief is based.¹¹⁰ Thus, organizations may claim that their rules are legitimate from a normative standpoint because they are good rules, or are representative of the constituents affected by them, or result from good process.¹¹¹ Whether States believe these claims are warranted is a sociological and subjective matter.¹¹²

While the actual perception of legitimacy is a sociological and subjective matter, the claim to legitimacy is one that can be assessed objectively. IOs’ legitimacy claims can be assessed by what Professor Fritz Scharpf, and later Robert Keohane and Joseph Nye, describe as input criteria (“the means by which constituents participate in IOs, e.g., representation, inclusiveness, or process”)¹¹³ and output criteria¹¹⁴

due to their limited authority and membership); *id.* ¶ II.8(b)–(c) (stating that UNCITRAL’s harmonization of international trade law should include both promoting participation in existing laws and developing new ones); *id.* ¶ II.9 (instructing UNCITRAL to consider the interests of all parties, “particularly those of developing countries, in the extensive development of international trade”).

¹⁰⁷. Since UNCITRAL is not only concerned with unifying international trade norms, but also with formulating them, developing countries or other States without established trade norms should adopt those promoted by UNCITRAL if they wish to participate effectively in the international market. *See id.* pmb1. (noting that UNCITRAL’s work is necessary to fulfilling UNCTAD’s interest in “promoting the establishment of rules furthering international trade as one of the most important factors in economic development”).

¹⁰⁸. Buchanan & Keohane, *supra* note 98, at 408 n.5. *See also* Claire R. Kelly, *The Value Vacuum: Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop*, 22 MICH. J. INT’L L. 673, 687–88 (2001) (introducing a modified constructivist theory of international relations).

¹⁰⁹. HURD, *supra* note 96, at 7.

¹¹⁰. *Id.* at 7–8.

¹¹¹. Kelly, *Legitimacy*, *supra* note 94, at 613–14 (discussing legitimacy claims in terms of institutional functioning and accomplishments, and input and output criteria).

¹¹² Buchanan & Keohane, *supra* note 98, at 405.

¹¹³. Kelly, *Legitimacy*, *supra* note 94, at 613. *See also* Robert O. Keohane & Joseph S. Nye, Jr., *Between Centralization and Fragmentation: the Club Model of Multilateral Cooperation and Problems*

(“substantive outcomes, e.g. trade liberalization, or fairness, and whether goals set by the IOs themselves are reached, i.e., is the IO effective”).¹¹⁵

In order to improve input legitimacy criteria, IOs will try to improve both the representative nature of their rulemaking as well as the process by which they make rules. IOs that allow for the participation of those affected by their rules are representative.¹¹⁶ It would be difficult, if not impossible, in the international realm for an IO to be democratic. But IOs can attempt to structure their norms to reflect the will of the entities on whose behalf they act.¹¹⁷ IOs can also improve their claims to legitimacy by improving process, e.g. fair procedures, deliberations, transparency, and rules against abuse. IOs can certainly attempt to improve process by utilizing traditional administrative law devices, such as notice, comment, and power sharing.¹¹⁸

Alternatively, output legitimacy focuses on good outcomes: whether a law, standard, or rule is fair, just, well-ordered, universally accepted, or supportive of a particular goal such as trade liberalization. Effectiveness depends on developing useful norms.¹¹⁹ It results from

of Democratic Legitimacy 12–15 (Kennedy Sch. of Gov’t Working Paper Series, RWP01-004, 2001), available at [http://ksnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP01-004/\\$File/rwp01_004_nye_rev1.pdf](http://ksnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP01-004/$File/rwp01_004_nye_rev1.pdf) (discussing input legitimacy criteria and noting that inputs can be either electoral and non-electoral).

¹¹⁴. FRITZ SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* 2 (1999) (discussing input and output legitimacy); Keohane & Nye, *supra* note 113, at 3 (noting that both inputs and outputs can affect legitimacy).

¹¹⁵. Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *YALE L.J.* 1490, 1517 (2006) (discussing legitimacy in terms of outcomes).

¹¹⁶. See Keohane & Nye, *supra* note 113, at 14 (discussing the legitimacy of domestic democracies and noting that these governments garner more legitimacy than IOs because they readily incorporate the views of the affected public, rather than just elite law-makers).

¹¹⁷. See Esty, *supra* note 115, at 1504–05 (noting that claims to legitimacy are strongest where there is a sense of community, but that it is increasingly harder for constituents to identify with policymakers on a global scale).

¹¹⁸. *Id.* at 1534–37 (discussing that horizontal and vertical power-sharing mechanisms can increase the legitimacy of international rulemaking); Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 *EUR. J. INT’L L.* 1, 4 (2006) (noting the tendency of IOs to improve participation and accountability by incorporating various administrative law mechanisms into their decision-making, including procedures for notice-and-comment).

¹¹⁹. Keohane & Nye, *supra* note 113, at 15. See also Keohane, *supra* note 91, at 15 (noting the need for epistemic legitimacy whereby IOs properly utilize both existing and new information to develop standards that remain open to improvement).

expertise, sometimes combined with a limited constituency and/or limited focus and mandate.¹²⁰ Process and inclusion may also foster effectiveness and engender better rules that will be more readily accepted by those affected by them.¹²¹ Focusing on good outcomes requires a normative assumption of what is a good outcome.

Neither input nor output legitimacy are ideal and, in fact, IOs often seek both and try to balance the tension between them. The very nature of legitimacy—its normative and sociological aspects, as well as the value judgments required for any normative framework—reveals that legitimacy is an ongoing dynamic balancing act. As a result, procedural criteria are helpful to ensure that an institution remains accountable and flexible. Alan Buchanan and Robert Keohane have developed a normative standard for institutional legitimacy which captures both output and input criteria. Buchanan and Keohane seek to construct a model that provides for the “ongoing critical revision of [an institution’s] goals, through interaction with agents and organizations outside the institution.”¹²² Their model seeks to strike the right balance of public support on moral grounds, a minimum level of justice, democratic consent as well as democratic values, and flexibility and accountability.¹²³ To achieve these ends, Buchanan and Keohane suggest three substantive criteria (output): (i) minimal moral acceptability; (ii) comparative benefit; and (iii) institutional integrity. Further, they seek to counteract weaknesses in this model through mechanisms to achieve accountability and transparency (input).

Minimal moral acceptability is indeed a minimal requirement. According to Buchanan and Keohane, it does not require that institutions promote human rights but it does impose a “do no harm” baseline.¹²⁴ At minimum, institutions “are legitimate only if they do not persist in

¹²⁰. See, e.g., Jean-Marc Coicaud, *Conclusion: International Organizations, the Evolution of International Politics and Legitimacy*, in LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 521 (2001) (discussing limited focus and mandate).

¹²¹. Keohane, *supra* note 91, at 5 (noting that where effectiveness depends on legitimate processes, output legitimacy is thus reliant upon input legitimacy).

¹²². Buchanan & Keohane, *supra* note 98, at 406.

¹²³. *Id.* at 417–18.

¹²⁴. *Id.* at 420 (noting that institutions should at least respect human rights).

violations of the least controversial human rights.”¹²⁵ Institutions should also promote comparative benefit: they must do some good in order to pursue a stronger claim to legitimacy.¹²⁶ To be legitimate, institutions must have an instrumental role that is not otherwise achievable,¹²⁷ or not otherwise more achievable (hence the comparative nature of the benefit is what matters).¹²⁸ Finally, institutional integrity requires that legitimate institutions be true to themselves.¹²⁹ They cannot promote democracy and be undemocratic.¹³⁰ This model reflects the fact that both input and output criteria must be used to assess claims to legitimacy. While we can assess legitimacy claims by looking at either, were we to design an institution we would want to consider both.¹³¹

I believe that as both input and output criteria have their weaknesses and the process of international lawmaking must necessarily be a dynamic one, a model that attempts to balance these criteria, such as the one put forth by Buchanan and Keohane, is most helpful. An assessment of an institution’s claim to legitimacy should therefore consider the following: whether the institution’s level of effectiveness justifies its role, whether there is some level of participation by those

¹²⁵. *Id.* at 420. Buchanan and Keohane explain that it is difficult to categorize human rights because what many commonly refer to as “rights,” are actually protective mechanisms for “basic human interests” to which there are standard known threats. *Id.* at 419. Although the list of potential human rights is long, there are but a few upon which agreement has been achieved: “the rights to physical security, . . . freedom from slavery, servitude, and forced occupations[], and the right to subsistence.” *Id.* at 420. Thus, due to the uncertain existence of other “human rights,” an institution must acknowledge and respect these agreed-upon rights in order to claim that it is legitimate. While actively promoting and protecting more controversial rights may bestow greater legitimacy on an institution, it is unfair to *require* such action where uncertainty exists. *Id.* at 421–22.

¹²⁶. Institutions are created under the premise that they will fulfill some mandate and generally benefit those States that are subject to their rules. If they cannot achieve this goal, their claim to legitimacy is less tenable. *Id.* at 422.

¹²⁷. If States consent to be bound by institutional rules, but can realize similar benefits elsewhere, then those States will be more inclined to question or interfere with the functioning of the institution. To claim legitimacy based on comparative benefit, the institution itself must be necessary. *Id.* at 422.

¹²⁸. Legitimacy is compromised where an institution’s performance falls short of feasible and available alternatives. But it is important to note that “[l]egitimacy is not to be confused with *optimal* efficacy and efficiency”; rather, this assessment will depend in part on its efficiency relative to other institutions. *Id.* at 422.

¹²⁹. *Id.* at 422–23.

¹³⁰. *Id.* at 423 (noting that an institution’s “practices or procedures [should not] predictably undermine the pursuit of [its] goals”).

¹³¹. *See Id.* at 410 (stating that institutional effectiveness should not undermine “basic moral commitments,” thus a hybrid perspective is necessary).

affected by its rules, and whether some processes exist to protect both its normative mission and its representative credentials. The exact calibration of this model for any specific endeavor is a larger project. But, here, I would like to briefly discuss the challenges of applying a dynamic model of legitimacy by using the UNCITRAL Working Methods controversy.

b. CONSIDERING THE LEGITIMACY VALUE OF THE PROPOSALS TO UNCITRAL’S WORK METHODS

The French proposals to the Working Methods suggest that reaching “consensus” on any given matter requires a greater degree of agreement than sometimes exists.¹³² There appears to be a concern that the Commission may declare consensus when some States believe it truly does not exist. France also desires that the working documents that serve as the basis for consensus flow from the Member States and should not be diluted by nonmembers. France’s proposals would restrict the influence of non-states and nonmembers in drafting these working instruments.¹³³

One could view these objections as political, as a means for France to achieve a substantive outcome more akin to its own interests, or as an attempt to secure more legitimate norms. First, consider the question of the meaning of consensus. The Secretariat’s position, as well as that of the United States, seems to be that when a decision is the result of a substantially prevailing view, one can say that it has been achieved by consensus.¹³⁴ However, from a power perspective, France, as a Member State of UNCITRAL, has its influence diminished if the level of agreement needed for consensus is lessened when France objects to the action at hand. Depending on France’s relative power within the institution, this dilution of its power could be considerable. This concern would, theoretically, at least apply to other States with whom France competes for power, but the power dynamics would necessarily be affected by the relative power of each State.

132. *See supra* notes 53–54 and accompanying text.

133. *See supra* notes 69 & 71 and accompanying text.

134. *See supra* notes 34 & 80 and accompanying text.

However, the meaning of consensus affects a variety of issues. Before the parties reach agreement, the level of agreement needed for consensus serves as leverage for those holding a minority opinion. Where consensus requires a high level of agreement, those in the majority position will need to compromise more in order to achieve their goals. Where the meaning is diluted, less will be sacrificed. Viewed from this perspective, the meaning of consensus seems like a political bargaining tool. This characterization seems especially appropriate when one understands that if the matter were put to a simple majority vote, as it may be in UNCITRAL,¹³⁵ the majority position would likely pass and the minority position would fail. The level of consensus needed will not affect whether the majority position ultimately prevails, but it might affect the compromises that the majority is willing to make in order to have its position adopted by consensus.

Interestingly, this negotiation effect not only impacts the political positions of the individual States, but it implicates a political issue for the institution as well. The ability of the institution to operate by consensus affects its power within the international community. As IOs compete with each other for relevance, the States within the institution, and the institution itself, have an interest in maintaining the institution's power.

The power of the institution is implicated because consensus is important from a legitimacy standpoint. From that perspective, France may feel that a weakened level of agreement necessary for consensus enables other parties to misrepresent the level of agreement actually achieved, thus empowering a decision with more legitimacy than it deserves. In other words, if one looks at legitimacy as a matter of inputs, e.g., representation, when consensus is reached with less than full agreement of all those represented, no one should be entitled to claim as much. Thus, the proposal could be defended based upon an input legitimacy framework.

The effect of the meaning of consensus on legitimacy matters more from an input legitimacy perspective than from an output legitimacy perspective. Input legitimacy focuses on, *inter alia*,

135. See *supra* note 33 and accompanying text.

participation. Output legitimacy focuses on effective norms. One could suppose that the level of agreement correlates to the efficacy of the norm, but it is not hard to imagine a situation where that would not be the case. Admittedly, the level of agreement may affect the acceptance of the norm by States, which may impact its effectiveness and output legitimacy. Still, consensus seems more important from an input legitimacy perspective.

Likewise, one can view the concern over participation from a political perspective. The participation of non-states (or nonmember States) dilutes the representation of Member States. But, again, this influence would presumably dilute the interest of all Member States such that France would not be able to complain from a political perspective. Nevertheless, the effect of that dilution depends upon the relative power positions of each State within UNICITRAL. Moreover, France, or other countries, may feel that the influence of non-states benefits another State in particular, or that one State, perhaps because of the influence of nonmembers, is able to dominate the document-drafting process. France may see the influence of nonmembers as favoring the views of another State, perhaps the United States. Thus, the concern over participation may be motivated by political concerns.

Indeed, it would seem that the proposal is necessarily political as more participation would almost always improve an organization's input legitimacy credentials and, thus, any objection would likely be a political one. Expert participation seems particularly helpful, where, as is the case at UNCITRAL, there is some vetting process to discern who should be allowed to participate as an expert.¹³⁶ One challenge to IOs is that they fail to represent those affected by them.¹³⁷ As the democratic analogy fails to translate well in the international sphere for a variety of reasons,¹³⁸ it would seem that representation from various groups would be welcomed from a legitimacy perspective, especially if those groups are experts.

136. *See supra* notes 40, 47–48, 85.

137. Keohane & Nye, *supra* note 113, at 14–15.

138. Buchanan & Keohane, *supra* note 98, at 416; Kelly, *Legitimacy*, *supra* note 94, at 617; Keohane & Nye, *supra* note 113, at 11–15.

France may claim that the participation of nonmembers actually undermines representation legitimacy by giving some States more representation than others. France and the United States do not disagree over the suggestion that experts be categorized according to their level of expertise.¹³⁹ Rather, France seems troubled by who is funding the experts, implying that some States are given undue representation because of expert participation.¹⁴⁰ If input credentials, such as representation, are important, then the nature and scope of that representation should matter. Just because States are present in an organization does not mean that they share the same level of influence. Now it may be that we do not want them to do so. Some States have stronger interests, more at stake, or better expertise. Perhaps it is normatively desirable that they exert greater influence.

Nevertheless, I believe that if one uses the broad notion of input legitimacy as the proper yardstick, participation by nonmembers would strengthen a legitimacy claim. UNCITRAL's legitimacy thrives in part on its claim to expertise both because it is seen as welcoming wide participation by experts as well as States (input), and because its documents are viewed as effective (output). While it is true that the participation of experts might give greater support to one State's position over another's, as long as the contributor is an expert and other experts are also permitted to participate, it would seem to serve the organization's interests, and input legitimacy.

This last point, that other experts are also permitted to participate, is an important one. Simply because an entity is an expert does not mean that it holds the only view of what would be an effective standard or rule. The very existence of IOs like UNCITRAL demonstrates that there are a variety of ways to approach difficult problems and that no one view of how the law should operate is correct for all circumstances. Experts can tell us how things will work (or not work) and, in doing so, they may make policy recommendations about how best to fashion rules. But, there may be larger policy questions at stake that would privilege the

139. *See supra* note 73 and accompanying text (setting forth France's proposals regarding experts); *see supra* note 86 and accompanying text (noting U.S. agreement with categorization of experts).

140. *See supra* notes 61 & 75 and accompanying text.

views of another set of experts. Simply put, a common law expert will not be very helpful in addressing the value of a civil law approach to a particular problem. Understanding that we live in a world where there are fundamentally different approaches to legal problems reveals that the term “expert” has its limitations. Ideally, legitimacy is fostered by hearing from all the experts and, to the extent that France’s proposals suggest there are experts whose voices are silenced, it would trigger legitimacy concerns as well.

IV. CONCLUSION

Thinking about process in terms of legitimacy is important. Organizations compete for relevance in part by competing for legitimacy. Lawmaking that is seen as legitimate is more likely to be implemented and obeyed. States within those organizations compete for influence by competing for control over the law-making process. What seems like a political struggle can also have legitimacy implications, and vice versa. Some points to keep in mind when trying to evaluate proposals:

1. Input and output legitimacy both matter. Organizations strive for, and need, both.
2. The right balance of input and output criteria depends on the organization and may be dynamic within the organization.
3. Proposals to alter the processes of organizations serve both politics and legitimacy.
4. The same proposal may affect both politics and legitimacy at the same time.
5. When considering proposals it is helpful to think of how those proposals affect input and output legitimacy criteria separately.
6. Legitimacy affects the power (politics) of the organization itself.

7. To the extent that States have (or lack) relative power in an organization, their positions are affected by the legitimacy (power) of the organization.

Ultimately, it is difficult to speculate about the true motivation of any State when making proposals. Also, any proposal may be the result of mixed motivations. And any proposal may serve (or disserve) legitimacy criteria, regardless of motivation. But assessing the legitimacy impact of proposals seems worthwhile to facilitate useful IOs.

These preliminary conclusions suggest some thoughts for further research. The following is a non-exhaustive list of data that might be collected:

1. Identify the non-state entities that now participate at UNCITRAL: How do they compare to other non-state entities that participated in the past? What interests, if any, do they represent or align themselves with?
2. Identify the actual process of norm generation: Do norms evolve first from generated documents? Or, if at some point prior to that, when? Are they easy or difficult to change prior to their appearance in an institution's written documentation? How likely are they to change once they appear in writing? What or where are the major points of evolution in norms?
3. Does the status of participants (whether Member State, nonmember State, or non-state entity) matters in terms of their influence over the norm generation process?
4. Identify both a continuum of agreement and also the points at which parties consider a consensus to be present.
5. Identify whether there are real needs or desires to limit transparency and, further, the reasons behind such needs and desires.
6. Whether and to what extent does the technical expertise needed in decision making implicate policy concerns?

7. Identify specific proposals and the concomitant state support or objection to them in relation to the policy preferences of Member States.

The answers or data collected from these questions may help us better assess whether particular proposals regarding how institutions generate rules will enhance the institution's legitimacy. We can they assess whether these legitimacy gains are offset at all or to what extent by the particular political agendas of individual States that promote these proposals.