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INCREMENTALISMS IN GLOBAL LAWMAKING

*Susan Block-Lieb** & *Terence C. Halliday***

I. INTRODUCTION

Academics have noted that global law may develop only slowly—two steps forward, three steps back, three steps forward, two steps back. Some are frustrated with the interminable pace and the fragmentation caused (they claim) by incrementalism in international law.¹ To others, the gradual accretion of international law constitutes strength. For example, Oona Hathaway² describes the benefits of incremental international law-making in this way:

Rather than confront states immediately with a legal regime that couples challenging goals with strong sanctions for failure to meet them, states can be gradually led toward stronger legal rules. This can be ac-

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Both authors have been involved in UNCITRAL proceedings since 1999: Block-Lieb as a delegate from the American Bar Association and Halliday as a social scientific observer. Our findings are based on a combination of research methods, including participation in all formal Working Group and Commission sessions and informal expert meetings, statistical analysis of speech turns by all delegates, content analysis of all recommendations, and interviews of key delegates and UNCITRAL staffers during all phases of the proceedings.

1. See, e.g., Johathan I. Charney, *Technology and International Negotiations*, 76 AM. J. INT'L L. 78, 79–80 (1982) (“While traditionally the international law relevant to new technological developments has slowly evolved out of the customs and practices of nations before being codified in international agreements, . . . the current international situation has been characterized as ‘functional eclecticism’ or ‘incrementalism,’ which means that a relatively disorganized international community reacts in an ad hoc manner to direct needs and demands.”); Sara Dillon, *Looking for the Progressive Empire: Where is the European Union’s Foreign Policy?*, 19 CONN. J. INT’L L. 275, 278 (2004) (arguing that “decades-old European Community ‘method’—rational planning, bureaucratic solutions, suppression of political passion and a steady incrementalism—is incapable of catching popular fire in a way that would allow the EU to mount a true global challenge to the U.S.”).

2. Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 531 (2005) (constructing an integrated theory of international law, and observing that one method for mediating “conflict between commitment and compliance” with international law involves moving “states incrementally down the path toward stronger international rules with true enforcement provisions”).

completed by starting with relatively weak international rules backed by little or no sanctions that all states feel comfortable joining, but then gradually pushing states to accept successively stronger and more challenging requirements.³

The benefits of incrementalism are, thus, only revealed over time. These benefits are also prominent when assessing how to tackle hard cases for global reform. Incremental development of global law is more often championed where law reformers possess limited authority⁴ and where the subject is either controversial⁵ or technical⁶ (or both).

3. *Id.*

4. Amichai Cohen similarly describes bureaucracies and administrative agencies as legitimizing international law, albeit only incrementally. Amichai Cohen, *Bureaucratic Internalization: Domestic Governmental Agencies and the Legitimization of International Law*, 36 GEO. J. INT'L L. 1079, 1107–08 (2005). Cohen describes agencies' slow progress in implementing international norms to domestic policy in this way:

Revolution via bureaucracy will never be considered legitimate. In cases of persistent domestic opposition to the implementation of international law, agencies can only take small steps, constantly seeking to change public perceptions and ideas. Hence, when an agency uses its legitimacy to promote a specific policy, it usually does so through an incremental process of policy changes.

Id.; see also Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663 (2005); James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 L. & CONTEMP. PROBS. 189 (2005) (making a similar observation in the context of describing the Organization for Economic Cooperation and Development (OECD)).

5. For a defense of the incrementalism with which international environmental law often proceeds, see, for example, Philippa England, *Book Reviews*, 54 INT'L & COMP. L.Q. 1037, 1038 (2005) (reviewing Francis Botchway, *International Encyclopaedia of Laws, Supplement 46*, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS: ENVIRONMENTAL LAW) (“More sophisticated legal techniques are not necessarily the solution—realistic, feasible solutions driven by the political will of leaders, the general population and supported by the international community may offer a more incremental but ultimately more effective method of dealing with environmental issues.”). See also Melissa E. Crow, *Smokescreens and State Responsibility: Using Human Rights Strategies to Promote Global Tobacco Control*, 29 YALE J. INT'L L. 209 (2004) (describing recommendations for incremental development of international standards on tobacco regulation).

6. See, e.g., Arthur J. Cockfield, *Tax Integration Under NAFTA: Resolving the Conflict Between Economic and Sovereignty Interests*, 34 STAN. J. INT'L L. 39, 58 (1998) (defending “gradualism” on the topic of integration of tax laws of NAFTA member states); Carl Felsenfeld & Genci Bilali, *The Role of the Bank for International Settlements in Shaping the World Financial System*, 25 U. PA. J. INT'L ECON. L. 945, 1044 (2004) (noting that the international financial system has evolved (and should evolve) “incrementally, changing marginally in response to pressures from markets and governments, not discontinuously in response to radical visions”); Janet Koven Levit, *The Dynamics of*

Not surprisingly, then, incrementalists have found much to like about global insolvency law reform. John Pottow describes the “genius” of the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law (UNCITRAL) as a combination of its “modesty of scope” and “procedural focus”—attributes that together lead him to describe the Model Law as the product of “procedural incrementalism.”⁷ Pottow’s work is important because, more than simply noting that the Model Law on Cross-Border Insolvency constitutes incremental reform and lauding the benefits of its incrementalism, it also attempts to explain *how* international law develops incrementally.⁸ By focusing his theory of procedural incrementalism on a single

International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits, 45 HARV. INT’L L.J. 65, 69 (2004) (pointing to the Arrangement on Officially Supported Export Credits as a case study and concluding: “In its pragmatism, the elasticity of its soft form, consensus-backed incrementalism, and dialogue-enhancing procedures [sic], the Arrangement is an international regulatory framework that effectively beckons compliance, thereby deserving attention and emulation.”).

7. John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT’L L. 935, 939 (2005). Pottow describes UNCITRAL’s incrementalism in the Model Law on Cross-Border Insolvency as follows:

By adopting an incrementalist and procedurally animated approach (what I call “procedural incrementalism” as a shorthand), the Model Law created an opportunity to bridge the theoretical gap between universalists and territorialists. This was accomplished obliquely: on the surface, the Model Law bridged it by appearing to be a hybrid of universalism *and* territorialism, with something seemingly for everyone. Beneath the surface, however, the Model Law actually advanced universalism, and in a way that caused minimal affront to territorialist jurisdictions. The Model Law’s design thus allowed hesitant states to “acclimate” to a regime of universalism. This is the genius of the Model Law and makes it unprecedented in its effectiveness as a mechanism of international reform.

Id.

8. Pottow is not the first scholar to note that “soft law” assists in promoting the incremental development of global law. *See, e.g.*, Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 446 (2000) (“Because even soft legal agreements commit states to characteristic forms of discourse and procedure, soft law provides a way of achieving compromise over time.”); David M. Trubek et al., “*Soft Law, “Hard Law,” and European Integration: Toward a Theory of Hybridity*,” 11-12 (Univ. of Wis. Legal Stud. Res. Paper Series, Paper No. 1002, 2005), available at <http://SSRN.com/abstract=855447> (constructing a list of explanations as to “why soft law might be preferable to hard law in some circumstances,” and listing “incrementalism” as “one such benefit” in that “[s]oft law can also represent a first step on the path to legally binding agreements or hard law”); *see also* Wolfgang H. Reinicke & Jan Martin Witte, *Interdependence, Globalization, and Sovereignty: The Role of Non-Binding International Legal Accords*, in COMMITMENT AND COMPLIANCE: THE ROLE OF

episode of global lawmaking, however, Pottow may place undue emphasis on the “procedural focus” of incremental global lawmaking, and may not fully appreciate its dynamic benefits.

More than simply appraise the case for incrementalism, we also explain how incrementalism works, offering a dynamic model of incrementalism with potentially broad application. Focusing on how UNCITRAL has engaged in global lawmaking over its roughly forty-year tenure, we find that incrementalism takes at least three forms.⁹ *Vertical* incrementalism occurs when international organizations dig more deeply in a particular area over progressive rounds.¹⁰ *Horizontal* incrementalism can be observed when international organizations expand the substantive boundaries of the range of topics they seek to embrace in successive rounds. *Pyramidal* incrementalism occurs when an international organization deliberately drafts its norms by standing on the shoulders of prior efforts of other international organizations.

This careful examination of methodologies permits us to observe important connections between UNCITRAL’s incremental progress in law

NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 75, 76 (Dinah Shelton ed., 2000) (explaining that non-binding international legal agreements “are not necessarily an alternative to international hard law or inter-state cooperation, but they can and often do represent the first important element in an evolutionary process that shapes legal relationships among and between multiple actors, facilitating and ultimately enhancing the effectiveness and efficiency of transnational policy-making”).

9. This dynamic model of incremental global lawmaking is not meant to assert that soft law should only serve “as a way station to harder legalization,” nor that “legal agreements have an inevitable life cycle from softer toward harder legalization.” Abbott & Snidal, *supra* note 8, at 423, 447 (“Hard law is probably more likely to evolve from soft law than from (utopian) plans to create hard law full-blown. But this does not imply that all soft legalization is a way station to hard(er) legalization, or that hard legalization is the optimal form.”). Like Abbott and Snidal, we see important normative value in soft law, but leave explication of the circumstances in which soft law should be preferred to hard law for another time. Here, we argue that international and global law often develops incrementally, that the incremental development of law may in some instances be assisted by first adopting soft laws that, over time, become harder, that the incremental development of global law may, in other instances, take a horizontal or pyramidal path rather than a vertical one, and, finally, that incremental global lawmaking can bolster the legitimacy of the lawmaker.

10. Although we are the first to call this sort of progress “vertical incrementalism,” we are not the first to note that the incremental development of international law may, and indeed perhaps should, take a path in which agreements slowly harden over time. See, e.g., Hathaway, *supra* note 2, at 531 (“The creation of weak international rules may frequently serve to offset pressure for stronger rules that would be more effective. Hence this incrementalist strategy must be embarked upon with caution. In fact, if incrementalism is to be successful, it may be necessary to require participants in the regime to make successive steps toward stronger and more enforceable rules.”).

reform and the legitimacy¹¹ with which the international community views its law reform efforts.¹² Political science scholarship indicates that the legitimacy of international organizations comes from three sources: representativeness; procedural fairness; and effectiveness. We argue that incrementalism facilitates legitimacy because it assists an international organization in promoting (a perception of) its effectiveness to the international community. If the organization meets the standards for success that it sets itself, it is more likely to be considered effective. Setting and meeting achievable goals are more important, then, than setting and meeting grandiose goals. On this ground, success in taking a series of small steps is preferable to having made an unsuccessful attempt at achieving grand plans. Over time the repeated meeting of incremental improvements sets up expectations that its success will occur as a matter of course. Since that success involves the perceived rightness of its actions and products, audiences will be more inclined to take-for-granted the naturalness of obedience, compliance, or conformity to the norms promulgated by the organization.

Insolvency law highlights the benefits of UNCITRAL's incrementalism (and the relationship between its incrementalism and its legitimacy) precisely because international agreement on the substance of insolvency law was believed by many to present insoluble difficulties. Experts were (and some remain) skeptical of the likelihood of global reform of insolvency laws, both because insolvency law is thought to be more deeply embedded in national traditions and legal cultures than other areas where

11. Legal sociologist Mark Suchman defines legitimacy as "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions." Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. OF MGMT. REV. 571, 574 (1995). By this he means that an actor, such as a nation-state, corporation, or NGO, believes in the "rightness" of a rule or the authority of an institution. If a rule is legitimate, it should be obeyed. If an institution has authority, it should be acknowledged. In either case, an external standard becomes internalized by an actor. It is critical to recognize that legitimacy is a *subjective* state, that is, it depends on a perception by others. See also JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY ch. 5 (Thomas McCarthy trans.) (1979); IAN HURD, LEGITIMACY AND POWER IN INTERNATIONAL RELATIONS (forthcoming 2007); Tom R. Tyler, *A Psychological Perspective on the Legitimacy of Institutions and Authorities*, in THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS 416 (John T. Jost & Brenda Major eds., 2001). We know an institution is legitimate by the assessments and behaviors of its audiences or constituencies; legitimacy should not be equated with coercion or self-interest.

12. For further discussion of the legitimacy of UNCITRAL, see Susan Block-Lieb & Terence Halliday, *Legitimation and Global Lawmaking*, (Fordham L. Legal Studies Res. Paper No. 952492, 2006), available at <http://ssrn.com/abstract=952492>.

successful conventions and model laws have been developed, such as sales and arbitration, and because there is wide substantive and institutional divergence of insolvency regimes across the world's nations. Moreover, insolvency law puts on the table fundamental policy disputes over the relative market power of parties often in conflict—owners and managers, managers and workers, secured creditors and unsecured creditors, shareholders and stakeholders. Differences in insolvency regimes reflect differences in the principal ways that states and markets are regulated. Insolvency law is thought to be a highly complex area where the authority of technical specialists might be expected to dominate.¹³

This Article provides a glimpse at the incremental path UNCITRAL has followed and offers preliminary comments on the methodology and benefits of incrementalism. Part II of this Article looks historically at the international instruments promulgated by UNCITRAL since its inception, and notes its incremental progress within various areas of trade law. Part III examines in greater detail the efforts of a single working group within UNCITRAL: the Working Group on Insolvency Law. Part IV comments on the connections between legitimacy and incremental global law reform.

II. UNCITRAL'S INCREMENTALISMS

The United Nation's General Assembly adopted a resolution to establish its Commission on International Trade Law in 1966.¹⁴ In justifying the creation of UNCITRAL, the General Assembly "[r]eaffirm[ed] its conviction that divergencies arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade."¹⁵ Because other international organizations had been established earlier with the same ends in mind and law reform had only slowly lumbered forward, the Resolution justified the need for yet another international organization devoted to "the progressive harmonization and unification" of trade law on the grounds that "[broader] participation in this field on the part of many developing countries" would "be desirable" and that the U.N. was uniquely positioned both to provide a more representative forum for law reform and to "co-ordinate[], systematize[] and accelerate[]" the process of "harmonization and unification of the law of international trade."¹⁶

13. BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, *RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES* 1-11 (1998).

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

15. *Id.*

16. Here are the relevant four paragraphs from G.A. Res. 2205(XXI):

This charter, on its face, encourages UNCITRAL to proceed incrementally by providing that UNCITRAL “shall further the progressive harmonization and unification of the law of international trade,” not simply by adopting conventions, but through eight different permitted means. The Resolution grants UNCITRAL broad leeway in the form of the international instrument through which it chooses to accomplish law reform, indicating that it should “prepar[e] and promot[e] the adoption of new international conventions, model law[,] and uniform laws,” as well as “promot[e] the codification and wider acceptance of international trade terms, provisions, customs[,] and practices” Incrementalism is invited, if not virtually assured, by the range of international instruments and other technologies of law reform permitted by the Resolution.

The Resolution also envisions UNCITRAL as a coordinator of global law reform as much (and arguably even more than) as a source of global law. Seven of the eight proscribed means for furthering the “progressive harmonization and unification of the law of international trade” that appear in the Resolution involve the coordination of other organizations.¹⁷ Paragraph eight provides that UNCITRAL may proceed by:

Having noted with appreciation the efforts made by intergovernmental and non-governmental organizations towards the progressive harmonization and unification of the law of international trade by promoting the adoption of international conventions, uniform laws, standard contract provisions, general conditions of sale, standard trade terms and other measures,

Noting at the same time that progress in this area has not been commensurate with the importance and urgency of the problem, owing to a number of factors, in particular insufficient co-ordination and co-operation between the organizations concerned, their limited membership or authority and the small degree of participation in this field on the part of many developing countries,

Considering it desirable that the process of harmonization and unification of the law of international trade should be substantially co-ordinated, systematized and accelerated and that a broader participation should be secured in furthering progress in this area,

Convinced that it would therefore be desirable for the United Nations to play a more active role towards reducing or removing legal obstacles to the flow of international trade

Id.

17. José Angelo Estrella Faria, Secretary to UNCITRAL’s Working Group in Electronic Commerce, explains the number and range of law reform bodies in existence at the time of UNCITRAL’s creation in this way:

Obviously, UNCITRAL was not the first international organization to act in the field of harmonization of commercial and private law. Both the Hague Conference on Private International Law (“Hague Conference”) and the International

- (a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them;
- (b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws;
- (c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in the field;
- (d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;

Institute for the Unification of Private Law ("UNIDROIT") had made remarkable contributions to legal harmonization long before the United Nations was established in 1945.

Following the establishment of the United Nations, a second group of international organizations involved in the development of rules of international commercial law emerged. Before the creation of UNCITRAL, this group included other organs of the United Nations, such as the United Nations Conference on Trade and Development ("UNCTAD"), the U.N. Economic Commissions for Africa ("ECA"), Asia and the Pacific ("ESCAP"), Europe ("ECE"), and Latin America and the Caribbean ("ECLAC"). On a worldwide scale, there were also specialized agencies of the United Nations, such as the International Bank for Reconstruction and Development ("World Bank"), the United Bureaux for Protection of Intellectual Property ("BIRPI"), which later became the World Intellectual Property Organization ("WIPO"), the Intergovernmental Maritime Consultative Organization ("IMCO"), which later became the International Maritime Organization ("IMO"), and the International Civil Aviation Organization ("ICAO").

A third group of international organizations, separate from those established by the United Nations, also aided in the development of international commercial law. This group included regional organizations and intergovernmental groupings, such as the European Economic Community ("EEC"), the Council of Mutual Economic Assistance, the Council of Europe, the various inter-American (such as the Organization of the American States) and Latin-American organizations (such as the Latin-American Association of free trade ("ALALC")), and the Organization of African Unity ("OAU").

Finally, non-governmental organizations, such as the International Chamber of Commerce ("ICC") and the International Maritime Committee ("CMI"), had for several decades worked towards trade law harmonization.

José Angelo Estrella Faria, *The Relationship Between Formulating Agencies in International Legal Harmonization: Competition, Cooperation, or Peaceful Coexistence? A Few Remarks on the Experience of UNCITRAL*, 51 LOY. L. REV. 253, 255-56 (2005).

- (e) Collecting and disseminating information on national legislation, and modern legal developments, including case law, in the field of the law of international trade;
- (f) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;
- (g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade;
- (h) Taking any other action it may deem useful to fulfil [sic] its functions.¹⁸

Subsequent paragraphs broaden the scope of coordination UNCITRAL is directed to fulfill, by permitting it also to “consult with or request the services of any international or national organization, scientific institution and individual expert,”¹⁹ as well as to “establish appropriate working relationships with intergovernmental organizations and international non-governmental organizations concerned with the progressive harmonization and unification of the law of international trade.”²⁰ These paragraphs of the Resolution direct UNCITRAL to progress pyramidally—to make incremental progress on the “progressive harmonization and unification of the law of international trade” by coordinating with and, if possible, standing on the shoulders of earlier efforts of other organizations (international and national, governmental, intergovernmental and non-governmental, within the United Nations and outside it).

UNCITRAL is probably best known for its drafting of the Convention on Contracts for the International Sales of Goods (CISG),²¹ which has been adopted in more than fifty countries including the United States.²²

18. G.A. Res. 2205(XXI), *supra* note 14, ¶ 8.

19. *Id.* ¶ 11.

20. *Id.* ¶ 12.

21. United Nations Convention on Contracts for the International Sale of Goods (1980), available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf> [hereinafter CISG].

22. For a list of the roughly seventy nations that have adopted the CISG in one form or another, see UNCITRAL: United Nations Commission on International Trade Law, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Mar. 21, 2007). Neither Japan nor the United Kingdom has adopted the CISG. *See id.*

Table 1. UNCITRAL Work Products and Legal Technologies: 1974–2005

Year	UNCITRAL Work Product	Legal Technology
1974	Convention on the Limitation Period in the International Sale of Goods	convention
1976	Arbitration Rules	rules
1978	Convention on the Carriage of Goods by Sea (the "Hamburg Rules")	convention
1980	Conciliation Rules	rules
1980	Convention on Contracts for the International Sale of Goods	convention
1982	Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules	recommendations
1982	Unit of Account Provision and Provisions for the Adjustment of the Limit of Liability in International Transport and Liability Conventions	model legislative provisions
1983	Uniform Rules on Contract Clauses for an Agreed Sum Due Upon Failure of Performance	rules
1985	Model Law on International Commercial Arbitration	model law
1985	Recommendation on the Legal Value of Computer Records	recommendation
1987	Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works	legal guide
1988	Convention on International Bills of Exchange and International Promissory Notes	convention
1991	Convention on the Liability of Operators of Transport Terminals in International Trade	convention
1992	Legal Guide on International Countertrade Transactions	legal guide
1992	Model Law on International Credit Transfers	model law
1993	Model Law on Procurement of Goods and Construction with Guide to Enactment	model law + guide to enactment
1994	Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment	model law + guide to enactment
1995	Convention on Independent Guarantees and Stand-by Letters of Credit	convention
1996	Notes on Organizing Arbitral Proceedings	notes
1996	Model Law on Electronic Commerce with Guide to Enactment	model law + guide to enactment
1997	Model Law on Cross-Border Insolvency with Guide to Enactment	model law + guide to enactment

2000	Legislative Guide on Privately Financed Infrastructure Projects	legislative guide
2001	Model Law on Electronic Signatures with Guide to Enactment	model law + guide to enactment
2001	Convention on the Assignment of Receivables in International Trade	convention
2002	Model Law on International Commercial Conciliation with Guide to Enactment and Use	model law + guide to enactment and use
2003	Model Legislative Provisions on Privately Financed Infrastructure Projects	model legislative provisions
2005	Convention on the Use of Electronic Communications in International Contracts	convention
2005	Legislative Guide on Insolvency Law	legislative guide

Over the past forty years, UNCITRAL has produced conventions, model laws, legislative guides, and other international instruments on many areas of procedural and substantive law, including international arbitration,²³ e-commerce,²⁴ international payments,²⁵ procurement, and

23. See, e.g., UNCITRAL, UNCITRAL Arbitration Rules (1976), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>; UNCITRAL, UNCITRAL Conciliation Rules (1980), available at <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf>; *Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitrations Under the UNCITRAL Arbitration Rules Adopted at the Fifteenth Session of the Commission*, [1982] 8 Y.B. UNCITRAL 420, available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-recommendation/arb-recommendation-e.pdf>; UNCITRAL, UNCITRAL Model Law on International Commercial Arbitration (1985), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf; UNCITRAL, UNCITRAL Notes on Organizing Arbitral Proceedings (1996), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>; UNCITRAL, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use (2002), available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf>.

24. UNCITRAL, UNCITRAL Recommendation on the Legal Value of Computer Records (1985), available at <http://www.uncitral.org/pdf/english/texts/electcom/computerrecords-e.pdf>; UNCITRAL, UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (1996), available at http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf; UNCITRAL, UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (2001), available at <http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf>; UNCITRAL, United Nations Convention on the Use of Electronic Communications in International Contracts (2005), available at http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf.

25. United Nations, United Nations Convention on International Bills of Exchange and International Promissory Notes (Dec. 9, 1988), available at http://www.uncitral.org/pdf/english/texts/payments/billsnotes/X_12_e.pdf [hereinafter *Convention on International Bills of Exchange and International Promissory Notes*]; UNCITRAL, UNCITRAL Model Law on International Credit Transfers (1992), available at <http://www.uncitral.org/pdf/english/texts/payments/transfers/ml-credittrans.pdf>; UNCITRAL, United Nations Convention on Independent Guarantees and Stand-By Letters of Credit (1995), available at <http://www.uncitral.org/pdf/english/texts/payments/guarantees/guarantees.pdf> [hereinafter *Convention on Independent Guarantees and Stand-By Letters of Credit*]; United Nations, United Nations Convention on the Assignment of Receivables in International Trade (2001), available at <http://www.uncitral.org/pdf/english/texts/payments/receivables/ctc-assignment-convention-e.pdf> [hereinafter *Convention on the Assignment of Receivables in International Trade*].

infrastructure development,²⁶ international transport of goods,²⁷ and insolvency.²⁸ There are currently six active UNCITRAL working groups, whose topics range from insolvency²⁹ and secured transactions³⁰ to electronic commerce, procurement, transport law, and international arbitration and conciliation.³¹

26. UNCITRAL, Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (1987), *available at* <http://www.uncitral.org/pdf/english/texts/procurem/construction/lgconstr-e.pdf>; UNCITRAL, UNCITRAL Model Law on Procurement of Goods and Construction (1993), *available at* <http://www.uncitral.org/pdf/english/texts/procurem/proc93/proc93.pdf>; UNCITRAL, UNCITRAL Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment (1994), *available at* <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf>; UNCITRAL, UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000), *available at* <http://www.uncitral.org/pdf/english/texts/procurem/pfip/guide/pfip-e.pdf>; UNCITRAL, UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003), *available at* <http://www.uncitral.org/pdf/English/texts/procurem/pfip/model/annex1-e.pdf>.

27. United Nations Convention on the Carriage of Goods by Sea (1978) (the “Hamburg Rules”), *available at* http://www.uncitral.org/pdf/English/texts/transport/hamburg/XI_d_e.pdf; Unit of Account Provision and Provisions for the Adjustment of the Limit of Liability in International Transport and Liability Conventions (1982); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991), *available at* http://www.uncitral.org/pdf/English/texts/transport/ott/X_13_e.pdf.

28. UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment (1997), *available at* <http://www.uncitral.org/pdf/English/texts/insolv/insolvency-e.pdf>; UNCITRAL Legislative Guide on Insolvency Law (2004), *available at* http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf [hereinafter Legislative Guide].

29. For a list and description of the ongoing work of the Insolvency Working Group, see http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html.

30. The Working Group on Secured Transactions Law began its work on the Secured Transactions Guide in 2000 and projects the guide’s completion in late 2007. For a list and description of their ongoing work, see http://www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html.

31. For a description of Working Groups I, II, III and IV and their ongoing projects and draft work product, see UNCITRAL, Working Groups, http://www.uncitral.org/uncitral/en/commission/working_groups.html (last visited May 6, 2007).

Table 1 (above) lists UNCITRAL's work product over time. It also lists the legal technologies UNCITRAL employed for these projects. Table 1 demonstrates that UNCITRAL has historically relied on model laws and conventions to communicate to domestic legislatures. Over time, it has adopted two sets of rules, seven conventions, two recommendations, two sets of model legal provisions, eight model laws (four of which it combined with guides to enactment), one legal guide and one set of notes. Of the twenty-five international instruments produced by UNCITRAL since its inception, fifteen constitute model laws, model legal provisions, or conventions. In a companion article,³² we note that when it has spoken to domestic legislatures (and there are several legal technologies directly solely to private parties that we exclude from our count), UNCITRAL has overwhelmingly chosen to speak through conventions (of which it has produced seven), model laws (of which there are eight) and model legal provisions (of which there are two sets). The only exceptions to this general observation include one recommendation (on the Legal Value of Computer Records) and two legislative guides (one on Privately Financed Infrastructure Projects and another on Insolvency Law).

In large part, UNCITRAL's success in promulgating conventions, model laws, and model legal provisions has been the result of its incrementalism. Table 2 (below) reconfigures this list of work product by subject, rather than chronologically. It demonstrates that UNCITRAL has returned multiple times to each subject area of trade law. In revisiting a topic, UNCITRAL often becomes increasingly specific in its focus. Work that starts as rules or a recommendation may end with UNCITRAL promulgating a model law or convention on the topic. On these topics, UNCITRAL's incrementalism occurs vertically. But not all of UNCITRAL's incrementalism is the result of digging more deeply on a single topic and in the end adopting a convention or model law. UNCITRAL has, on occasion, begun its work on a topic by promulgating a convention or model law. Its success in adopting a convention or model law on a topic has not meant that work ceases on a subject, however. Instead, Table 2 also demonstrates incrementalism that moves sideways by expanding on the issue covered in the earlier convention or model law to consider a related topic in the same subject area. Thus, even where UNCITRAL leads with a convention or model law, it may move horizontally to cover more ground and add breadth. In some instances, finally, UNCITRAL's work follows on the heels of the earlier work of other in-

32. Susan Block-Lieb & Terence Halliday, *Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law*, TEX. INT'L L. J. (forthcoming 2007).

ternational organizations. With this sort of pyramidal progress, UNCITRAL is more likely to promulgate a convention or model law, rather than some softer international instrument. In the sections that follow, we relate each of these forms of incremental progress to specific UNCITRAL work.

Table 2. UNCITRAL Work Products and Legal Technologies, Sorted by Subject

Subject	Year	UNCITRAL Work Product	Legal Technology
Arbitration and dispute resolution	1976	Arbitration Rules	rules
Arbitration and dispute resolution	1980	Conciliation Rules	rules
Arbitration and dispute resolution	1982	Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules	recommendations
Arbitration and dispute resolution	1985	Model Law on International Commercial Arbitration	model law
Arbitration and dispute resolution	1996	Notes on Organizing Arbitral Proceedings	notes
Arbitration and dispute resolution	2002	Model Law on International Commercial Conciliation with Guide to Enactment and Use	model law + guide to enactment and use
Sales	1974	Convention on the Limitation Period in the International Sale of Goods	convention
Sales	1980	Convention on Contracts for the International Sale of Goods	convention
Sales	1983	Uniform Rules on Contract Clauses for an Agreed Sum Due Upon Failure of Performance	rules
Sales	1992	Legal Guide on International Countertrade Transactions	legal guide
Transportation	1978	Convention on the Carriage of Goods by Sea (the "Hamburg Rules")	convention
Transportation	1991	Convention on the Liability of Operators of Transport Terminals in International Trade	convention
Electronic records and electronic commerce	1985	Recommendation on the Legal Value of Computer Records	recommendation
Electronic records and electronic commerce	1996	Model Law on Electronic Commerce with Guide to Enactment	model law + guide to enactment

Electronic records and electronic commerce	2001	Model Law on Electronic Signatures with Guide to Enactment	model law + guide to enactment
Electronic records and electronic commerce	2005	Convention on the Use of Electronic Communications in International Contracts	convention
Procurement and project finance	1987	Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works	legal guide
Procurement and project finance	1993	Model Law on Procurement of Goods and Construction with Guide to Enactment	model law + guide to enactment
Procurement and project finance	1994	Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment	model law + guide to enactment
Procurement and project finance	2000	Legislative Guide on Privately Financed Infrastructure Projects	legislative guide
Procurement and project finance	2003	Model Legislative Provisions on Privately Financed Infrastructure Projects	model legislative provisions
Payments	1988	Convention on International Bills of Exchange and International Promissory Notes	convention
Payments	1992	Model Law on International Credit Transfers	model law
Payments	1995	Convention on Independent Guarantees and Stand-by Letters of Credit	convention
Payments	2001	Convention on the Assignment of Receivables in International Trade	convention
Insolvency	1997	Model Law on Cross-Border Insolvency with Guide to Enactment	model law + guide to enactment
Insolvency	2005	Legislative Guide on Insolvency Law	legislative guide

A. Vertical Incrementalism

UNCITRAL's vertical incrementalism is most starkly evidenced with the progression of legal technologies produced by UNCITRAL on electronic commerce. With e-commerce, UNCITRAL ultimately succeeded in promulgating two model laws and a convention, but only after first producing a less binding and less specific international instrument. UNCITRAL's work in this area started quite modestly with its production of the Recommendation on the Legal Value of Computer Records in 1985.³³ With this Recommendation, UNCITRAL walked very gingerly into the topic of automatic data processing, computer records, electronic communications and electronic data interchange. Comprising no more than two pages in length, the Recommendation amounts to little more than a "Recommendation" to "Governments" that they review their "legal rules affecting the use of computer records as evidence in litigation in order to eliminate unnecessary obstacles to their admission," as well as any "legal requirements" that "trade related documents" or "documents for submission to governments" be "in writing" or signed.³⁴ The preamble paragraphs of the Recommendation make clear that, although the commercial practices associated with electronic communications were rapidly changing, domestic commercial laws had not.³⁵ Although there were no existing domestic laws on the books, there was a sense that the technology was poised to mushroom in importance and a fear that inter-

33. UNCITRAL, *Recommendation on the Legal Value of Computer Records (1985)*, U.N. Doc. A/CN.9/265, available at <http://www.uncitral.org/pdf/english/texts/electcom/computerrecords-e.pdf> [hereinafter Recommendation]. The Commission prepared the Recommendation after considering several reports it had received on the topic. The first, a report from the Secretary-General of the U.N. entitled "Legal Aspects of Automatic Data Processing," (A/CN.9/254), "identified several legal issues relating to the legal value of computer records, the requirement of a 'writing,' authentication, general conditions, liability and bills of lading." See UNCITRAL, UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT 1996, WITH ADDITIONAL ARTICLE 5 *BIS* AS ADOPTED IN 1998, at 64, ¶ 125, U.N. Sales No. E.99V.4 (1999), available at http://www.uncitral.org/pdf/English/texts/electcom/05-89450_Ebook.pdf. The Commission also considered a report of the Working Party on Facilitation of International Trade Procedures (WP.4), which had been jointly sponsored by the Economic Commission for Europe and the United Nations Conference on Trade and Development, *id.*, and a report by the UNCITRAL Secretariat entitled "Legal Value of Computer Records" (A/CN.9/265).

34. Recommendation, *supra* note 33, at 2.

35. See *id.* at 1-2.

national trade would be held back if commercial law was not brought up to speed with these commercial practices.³⁶

Eleven years passed before UNCITRAL next spoke on the topic of the computerization of commercial practices,³⁷ but since then UNCITRAL has promulgated two model laws and one convention on the topic.³⁸ Importantly, these model laws and convention build on the earlier Recommendation and on each other. The UNCITRAL Model Law on Electronic Commerce explains its history and background as “prepared in response to a major change in the means by which communications are made between parties using computerized or other modern techniques in doing business.”³⁹ Although it notes the Commission’s adoption of the Recommendation as instrumental in its production of the Model Law on Electronic Commerce,⁴⁰ the Guide to Enactment of the Model Law on Electronic Commerce also explains the need both for the Model Law and for the accompanying Guide to Enactment in terms of a need for a more

36. In a companion Article we argue that this Recommendation takes on special significance in describing the history of UNCITRAL because “[t]he case for ‘in with the new’ modernization was, thus, first made with this Recommendation.” Block-Lieb & Halliday, *Harmonization and Modernization*, *supra* note 32.

37. It may be unfair to say that UNCITRAL waited eleven years to speak on the topic of electronic communications. Its LEGAL GUIDE ON ELECTRONIC FUNDS TRANSFERS (1987), and UNCITRAL Model Law on International Credit Transfers, *supra* note 25, focused on the needs of electronic commerce. *See* Model Law on Electronic Signatures with Guide to Enactment (2001), *supra* note 24, at 9. Moreover, UNCITRAL was involved in the preparation of several reports on the topic. *See* The Secretary-General, *Report of the Secretary-General on Legal Implication of Automatic Data Processing*, U.N. Doc. A/CN.9/279 (1986); The Secretary-General, *Report of the Secretary-General on Legal Implications of Automatic Data Processing*, U.N. Doc. A/CN.9/292 (1987); The Secretary-General, *Report of the Secretary-General on Electronic Data Interchange: Preliminary Study of Legal Issues Related to the Formation of Contracts by Electronic Means*, U.N. Doc. A/CN.9/333 (1990). For a discussion of these and other efforts to push for global law reform on this topic, see Amelia H. Boss, *The International Commercial Use of Electronic Data Interchange and Electronic Communications Technologies*, 46 BUS. L. 1787, 1789–90 (1991).

38. In 1996, UNCITRAL adopted a Model Law on Electronic Commerce with Guide to Enactment, *see supra* note 24; in 2001, it promulgated the Model Law on Electronic Signatures with Guide to Enactment, *see supra* note 24. Most recently, in 2005, the U.N. adopted its Convention on the Use of Electronic Communications in International Contracts. *See supra* note 24.

39. Model Law on Electronic Commerce with Guide to Enactment, *supra* note 24, at 64.

40. *Id.* at 65 (In historical section, referring to the earlier Recommendation as “express[ing] some of the principles on which the Model Law is based.”).

precise statement of desirable legislative reforms than had been presented in the Recommendation.⁴¹

[T]here was a general feeling that, in spite of the efforts made through the 1985 UNCITRAL Recommendation, little progress had been made to achieve the removal of the mandatory requirements in national legislation regarding the use of paper and handwritten signatures. It has been suggested by the Norwegian Committee on Trade Procedures (NORPRO) in a letter to the Secretariat that 'one reason for this could be that the 1985 UNCITRAL Recommendation advises on the need for legal update, but does not give any indication of how it could be done.' In this vein, the Commission considered what follow-up action to the 1985 UNCITRAL Recommendation could usefully be taken so as to enhance the needed modernization of legislation. The decision by UNCITRAL to formulate model legislation on legal issues of electronic data interchange and related means of communication may be regarded as a consequence of the process that led to the adoption by the Commission of the 1985 UNCITRAL Recommendation.⁴²

The Model Law on Electronic Commerce, adopted by the Commission in 1996, was quickly complemented by an additional article 5 bis adopted by the Commission at its thirty-first session in 1998.⁴³

Five years after adoption of the Model Law on Electronic Commerce, UNCITRAL promulgated its Model Law on Electronic Signatures with Guide to Enactment.⁴⁴ In this Guide to Enactment, UNCITRAL explains that the Model Law on Electronic Signatures represents a "modest but significant addition to the UNCITRAL Model Law on Electronic Commerce" in that it "offers practical standards against which the technical reliability of electronic signatures may be measured."⁴⁵ It is careful to

41. *Id.*

42. *Id.* at 66–67.

43. See UNCITRAL, *Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Ninth Session, 28 May–14 June 1996*, at 48–49, ¶ 209, U.N. Doc. A/51/17 (1996). Current publications of the Model Law on Electronic Commerce all include article 5 bis, with a footnote indicating the chronology of its production.

44. See Model Law on Electronic Signatures with Guide to Enactment, *supra* note 24.

45. Model Law on Electronic Signatures with Guide to Enactment, *supra* note 24, at 8 (noting that Model Law on Electronic Signatures building "on the fundamental principles underlying article 7 of the UNCITRAL Model Law on Electronic Commerce," and that the Model Law on Electronic Signatures "adds substantially to the UNCITRAL Model Law on Electronic Commerce."); see also UNCITRAL, *Report of the United Nations Committee on International Trade Law on the Work of its Thirty-Fourth Session*, U.N. Doc. A/56/588 (Nov. 27, 2001) ("Desiring to build on the fundamental principles underlying article 7 of the Model Law on Electronic Commerce with respect to the fulfillment of the signature function in any electronic environment, with a view to promoting reli-

explain the relationship between the Model Law on Electronic Signatures and the Model Law on Electronic Commerce, by describing the former as “fully consistent” with the latter⁴⁶ in that the Model Law on Electronic Signatures “builds on the flexible criterion” expressed in the earlier model law.⁴⁷ Importantly, the Guide to Enactment states that the Model Law on Electronic Signatures was drafted with cognizance of the developing technology and should not “be interpreted as discouraging the use of any method of electronic signature, whether already existing or to be implemented in the future.”⁴⁸

ance on electronic signatures for producing legal effect where such electronic signatures are functionally equivalent to handwritten signatures . . .”).

46. Model Law on Electronic Signatures with Guide to Enactment, *supra* note 24, at 32; *see also id.* at 18 (“It should be noted that some countries consider that the legal issues related to the use of electronic signatures have already been solved by the UNCITRAL Model Law on Electronic Commerce and do not plan to adopt further rules on electronic signatures until market practices in that new area are better established. However, States enacting the new Model Laws alongside the UNCITRAL Model Law on Electronic Commerce may expect additional benefits.”).

47. *Id.* at 36 (“Building on the flexible criterion expressed in article 7, paragraph 1(b), of the UNCITRAL Model Law on Electronic Commerce, articles 6 and 7 of the new Model Law establish a mechanism through which electronic signatures that meet objective criteria of technical reliability can be made to benefit from early determination as to their legal effectiveness.”); *see also id.* at 34 (“As a supplement to the UNCITRAL Model Law on Electronic Commerce, the new Model Law is intended to provide essential principles for facilitating the use of electronic signatures.”).

48. *Id.* at 21. The Guide to Enactment expressly recognizes that States may “need to preserve flexibility” in the face of rapid technological development, and contends that legislation implementing the Model Law on Electronic Signatures would not preclude this needed flexibility. *Id.* at 34.

As a supplement to the UNCITRAL Model Law on Electronic Commerce, the new Model law is intended to provide essential principles for facilitating the use of electronic signatures. However, as a ‘framework,’ the Model Law itself does not set forth all the rules and regulations that may be necessary (in addition to contractual arrangements between users) to implement those techniques in an enacting State. Moreover, as indicated in this Guide, the Model Law is not intended to cover every aspect of the use of electronic signatures. Accordingly, an enacting State may wish to issue regulations to fill in the procedural details for procedures authorized by the Model Law and to take account of the specific, possibly changing, circumstances at play in the enacting State, without compromising the objective of the Model Law. It is recommended that, should it decide to issue such regulation, an enacting State should give particular attention to the need to preserve flexibility in the operation of electronic signature systems by their users. *See id.*

The Guide’s reference to the flexibility of the Model Law on Electronic Signatures may be intended as a response to criticisms that the Model Law is “based on an outmoded idea of how digital signatures are likely to be used in Internet commerce” and compounds “this shortcoming by mandating risk allocation rules that are counter-intuitive and unproductive.” Jane K. Winn, *Electronic Commerce Law: 2001 Developments*, 57 BUS. L. 541, 550 (2002) (“The E-Signatures Model Law was supported by most partici-

Later, in 2005, UNCITRAL adopted, and the United Nations ratified, a Convention on the Use of Electronic Communications in International Contracts.⁴⁹ Like the Model Law on Electronic Signatures, the scope of the Convention on the Use of Electronic Communications in International Contracts is narrower, but digs more deeply than the broad scope of the Model Law on Electronic Commerce. A comparison of the provisions of the Convention to the provision of the Model Law on Electronic Commerce finds more than several defined terms and articles that closely resemble each other.⁵⁰ Commentators describe the Convention as “[b]uilding on the earlier Model Law.”⁵¹ Some have even argued that

pants in the UNCITRAL drafting process but was vociferously objected to by some members of the U.S. delegation.”). Winn argues that the Model Law ossifies this disconnect between technology and law, rather than providing needed flexibility as the Guide suggests:

In addition, the E-Signatures Model Law was promulgated by UNCITRAL after developed countries had already passed laws dealing with the same subject matter in quite different ways than the Model Law. Because it is unlikely any developed countries are going to repeal their current laws in order to enact legislation based on the Model Law, the Model Law is unlikely to achieve its objective of harmonizing law in this area. What it is likely to do, however, is encourage developing countries to pass laws that are out of step with actual commercial practice in Internet commerce, further disadvantaging their local businesses that try to compete in the global information economy.

Id. It is interesting to note that few countries have enacted legislation to implement the Model Law on Electronic Signatures to date, none of them developed nations.

49. Convention on the Use of Electronic Communications in International Contracts, *supra* note 24.

50. For provisions that are virtually identical except for the use of similarly defined but distinctly named terms, compare Convention on the Use of Electronic Communications in International Contracts, Art. 8 (Legal recognition of electronic communications), *supra* note 24, with Model Law on Electronic Commerce, Art. 5 (Legal recognition of data messages), *supra* note 24. There are, however, several provisions in the Convention that are found in neither the Model Law on Electronic Commerce nor the Model Law on Electronic Signatures.

51. José Angelo Estrella Faria, *The United Nations Convention of the Use of Electronic Communications in International Contracts—An Introductory Note*, 55 INT'L & COMPAR. L. Q. 689, 689 (2006) (“Calls for another round of legislation, an international convention or electronic commerce, to achieve further harmonization of national laws began even before the drafting of the UNCITRAL Model Law on Electronic Signatures have been completed. Underlying those proposals was the recognition that despite the wide acceptance of the UNCITRAL Model Law on Electronic Commerce, only a binding instrument could effectively remove obstacles to electronic commerce that might derive, for example, from form requirements contained in other international conventions.”); Peter Winship & Louise Ellen Teitz, *Developments in Private International Law: Facilitating Cross-Border Transactions and Dispute Resolution*, 40 INT'L LAW. 505, 511

adoption of the Model Law paved the way for the Convention: “The rules of the MLEC were done as a model law at the time it was adopted because people were tentative about its solutions. Now they have proved valid and workable and deserve more legal force behind them.”⁵² In this view, the Model Law created a trial run that permitted UNCITRAL to take the next step.⁵³

(2006) (noting that the United Nations Convention on the Use of Electronic Communications in International Contracts “builds upon the UNCITRAL Model Law on Electronic Commerce”). *But see* Charles H. Martin, *The UNCITRAL Electronic Contracts Convention: Will It Be Used or Avoided?*, 17 PACE INT’L L. REV. 261, 265 (2005) (“Although many CUECIC substantive legal rules are based on the MLEC, the procedural framework of CUECIC closely resembles the structure of the CISG, particularly regarding scope of application, statutory interpretation principles, and declarations by ratifying countries of variations from default legal rules. This procedural framework will affect the degree of acceptance and utilization of CUECIC by major trading nations like the United States.”).

52. John D. Gregory, *The Proposed UNCITRAL Convention on Electronic Contracts*, 59 BUS. L. 313, 317 (2004).

53. This story suggests an explanation for the fact that there have been no meetings of the Working Group on Electronic Commerce scheduled since 2004, when it promulgated the Convention on the Use of Electronic Communication in International Contracts—and that story would describe this radio silence as the culmination of a Working Group that had dug as deeply as technological marketplace developments required.

But that reading of events would be misleading in that pieces of other working groups’ ongoing projects involve consideration of the impact of electronic communications on their earlier work product. As noted earlier, there are six Working Groups, five of which met during 2006 and plan to meet again in 2007. All of the Working Groups, other than Working Group VI (secured transactions), are revisiting or revising existing international instruments to account for practical experience and technical developments since adoption. Three of the five active working groups, Working Groups I, II and III, are engaged in revisions to an earlier UNCITRAL model law or convention. Working Group I (procurement and project finance) continues to meet to discuss possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services, *supra* note 26, including revisions to address electronic communications in public procurement. Christopher Yukins et al., *International Procurement*, 40 INT’L L. 337, 338–44 (2006); Don Wallace, Jr., *UNCITRAL: Reform of the Model Procurement Law*, 35 PUB. CONT. L.J. 485, 486 (2006) (noting that the “main justification” for current effort to reform UNCITRAL’s Model Procurement Law is “the need to bring the Model Law into the electronic age”). Working Group II (international arbitration and conciliation) is actively considering revisions to the UNCITRAL Arbitration Rules, with an emphasis placed on considering the implications of electronic communications for possible revisions to the Arbitration Rules. UNCITRAL, *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Fifth Session*, at 3, ¶ 6, U.N. Doc. A/CN.9/614 (Oct. 5, 2006). Working Group III (transport law) is engaged in a project to draft a convention on the carriage of goods, a small piece of which involves considering the impact of electronic bills of lading and other electronic communications in international transport. Of those actively meeting, only Working Groups V (insolvency) and VI (secured transactions) are not working on revisions to a model law or convention. The Secured Transac-

B. Vertical + Horizontal Incrementalism

A similar progression of deepening law reform appears when we closely examine UNCITRAL's work on the topics of arbitration and conciliation, although here UNCITRAL moved both vertically (in proceeding from rules to model law to convention) and horizontally (in shifting from arbitration to conciliation and back again).

UNCITRAL's work in this area began in 1976 with its promulgation of the Arbitration Rules⁵⁴ and in 1980 with the Conciliation Rules.⁵⁵ The Arbitration and Conciliation Rules are directed to private parties including international arbitrators, rather than domestic legislatures; similarly, UNCITRAL's Recommendations to Assist Arbitral Institutions and Other Interested Bodies with Regard to Arbitrations Under the UNCITRAL Arbitration Rules⁵⁶ and Notes on Organizing Arbitral Pro-

tion Working Group has been working steadily since 2000 on its Legislative Guide on Secured Transactions Law, with its work projected to be completed by some time in 2007. UNCITRAL, *Draft Legislative Guide on Secured Transactions*, at 1–6, ¶¶ 1, 23, U.N. Doc. A/CN.9/WG.VI/WP.31 (Nov. 16, 2006). Following ratification of its Legislative Guide on Insolvency Law by the Commission and the U.N. General Assembly, UNCITRAL recently directed the Insolvency Working Group to consider three additional topics: the treatment of corporate groups, particularly in cross-border insolvency proceedings; the financing of cross-border insolvency proceedings; and court-to-court communication and the use of protocols in cross-border insolvency proceedings. UNCITRAL, *Annotated Provisional Agenda for the Thirty-First Session of Working Group V (Insolvency Law)*, at 1–2, ¶¶ 2–4, U.N. Doc. A/CN.9/WG.V/WP.73 (Sept. 22, 2006) [hereinafter *Annotated Provisional Agenda*]. Because the newly reconstituted Insolvency Working Group has met only once, it is unclear whether the Group conceives of its mandate as one to draft a convention, model law, legislative guide or other document (or to revise either the Model Law on Cross-Border Insolvencies or the Legislative Guide on Insolvency Law, or both).

54. UNCITRAL Arbitration Rules, *supra* note 23.

55. UNCITRAL Conciliation Rules, *supra* note 23. The Arbitration Rules were adopted following “extensive consultation with arbitral institutions and centres of international arbitration” and extensive deliberations of the proposed text.” *Id.* at 371 (citations omitted). Although the Rules were intended primarily as default rules to guide private parties’ “ad hoc” arbitrations,” they have also applied in arbitrations administered by “agencies such as the International Chamber of Commerce (ICC) and the American Arbitration Association (AAA) . . . [where] the parties generally have stipulated in the contract that the UNCITRAL Rules are to substitute for the institution’s rules, such as ICC’s Rules of Conciliation and Arbitration or AAA’s Commercial Arbitration Rules.” John D. Franchini, Note, *International Arbitration Under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement*, 62 FORDHAM L. REV. 2223, 2226–27 (1994).

56. UNCITRAL, *Recommendations to Assist Arbitral Institutions and Other Interested Bodies With Regard to Arbitrations Under the UNCITRAL Arbitration Rules Adopted at the Fifteenth Session of the Commission*, *supra* note 23. The Recommendations were drafted in recognition that “a substantial number of arbitral institutions have,

ceedings are addressed to arbitral institutions and, ultimately, arbitration parties but not legislatures or lawmakers.⁵⁷ In 1985, UNCITRAL subsequently shifted its focus toward domestic legislatures when it produced the Model Law on International Commercial Arbitration.⁵⁸ The Model Law on International Commercial Arbitration, “with its eight chapters and thirty-six articles, is a comprehensive work governing the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the conduct of the arbitral proceedings, and the making of and recourse against the award.”⁵⁹ It borrows numerous provisions regarding the arbitration procedure from UNCITRAL’s Arbitration Rules, but also includes “an enforcement mechanism almost identical to that of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958”⁶⁰—commonly referred to as the New York Convention.⁶¹ More than simply combining provisions from UNCITRAL’s

in a variety of ways, accepted or adopted these Rules.” *Id.* at 420, ¶¶ 2–5 (noting that arbitral institutions “have drawn on [the Rules] in preparing their own institutional arbitration rules” or have adopted “the UNCITRAL Arbitration Rules as such, maintaining their name” and indicating “that disputes referred to the institution shall be settled in accordance with the UNCITRAL Arbitration Rules, subject to any modifications set forth in those statutes or administrative rules,” or have indicated in their rules the acceptability of “the use of the UNCITRAL Arbitration Rules if parties so wished”).

57. In 1996, UNCITRAL adopted its Notes on Organizing Arbitral Proceedings, *supra* note 23. The Notes state that their purpose “is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful” and “may be used whether or not the arbitration is administered by an arbitral institution.” *Id.* ¶ 1. Because the Notes are not binding “on the arbitrators or the parties,” they indicate that an “arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them.” *Id.* ¶ 2.

58. UNCITRAL Model Law on International Commercial Arbitration, *supra* note 23. The Model Law on International Commercial Arbitration has received wide international approval.

59. Kenneth T. Ungar, Note, *The Enforcement of Arbitral Awards Under UNCITRAL’s Model Law on International Commercial Arbitration*, 25 COLUM. J. TRANSNAT’L L. 717, 719 (1987).

60. *Id.* The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, frequently referred to as the New York Convention, was promulgated by the United Nations Conference on International Commercial Arbitration in 1958, eight years before the U.N. General Assembly established UNCITRAL. Often “considered the most successful private international law treaty of the twentieth century,” more than 130 nations have acceded to its terms. Leonardo D. Graffi, *Securing Harmonized Effects of Arbitration Agreements Under the New York Convention*, 28 Hous. J. INT’L L. 663, 667 (2006).

61. In its Web site description of the New York Convention, UNCITRAL claims ownership of the task of promoting the Convention as a “part of the Commission’s programme of work” on arbitration. UNCITRAL, *1985—Convention on the Recognition and*

Arbitration Rules with the New York Convention provisions on the recognition and enforcement of an arbitral award, the Model Law eliminated the “distinction between ‘foreign’ and ‘domestic’ awards present in the New York Convention.”⁶² The Model Law and New York Convention also differ in scope, as the former applies only to international *commercial* arbitration, while the latter applies to *any* foreign arbitration. Some suggest that UNCITRAL’s primary agenda in promulgating the Model Law may have been political, and not simply the reformatting of existing material for enactment as a statute.⁶³ In a 1972 report to UNCITRAL, Special Rapporteur Ion Nestor argued that less developed and developing nations had avoided acceding to the New York Convention due to “the mutual distrust between both private and governmental undertakings belonging to countries with differing forms of economic organization or differing levels of development.”⁶⁴ A model law was

Enforcement of Foreign Arbitral Awards—the “New York” Convention, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last visited May 6, 2007).

Although the Convention, adopted by diplomatic conference on 10 June 1958, was prepared by the United Nations prior to the establishment of UNCITRAL, promotion of the Convention is an integral part of the Commission’s programme of work. The Convention is widely recognized as a foundation instrument of international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognize and enforce awards made in other States, subject to specific limited exceptions. The Convention entered into force on 7 June 1959.

Id.

62. Ungar, *supra* note 59, at 721 (“By reducing the relevance of the place of arbitration, the Model Law insures that all awards rendered in international commercial arbitrations will be enforced uniformly.”).

63. *See id.* at 753 (“UNCITRAL has recognized that political and constitutional impediments to accession [to the New York Convention] exist for many U.N. member states, especially Latin American and African states The Model Law framework, by using the viable law of the Convention and making it more palatable to non-Convention states, may succeed in promoting unification and thereby improving the effectiveness of commercial dispute settlement and facilitating international commerce.”). We discuss the connection between UNCITRAL’s legitimacy and its incrementalism *infra* Part IV.

64. Special Rapporteur, *Problems Concerning the Application and Interpretation of Existing Multilateral Conventions on International Commercial Arbitration and Related Matters*, at 233, ¶ 144, U.N. Doc. A/CN.9/64 (Mar. 1, 1972) (prepared by Ion Nestor); *see also* The Secretary-General, *Report of the Secretary-General on Study on the Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. A/CN.9/168 (Apr. 20, 1979); The Secretariat, *Further Work in Respect of International Commercial Arbitration*, U.N. Doc. A/CN.9/169 (May 11, 1979); Ungar, *supra* note 59, at 734, n.92 (“It is not oversimplifying the issue to state

viewed as preferable to a convention in that developing nations might enact legislation implementing a model law that accommodated local constitutional, social, or cultural concerns, whereas a convention offered no such flexibility.⁶⁵ This political insight seems to have been correct. The Model Law on International Commercial Arbitration has been well received by the international community, including the community of less developed and developing nations that had eschewed the New York Convention. More than fifty countries have enacted legislation implementing the provisions of the Model Law, including several regions within the People's Republic of China and six states within the United States.⁶⁶ Moreover, promulgation of the Model Law appears to have jump-started interest in acceding to the New York Convention, as in 2006 and 2007, countries as diverse as the Marshall Islands, the United Arab Emirates, Gabon, and the Bahamas became parties to its terms.⁶⁷ To date, more than 140 nations are bound to the New York Convention, with most of these accessions or ratifications occurring after UNCITRAL had promulgated the Model Law in 1985.⁶⁸

UNCITRAL's work on dispute resolution follows a similar pattern, but for different reasons. Building on its Rules on Conciliation, in 2002, UNCITRAL promulgated a Model Law on International Commercial Conciliation with Guide to Enactment and Use.⁶⁹ Because a conciliation proceeding, often called a mediation or dispute resolution procedure, is, by definition, not binding on the parties, UNCITRAL's decision to formalize its Rules on Conciliation is not easily justified. The Guide to Enactment to the Model Law on International Commercial Conciliation explains the need for legislation on the topic of conciliation in terms of the

that the distrust is between developed countries, most of which [have long been] parties to the New York Convention, and the developing states of Latin America, Asia, and Africa, most of which are not.”)

65. Ungar, *supra* note 59, at 735–38.

66. For a list of enacting nations, see UNCITRAL, 1985—UNCITRAL Model Law on International Commercial Arbitration, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited May 6, 2007).

67. For announcement of these events, see UNCITRAL, Welcome to the UNCITRAL Web Site, *available at* <http://www.uncitral.org/uncitral/en/index.html> (last visited May 6, 2007).

68. For a list of nations to have signed, ratified, acceded or succeeded to the New York Convention, see UNCITRAL, 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited May 6, 2007).

69. UNCITRAL, Model Law on International Commercial Conciliation with Guide to Enactment and Use, *supra* note 23.

need for bright-line rules regarding the inadmissibility in any subsequent judicial proceeding of admissions and arguments made in the context of a conciliation proceeding. In the absence of a statutory rule of inadmissibility, parties' agreements to keep the record in a conciliation confidential may not be enforceable, with this lack of enforceability undermining the salutary effects of truthfulness in the context of a non-binding dispute resolution mechanism. The Model Law on International Commercial Conciliation digs more deeply than the Conciliation Rules on which it was based in that it combines evidentiary rules and rules of confidentiality with proscriptions as to the contours of an approved conciliation proceeding.⁷⁰

Viewing UNCITRAL's work on arbitration and conciliation chronologically, then, we find a quick horizontal move from arbitration to conciliation, followed by a return to arbitration. In returning to the topic of arbitration, UNCITRAL digs in more deeply, shifting from Rules, Recommendations, and Notes directed solely to private parties, to a Model Law on International Commercial Arbitration, and concluding with the Convention on International Commercial Arbitration. Once its work on arbitration culminated in a convention, UNCITRAL shifted sideways again, returning to the topic of conciliation. On the topic of conciliation, UNCITRAL dug in more deeply, moving from its Conciliation Rules to its Model Law on International Commercial Conciliation.

With its work on procurement and project finance, UNCITRAL also follows an incremental progression involving both vertical and horizontal moves. In 1987, UNCITRAL produced its Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works.⁷¹ This Guide, like the Arbitration Rules and Conciliation Rules, was not directed to domestic legislatures, but rather to the private and public parties that negotiate, draft, and execute contracts for the construction of industrial works. But as with its experience in arbitration and dispute resolution, UNCITRAL shifted from private to public audiences with its next international instrument on procurement. In 1993, UNCITRAL promul-

70. It may be worth noting that only four countries have enacted legislation implementing the Model Law on International Commercial Conciliation (Canada, Croatia, Hungary, and Nicaragua); similarly, uniform legislation influenced by the Model Law has been promulgated in the United States of America (Uniform Mediation Act), but has been enacted by only six states (Illinois, Iowa, Nebraska, New Jersey, Ohio, and Washington) on the grounds that non-uniform state law is more protective of the confidentiality of the parties participating in a dispute resolution procedure than the Uniform Mediation Act.

71. UNCITRAL, Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, *supra* note 26.

gated its Model Law on Procurement of Goods and Construction and Guide to Enactment,⁷² and in 1994 its Model Law on Procurement of Goods, Construction and Services with a Guide to Enactment.⁷³ The Guide to Enactment for the Model Law on Procurement of Goods, Construction and Services explains the quick succession of the two model laws as resulting from the decision of the Working Group to carve out issues surrounding the procurement of services from its deliberations on the procurement of goods and construction on the grounds that the issues confronting service contracts differed significantly from those governing goods and construction.⁷⁴ Upon completion of its work on the Model Law on Procurement of Goods and Construction, the Working Group returned to the topic of procurement and took up the issue of procurement of services. Rather than replicate its work on overlapping issues in a separate model law covering only the procurement of services, the Working Group, in short order, promulgated its Model Law on Procurement of Goods, Construction and Services, requiring only one session to complete the supplemented model law.⁷⁵ The Guide to Enactment to the

72. UNCITRAL, Model Law on Procurement of Goods and Construction, *supra* note 26.

73. UNCITRAL, Model Law on Procurement of Goods, Construction and Services, with Guide to Enactment, *supra* note 26.

74. *Id.* at Introduction, ¶ 2 (“On the understanding that certain aspects of the procurement of services were governed by different considerations from those that governed the procurement of goods or construction, a decision had been made to limit the work at the initial stage to the formulation of model legislative provisions on the procurement of goods and construction. At the twenty-sixth session, having completed work on model statutory provisions on procurement of goods and construction, . . . the Commission discussed additions and changes to the Model Law on Procurement of Goods and Construction that would need to be made so as to encompass procurement of services and adopted the UNCITRAL Model Law on Procurement of Goods, Construction and Services . . . without thereby superseding the earlier text, whose scope is limited to goods and construction.”).

75. The Guide to Enactment of the Model Law on Procurement of Goods, Construction and Services explains the relationship between the provisions of the Model Law on goods and construction on one hand and the provisions pertaining to services as follows:

To take account of certain differences between the procurement of goods and construction and the procurement of services, the Model Law sets forth in chapter IV a set of procedures especially designed for the procurement of services. The main differences . . . arise from the fact that, unlike the procurement of goods and construction, procurement of services typically involves the supply of an intangible object whose quality and exact content may be difficult to quantify. The precise quality of the services provided may be largely dependent on the skill and expertise of the suppliers or contractors. Thus, unlike procurement of goods and construction where the price is the predominant criterion in the evaluation process, the price of services is often not considered as important

Model Law on Procurement of Goods, Construction and Services explains that the later Model Law was meant to supplement but not supersede the earlier text.

By 2000, UNCITRAL further broadened the scope of its work in this area by shifting horizontally from procurement to project finance. It did not commence its work on project finance with a model law or model legal provisions. Instead, in 2000, UNCITRAL produced the Legislative Guide on Privately Financed Infrastructure Projects.⁷⁶ The Forward to the Legislative Guide states that:

[t]he legislative recommendations are intended to assist in the establishment of a legislative framework favourable to privately financed infrastructure projects. The legislative recommendations are followed by notes that offer an analytical introduction with references to financial, regulatory, legal, policy and other issues raised in the subject area.⁷⁷

The Legislative Guide was followed in 2003 by UNCITRAL's Model Legislative Provisions on Privately Financed Infrastructure Projects.⁷⁸ The Model Legislative Provisions are intended to build on the Legislative Guide, and, in fact, the Commission "requested the Secretariat to consolidate in due course the text of the Model Legislative Provisions and the Legislative Guide into one single publication and, in doing so, to retain the legislative recommendations contained in the Legislative Guide as a basis of the development of the Model Legislative Provisions."⁷⁹ Moreover, the Model Legislative Provisions on "selection of the concessionaire" refer to the Commission's earlier work on procurement, noting that

[t]he selection procedures reflected in this chapter are based largely on the features of the principal method for the procurement of services under the UNCITRAL Model Law on Procurement of Goods, Construction and Services The model provisions on the selection of the concessionaire are not intended to replace or reproduce the entire rules of the enacting State on government procurement, but rather to assist

a criterion in the evaluation and selection process as the quality and competence of the suppliers or contractors.

Id. at ¶ 11.

76. UNCITRAL, Legislative Guide on Privately Financed Infrastructure Projects, *supra* note 26.

77. *Id.* at xi.

78. UNCITRAL, Model Legislative Provisions on Privately Financed Infrastructure Projects, *supra* note 26.

79. *Id.* at iii (citing Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17, U.N. Doc. A/58/17, ¶¶ 12–171).

domestic legislators in developing special rules for the selection of the concessionaire.”⁸⁰

UNCITRAL’s work on procurement and project finance differs from its projects on arbitration and conciliation in that it dug more deeply on procurement before beginning its work on project finance. There are also important similarities with UNCITRAL’s work on arbitration and conciliation. In both arbitration and conciliation and procurement and project finance, UNCITRAL dug more deeply by building on work initially directed only to private parties (a Legal Guide on Procurement and a Legislative Guide on Privately Financed Infrastructure Projects) with the promulgation of legal technologies directed to a public audience—i.e., national legislatures (the Model Law on the Procurement of Goods and Construction, the Model Law on the Procurement of Goods, Construction and Services, and the Model Legal Provisions on Privately Financed Infrastructure Projects).

C. Horizontal Incrementalism

On three occasions, UNCITRAL began its work in an area of trade law by promulgating a convention—sales, transport, and payments. What incrementalism can follow in the wake of a convention? On the subject of international sales, UNCITRAL adopted two conventions (the Convention on the Limitation Period in the International Sales of Goods⁸¹ and the CISG⁸²), followed by a legal guide (the Legal Guide on International Countertrade Transactions)⁸³ and a set of uniform rules (the Uniform Rules on Contract Clauses for an Agreed Sum Due Upon Failure of Performance).⁸⁴ On the topic of international transportation, UNCITRAL has adopted two conventions, but no other international instruments. In 1978, in one of UNCITRAL’s first instruments, it produced the Conven-

80. UNCITRAL, Model Legislative Provisions on Privately Financed Infrastructure Projects, *supra* note 26, at 7 n.7.

81. UNCITRAL, United Nations Convention on the Limitation Period in the International Sale of Goods, *available at* <http://www.uncitral.org/pdf/english/texts/sales/limit/limit-conv.pdf> (last visited May 6, 2007).

82. CISG, *supra* note 21.

83. UNCITRAL, Legal Guide on International Countertrade Transactions, *available at* <http://www.uncitral.org/pdf/english/texts/sales/countertrade/countertrade-e.pdf> (last visited May 6, 2007).

84. UNCITRAL, Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance, U.N. Doc. A/CN.9/243, annex I, *available at* <http://www.uncitral.org/pdf/english/texts/sales/contract/vol14-p272-273-e.pdf> (last visited May 6, 2007).

tion on the Carriage of Goods by Sea.⁸⁵ With the exception of the Unit of Account Provision and Provisions for the Limit of Liability in International Transport and Liability Conventions,⁸⁶ UNCITRAL produced nothing further on the topic of international transportation until 1991 when it promulgated the Convention on the Liability of Operators of Transport Terminals in International Trade.⁸⁷ Similarly, on the topic of international payments, UNCITRAL's first effort involved the production in 1988 of a Convention on International Bills of Exchange and International Promissory Notes.⁸⁸ This convention was followed four years

85. UNCITRAL, Final Act of the United Nations Conference on the Carriage of Goods by Sea (Nov. 10, 1988), *available at* http://www.uncitral.org/pdf/english/texts/transport/hamburg/XI_d_3_e.pdf. UNCITRAL's Web site indicates that thirty-two nations are party to the Hamburg Rules, and that fifty altogether have signed it. *See* UNCITRAL, 1978—United Nations Convention on the Carriage of Goods by Sea—the “Hamburg Rules,” http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html (last visited May 6, 2007).

86. For a description of this project, but no hyperlink to text, see UNCITRAL, 1982—Unit of Account Provision and Provisions for the Adjustment of the Limit of Liability in International Transport and Liability Conventions http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/1982Unit_provisions.html (explaining that “the Unit of Account provision designates the Special Drawing Right as the unit of account in limitations of liability provisions. The two alternative sample provisions for adjusting the limits of liability are for use in the preparation of future international conventions containing limitation of liability provisions or in the revision of existing conventions.”). UNCITRAL built on these provisions when it subsequently promulgated the Convention on the Liability of Operators of Transport Terminals in International Trade in 1991.

87. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, (May 30, 1991), *available at* http://www.uncitral.org/pdf/english/texts/transport/ott/X_13_e.pdf. UNCITRAL's Web site indicates that four nations have either ratified or acceded to the terms of this convention, and that another five nations have signed it. Five actions are needed for entry into force. *See* UNCITRAL, 1991—United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/1991Convention_status.html (last visited Mar. 25, 2007).

88. *See* UNCITRAL, Convention on International Bills of Exchange and International Promissory Notes, *supra* note 25. On its Web site, UNCITRAL indicates that this convention has not come into force, as the participation of ten nations is required and only eight have acceded to its terms. *See* UNCITRAL, 1988—United Nations Convention on International Bills of Exchange and International Promissory Notes, http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1988Convention_bills_status.html (last visited Apr. 18, 2007). We also note that UNCITRAL has long endorsed the Uniform Customs and Practices for Documentary Credits, promulgated by the International Chamber of Commerce beginning in 1962 and revised in 1974, 1983, and 1993. For a list of these UNCITRAL endorsed ICC texts, as well as hyperlinks to the UNCITRAL endorsements and the text of the ICC product, see UNCITRAL, Texts of Other Organisations Endorsed by UNCITRAL, http://www.uncitral.org/uncitral/en/other_organizations_texts.html (last visited Mar. 25, 2007).

later by the Model Law on International Credit Transfers,⁸⁹ and thereafter by two additional conventions on topics on the law of international payments: the Convention on Independent Guarantees and Stand-by Letters of Credit in 1995⁹⁰ and the Convention on the Assignment of Receivables in International Trade in 2001.⁹¹

With each of these topics—sales, transport, and payments—UNCITRAL's incremental progress moved horizontally across the subjects. For example, on the topic of sales, UNCITRAL adopted, in relatively quick succession, two conventions: the Convention on the Limitation Period in the International Sale of Goods and the CISG.⁹² The Convention of Limitations Periods covered a much narrower topic than the CISG. With payments, UNCITRAL began by promulgating a convention on International Bills of Exchange and International Promissory Notes, then moved to related but not overlapping topics with later model law and conventions—international credit transfers, independent guarantees and stand-by letters of credit, and the assignment of receivables. Similarly, on the topic of international transportation, UNCITRAL first produced the Convention on the Carriage of Goods by Sea (the “Hamburg Rules”), and later promulgated the Convention on the Liability of Operators of Transport Terminals in International Trade. The latter convention

89. UNCITRAL, Model Law on International Credit Transfers, *supra* note 25. In its Web site, UNCITRAL indicates that no country has adopted legislation to implement this model law but that “directive of the European Parliament and of the Council of the European Union based on the principles of the UNCITRAL Model Law on International Credit Transfers was issued on 27 January 1997.” See UNCITRAL, 1992—Model Law on International Credit Transfers, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1992Model_credit_status.html (last visited Mar. 25, 2007).

90. UNCITRAL, Convention on Independent Guarantees and Stand-By Letters of Credit, *supra* note 25. UNCITRAL's Web site indicates that this convention came into force in 2000; eight participating nations were required and nine have acceded to its terms. See UNCITRAL, Status 1995—United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1995Convention_guarantees_status.html (last visited Mar. 25, 2007). In 1998, UNCITRAL endorsed the ICC's International Stand-by Practices, ISP98. For the text of ISP98 and the UNCITRAL endorsement of its terms, see UNCITRAL, Texts of Other Organisations Endorsed by UNCITRAL, http://www.uncitral.org/uncitral/en/other_organizations_texts.html (last visited Mar. 25, 2007).

91. Convention on the Assignment of Receivables in International Trade, *supra* note 25. While four nations have signed the convention, only one, Liberia, has ratified it. Thus, because five nations are required to be bound by its terms for the convention to enter into force, it is not yet so effective. However, the Convention was first promulgated in 2001. See UNCITRAL, 2001—United Nations Convention on the Assignment of Receivables in International Trade, http://www.uncitral.org/uncitral/en/uncitral_texts/payments/2001Convention_receivables_status.html (last visited Mar. 25, 2007).

92. See CISG, *supra* note 21.

covered issues of liability that had not been addressed in the earlier convention; moreover, the latter convention covered the liability of all transport terminals, and was not limited to the liability of terminals located at ports. Currently, Working Group III (transportation) has been involved in an immense effort to complete its Draft Convention on the Carriage of Goods [Wholly or Partly] [By Sea].⁹³ Working Group III has met twice a year for two-week-long working group sessions—roughly twice as long as other working groups generally meet. The explanation for these long sessions involves the breadth of the Draft Convention. Although the title of the Draft Convention appears to overlap the earlier Hamburg Rules on the carriage of goods by sea, the brackets in the title of the Draft Convention are meant to convey open issues that earlier divided the working group on the breadth of this endeavor. Many of the provisions of the Draft Convention cover the carriage of goods, not just by sea, but also by other means, such as air, rail, and ground transport, reflecting current interlocking practices in the market for carriage. The Working Group has agreed provisionally on the treatment of electronic bills of lading and other electronic documents used in the carriage of goods, and on the location of any arbitration of a dispute under a carriage contract containing an arbitration agreement, but has encountered difficulties reaching consensus on the liability rules that should be applied to the different transporters and the extent to which contractual waivers and other contractual opt-out provisions should be considered binding. If the Working Group succeeds in completing the Draft Convention along the lines suggested, the Draft Convention on the Carriage of Goods [Wholly or Partly] [By Sea] will constitute a huge horizontal move from the scope of the two earlier UNCITRAL conventions on international transport.

D. Pyramidal Incrementalism

Neither Table 1 nor Table 2 is constructed to reveal UNCITRAL's pyramidal incrementalism. Nonetheless, consistent with its mandate to coordinate legal activities among international organizations working in the field of international trade law,⁹⁴ UNCITRAL works with other international actors and on others' work product. It has endorsed the texts of other international organizations;⁹⁵ it also partners loosely from time to

93. For a compilation of the Working Group's agenda and reports of its drafting sessions, see UNCITRAL, Working Group III, http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html (last visited Mar. 25, 2007).

94. See G.A. Res. 2205(XXI), *supra* note 14, ¶¶ 8, 11–12.

95. For a list of the texts of other organizations endorsed by UNCITRAL, see UNCITRAL, Texts of Other Organisations Endorsed by UNCITRAL,

time with entities, such as UNDROIT, the Hague Convention, the World Bank, and the International Monetary Fund, for the drafting and implementation of core areas of commercial law in transitional and developing countries.⁹⁶

Moreover, UNCITRAL often refers to and builds upon the work of other international organizations. For example, before commencing work on the international sales of goods, the Commission directed the Working Group to consider (and the Working Group considered at length) the texts of earlier conventions: the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods (to which the Uniform Law on the International Sale of Goods is annexed), the 1964 Hague Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (to which the Uniform Law on the Formation of Contracts for the International Sale of Goods is annexed), and the 1955 Hague Convention on the Law Applicable to International Sales of Goods.⁹⁷ One commentator contends that the CISG “would not have been successfully completed had the ground not been leveled by the extensive work done by UNIDROIT in the preparation of the Hague Uni-

http://www.uncitral.org/uncitral/en/other_organizations_texts.html (last visited Mar. 25, 2007).

96. For a description of UNCITRAL’s coordination with other international organizations, see UNCITRAL, *Coordination of Work on International Trade Law*, <http://www.uncitral.org/uncitral/en/tac/coordination.html> (last visited Mar. 25, 2007). See also Faria, *supra* note 17, at 271 (“A recent example is the cooperation between the Hague Conference and UNCITRAL in the formulation of the choice-of-law rules contained in chapter 5 of the United Nations Convention on the Assignment of Receivables in International Trade (2001).”).

97. For the Report of the Working Group on the International Sale of Goods, see *Report of the Working Group on the International Sale of Goods, First Sess., 5–16 January 1970*, U.N. Doc. A/CN.9/35 (1970) (discussing these three Hague Conventions). See also The Secretary-General, *Report of the Secretary-General on the Analysis of Replies and Comments by Governments on the Hague Conventions of 1964*, U.N. Doc. A/CN.9/31 (1970). The Working Group on Time-Limits and Limitations (which ultimately produced the UNCITRAL Convention on the Limitation Period in the International Sale of Goods, also studied the 1955 and 1964 Hague Conventions. See *Report of the Working Group on Time-Limits and Limitations (Prescriptions), First Session, 18–22 August 1969*, U.N. Doc. A/CN.9/30 (1970). For text of the 1964 and 1955 Hague Conventions, see *Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964*, available at <http://www.cisg.law.pace.edu/cisg/text/antecedents.html> (last visited Mar. 19, 2007); *Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, July 1, 1964*, available at <http://www.cisg.law.pace.edu/cisg/text/ulf.html> (last visited Mar. 19, 2007); and *Convention on the Law Applicable to International Sales of Goods, Sept. 1, 1964*, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=31 (last visited Mar. 19, 2007).

form Laws.”⁹⁸ In establishing a Working Group on international transport law, the Commission “[r]equest[ed] the Secretary General to prepare a study in depth giving *inter alia* a survey of work in the field of international legislation on shipping done or planned in the organs of the United Nations, or in intergovernmental or non-governmental organizations, and to submit it to the Commission at its third session.”⁹⁹ Similarly, its Convention on International Commercial Arbitration builds upon not only UNCITRAL’s Rules on Arbitration, but also an earlier U.N. international instrument on arbitration, the New York Convention.¹⁰⁰

III. INCREMENTALISMS IN UNCITRAL’S INSOLVENCY WORKING GROUP

In 1997, UNCITRAL produced the Model Law on Cross-Border Insolvency with Guide to Enactment, and in 2004 its Legislative Guide on Insolvency Law. Unlike the incrementally more specific work product promulgated on electronic commerce, procurement, and arbitration and dispute resolution, the Legislative Guide is “less specific” and “less binding” than the Model Law on Cross-Border Insolvency. Still, we view UNCITRAL’s work on the topic of insolvency law as having proceeded incrementally over the past ten years—vertically, horizontally, and pyramidally. We look at each brand of incrementalism at work in UNCITRAL’s Working Group on Insolvency Law and note that vertical

98. Faria, *supra* note 17, at 270.

99. UNCITRAL, *Report of the United Nations Commission on International Trade Law on the Work of its Second Session*, at 110, ¶ 133(2), U.N. Doc. A/7618 (1970); see also The Secretary-General, *Report of the Secretary-General on A Survey of the Work in the Field of International Legislation on Shipping Undertaken by Various International Organizations and Co-ordination of Future Work in this Field*, at 233, ¶ 2, U.N. Doc. A/CN.9/41 (1970), available at <http://daccessdds.un.org/UNDOC/GEN/NL7/001/04/PDF/NL700104.pdf?OpenElement>. Faria comments on the pyramidal incrementalism of UNCITRAL’s Working Group on Transport in these terms:

The United Nations Conference on Trade and Development (“UNCTAD”) provides another example. In the early 1970s, UNCTAD was involved in preparing a convention on maritime transport, but later transferred the project to UNCITRAL, which concluded it with the adoption in 1978 of the United Nations Convention on the Carriage of Goods by Sea (“Hamburg Rules”), which entered into force on November 1, 1992. Similarly, UNIDROIT, after having carried out a substantial part of the preliminary work on a convention concerning the liability of operators or transport terminals in international trade, handed over the project in 1984 to UNCITRAL, which carried it until its adoption in a diplomatic conference in 1991.

Faria, *supra* note 17, at 270–71.

100. See *supra* text accompanying notes 55–71.

incrementalism has been relied on less than horizontal and pyramidal measures of incremental progress.

A. Pyramidal Incrementalism

With both the Model Law on Cross-Border Insolvency and the Legislative Guide on Insolvency Law, UNCITRAL's Insolvency Working Group did not start from a clean slate.

1. Model Law

For more than thirty years, the European Union struggled to reach agreement on the terms of a convention on which judgments entered in insolvency cases would be recognized by member States.¹⁰¹ The need for a convention among European member states to coordinate the conduct of their insolvency proceedings was foreseen by the (first) Treaty of Rome,¹⁰² establishing the European Economic Community, but the Brussels Convention on the enforcement and recognition of judgments within Europe “specifically excluded insolvency proceedings from its scope.”¹⁰³ In fits and starts, experts drawn from member states drafted a Preliminary Draft Convention and a Draft Convention on the topic,¹⁰⁴ but these efforts “collapsed because the draft's adoption of universalism could not garner support from territorialist states.”¹⁰⁵ Work on an intra-European convention on insolvency law recommenced in 1989, and again in 1995 following ratification of the Treaty of Maastricht and the European

101. See, e.g., GABRIEL MOSS ET AL., THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A COMMENTARY AND ANNOTATED GUIDE 2 (2002) (“Over the period from 1960 to 1996 the Insolvency Convention project featured on the agenda of the institutions of the European Community/European Union, particularly the Commission and the Council.”).

102. Treaty Establishing the European Economic Community art. 220(4), March 25, 1957, 298 U.N.T.S. 11 (committing Member States to negotiate a series of conventions, including a convention to secure “the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards”). Art. 220(4) of the (first) Treaty of Rome led to the Brussels Convention on Sept. 27, 1968.

103. Pottow, *supra* note 7, at 957; see Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters art. 1(2), Sept. 27, 1968, 29 I.L.M. 1417–18; see also, e.g., André J. Berends, *UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview*, 6 TUL. J. INT'L & COMP. L. 309, 316–17 (1998).

104. *Preliminary Draft of a Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings*, COM (1973) 3.327/1/XIV/70-F (initially dated Feb. 16, 1970 and subsequently revised June 4, 1973), available at http://aei.pitt.edu/5612/01/002316_1.pdf; see also *Draft of a Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings*, COM (1980) III/D/72/80.

105. Pottow, *supra* note 7, at 957.

Community's transformation into the European Union. Although twelve member states went so far as to initial a draft Insolvency Convention in early 1996, by mid-year, this draft Insolvency Convention languished for want of the signature of the United Kingdom within the requisite deadline due to political reasons having nothing to do with insolvency law.¹⁰⁶ Prospects for European agreement on the recognition of cross-border insolvency proceedings looked bleak, but market interests pressed for a solution to the problem of cross-border cases.¹⁰⁷ Not until 1999 was the then-defunct E.U. Insolvency Convention revived in the form of a Regulation on Insolvency Proceedings,¹⁰⁸ in which "the substantive provisions of the Convention's text were incorporated with only a handful of alterations, other than essential drafting adjustments."¹⁰⁹ The E.U. Regulation was adopted in May 29, 2000,¹¹⁰ and came into immediate effect.

At a Congress on International Trade Law held in May 1992 in New York, UNCITRAL first considered taking on the topic of insolvency law.¹¹¹ A joint UNCITRAL-INSOL Colloquium on Cross-Border Insol-

106. See MOSS ET AL., *supra* note 101, at 5, n.13 (describing the United Kingdom's failure to sign the convention in this way: "Although the pretext for non-signature by the United Kingdom in May 1996 was the disagreement between the UK and its EC partners over the agricultural crisis caused by the BSE epidemic, it subsequently transpired that the UK Government had concluded that the Convention's failure to make clear and unambiguous provision for its application to the colony of Gibraltar was an insurmountable obstacle to UK acceptance of the text.").

107. While there had been a number of cross-border insolvency cases that had preceded it, the dual insolvency proceedings involving Maxwell Communications Corp., filed both in the United States and in the United Kingdom in late 1991, highlighted the need for transnational law on the coordination of such cases. See *In re Maxwell Commc'n Corp.*, 93 F.3d 1036 (2d Cir. 1996); see also Jay Lawrence Westbrook, *Creating International Insolvency Law*, 70 AM. BANKR. L. J. 563 (1996); Jay Lawrence Westbrook, *The Lessons of Maxwell Communications*, 64 FORDHAM L. REV. 2531 (1996); Caryn M. Chittenden, Comment, *After the Fall of Maxwell Communications: Is the Time Right for a Multinational Insolvency Treaty?*, 28 WAKE FOREST L. REV. 161 (1993).

108. See MOSS ET AL., *supra* note 101, at 4, n.8 (explaining that "Community Conventions . . . are negotiated by all existing members of the Community (now the EU) as at the time of their adoption, and require the ratification of all members in order to enter into force."). By contrast, "[a] Regulation is a creature of the EC Treaty. As such, . . . Regulations shall: (1) have 'general application'; (2) be 'binding in their entirety'; and (3) be 'directly applicable in all Member States.'" *Id.* at 17.

109. *Id.* at 5.

110. Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings, 160 OFFICIAL J. OF THE EUR. COMMUNITIES 1 (2000) [hereinafter E.U. Regulation].

111. *Cross-Border Insolvency: Note by the Secretariat*, at 248, ¶1, U.N. Doc. A/CN.9/378/Add.4 (1993), available at <http://www.uncitral.org/pdf/english/yearbooks/yb-1993-e/vol24-p248-253-e.pdf> [hereinafter *Cross-Border Insolvency*]. The Note indi-

veny followed in mid-1994,¹¹² and by the summer of 1995, the Commission authorized “the development of a legal instrument relating to cross-border insolvency.”¹¹³ Thus, the Working Group on Insolvency Law began its work on the Model Law on Cross Border Insolvency in 1995 at a time when the European Union looked poised to adopt its Convention on Insolvency. Although within the year the E.U. Convention on Insolvency had failed to gather the requisite support, UNCITRAL continued to work on its draft Model Law, and it concluded this work in May 1997. By December 1997, the U.N. General Assembly had formally recognized UNCITRAL’s Model Law and recommended that member states enact legislation implementing it. All this occurred before the European Union had returned to the topic of cross-border insolvency in the form of the E.U. Regulation on Cross-Border Insolvency.

While it may technically be inaccurate to say that UNCITRAL’s work on the Model Law on Cross Border Insolvency builds on the E.U. Regulation on the same topic, work on the E.U. Convention on Insolvency clearly influenced the Model Law, and the E.U. Regulation is nearly identical to the earlier Convention on Insolvency.¹¹⁴ Reports to the Commission and to the Working Group detail earlier “initiatives towards regulation of cross-border insolvencies,” and include discussion of the E.U. Convention on Insolvency.¹¹⁵ Some country delegates to UNCITRAL’s Working Group had been involved in negotiating and drafting the E.U. Convention and the later E.U. Regulation.

Nor surprisingly, the Model Law contains clear references to important legal concepts embedded in the E.U. Regulation on Cross-Border Insolvency (but first found in the earlier E.U. Insolvency Convention). Specifically and most important to the question of cross-border insolvency proceedings, both the Model Law and the E.U. Regulation govern the circumstances under which a “foreign” proceeding—an insolvency proceeding pending in a jurisdiction outside the jurisdiction of the enacting State—and a “foreign representative”—an insolvency representative ap-

cates that, at the Congress, “proposals were made that the Commission consider undertaking work on international aspects of bankruptcy.” *Id.*

112. The Secretariat, *Report on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency*, U.N. Doc. A/CN.9/398 (May 19, 1994).

113. UNCITRAL, *Possible Issues Relating to Judicial Cooperation and Access and Recognition in Cases of Cross-Border Insolvency*, at 3, 18th Sess., U.N. Doc. A/CN.9/WG.V/WP.42 (Sept. 26, 1995), available at <http://www.uncitral.org/pdf/english/travaux/insolvency/acn9-wg5-wp42-e.pdf>.

114. It would also be fair to say that UNCITRAL’s rapid progress on its Model Law on Cross-Border Insolvency spurred the European Union to complete its work on the E.U. Regulation.

115. *Cross-Border Insolvency*, *supra* note 111, at 251–53, ¶¶ 33–48.

pointed to administer an insolvency proceeding pending in a foreign jurisdiction—should be recognized by and in courts of the enacting state. Both distinguish between two levels of recognition and accord greater deference to a “foreign main proceeding” than a “foreign nonmain proceeding.” Both define a “foreign main proceeding” as an insolvency proceeding pending in the jurisdiction in which the debtor’s “centre of main interests” is located, and a “foreign nonmain proceeding” as an insolvency proceeding pending in the jurisdiction in which an “establishment” of the debtor is located. The definition of an “establishment” in UNCITRAL’s Model Law is virtually identical to that found in the E.U. Regulation, and while the Model Law does not directly define a debtor’s “centre of main interests,” both presume that a debtor’s COMI exists in its “place of registration.” One further similarity between the two is noteworthy: neither the E.U. Regulation nor the UNCITRAL Model Law on Cross-Border Insolvency purport to harmonize substantive insolvency law. Both documents are focused, by and large, to questions of procedure: setting the process for the recognition of foreign proceedings and foreign representatives; and encouraging and facilitating the cooperation of the insolvency representatives and courts in which cross-border proceedings are pending. Both also cover creditors’ rights to information about cross-border proceedings and the procedures applicable to the filings of claims in such proceedings, including the language in which notice and filings should be made. Both contain a stay of pending actions, although the scope of the stay provided under the E.U. Regulation is considerably narrower than that envisioned by the Model Law.

Despite this influence, the Model Law differs from the E.U. Regulation on Cross-Border Insolvency in important ways.¹¹⁶ Most notably, the Model Law embraces a more universal treatment of cross-border insolvency proceedings (although this universalism is tempered with a heavy dose of pragmatism), while the E.U. Regulation adopts a more territorial view of cross-border coordination of insolvency proceedings.¹¹⁷ Surprisingly, given its universalist leanings, the Model Law does not contain rules of private international law (that is, conflict of law rules), although

116. There are numerous differences between the E.U. Regulation and UNCITRAL’s Model Law on Cross Border Insolvency, far too many for us to detail in this context. For a more detailed discussion of these differences, see, for example, Ramy El-Boraei, *Forum of Competent Jurisdiction: Lessons from the European Union Insolvency Regulation*, 39 INT’L LAW. 781 (2005).

117. *Id.* at 782–84.

the E.U. Regulation includes more than ten such provisions.¹¹⁸ The Model Law's failure to adopt conflict of law rules was not the result of indifference to the issue or for lack of effort.¹¹⁹

We also note here the efforts of two private organizations to build on UNCITRAL's Model Law. First, in 1996, the International Bar Association, through its Committee J on insolvency law, promulgated the Cross-Border Insolvency Concordat,¹²⁰ which it describes as "the precursor of modern cross-border court-to-court protocols."¹²¹ The Concordat is intended as a "framework for harmonizing cross-border insolvency proceedings."¹²² Addressing issues of coordination, cooperation, and applicable law, the Concordat offers not "a rigid set of rules" for adoption by national legislatures, but rather a flexible set of alternatives that "could be implemented by court orders or formal agreements between official representatives or informal arrangements, depending upon the rules and practices of the particular fora involved."¹²³ The American Law Institute (ALI) has also worked in this area. Its Transnational Insolvency Project on Co-Operation Among NAFTA Countries commenced in the mid-1990s and continued through 2003. With the NAFTA project, the ALI published a three-volume comparative law study of the insolvency laws

118. See E.U. Regulation, *supra* note 110. While the E.U. Regulation contains a number of rules governing the applicable law in cross-border insolvency cases, these rules of private international law are more procedural than substantive.

119. *Cross-Border Insolvency*, *supra* note 111, contains eleven paragraphs (out of a total of fifty-four paragraphs) on conflicts of laws. See *id.* at 250, ¶¶ 22–24 (conflicting laws regarding priority in distribution); *id.* at 250–51, ¶¶ 25–26 (questions regarding recognition of cross-border composition); *id.* at 251, ¶¶ 27–30 (recognition and treatment of security interests in cross-border insolvency proceedings); *id.* at 251, ¶¶ 31–32 (applicable avoidance law). *Possible Issues Relating to Judicial Cooperation and Access and Recognition in Cases of Cross-Border Insolvency*, *supra* note 113, at 13–14, ¶¶ 48–53 (discussing possible effects of recognition of foreign insolvency proceedings in terms of which countries' insolvency law should apply).

120. For a copy of the International Bar Association's Cross-Border Insolvency Concordat, see INTERNATIONAL BAR ASSOCIATION, SECTION ON BUSINESS LAW, COMMITTEE J—INSOLVENCY AND CREDITORS' RIGHTS CROSS-BORDER INSOLVENCY CONCORDAT (1996), available at <http://www.iiiglobal.org/international/projects/concordat.pdf> [hereinafter CONCORDAT].

121. See INTERNATIONAL BAR ASSOCIATION, Section on Insolvency, Restructuring and Creditor's Rights Projects, http://www.ibanet.org/legalpractice/Insolvency_Projects.cfm (last visited Mar. 22, 2007) [hereinafter IBA Insolvency Projects].

122. See CONCORDAT, *supra* note 120.

123. *Id.* For a more detailed discussion of the Concordat, see David H. Culmer, *The Cross-Border Insolvency Concordat and Customary International Law: Is It Ripe Yet?*, 14 CONN. J. INT'L L. 563 (1999); Anne Nielsen, Mike Sigal & Karen Wagner, *The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies*, 70 AM. BANKR. L.J. 533 (1996).

of Canada, Mexico, and the United States,¹²⁴ as well as the ALI Principles of Co-operation in NAFTA Cross-Border Insolvency Cases, containing numerous recommendations directed to practitioners, courts, and legislatures.¹²⁵ Also as a part of its Transnational Insolvency Project, the ALI, together with the International Insolvency Institute, began work on Principles of Cooperation in 2005.¹²⁶ The Principles of Cooperation intend to “extend and disseminate” the ALI’s earlier NAFTA work to “jurisdictions across the world, subject to appropriate local modifications, and to obtain the endorsement of influential domestic associations, courts, and other groups in those jurisdictions.”¹²⁷

2. Legislative Guide

In considering the feasibility of “possible future work” on cross-border insolvency, the Commission flirted with the possibility of harmonizing divergent insolvency laws more generally since, after all, what better way to coordinate cross-border cases.¹²⁸ But the question of harmonizing

124. AMERICAN LAW INSTITUTE, *Transnational Insolvency: International Statement of United States Bankruptcy Law* (2003); AMERICAN LAW INSTITUTE, *Transnational Insolvency: International Statement of Canadian Bankruptcy Law* (2003); AMERICAN LAW INSTITUTE, *Transnational Insolvency: International Statement of Mexican Bankruptcy Law* (2003); see also Jay Lawrence Westbrook & Jacob S. Ziegel, *The American Law Institute NAFTA Insolvency Project*, 23 BROOK. J. INT'L L. 7 (1998) (providing an overview of the NAFTA project).

125. AMERICAN LAW INSTITUTE, *Transnational Insolvency: Cooperation Among the NAFTA Countries, Principles of Co-operation in NAFTA Cross-Border Insolvency Cases* (2003). For a copy of the principles, but not the related commentary, see INTERNATIONAL INSOLVENCY INSTITUTE, International Organizations and Projects, available at <http://www.iiiglobal.org/organizations/index.html> (last visited May 17, 2007).

126. See American Law Institute, *Transnational Insolvency: Principles of Cooperation*, available at http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=18 (last visited Mar. 28, 2007).

127. *Id.*

128. *Cross-Border Insolvency*, *supra* note 111, at 253, ¶¶50–51.

It has been stated by commentators and associations of practitioners that it would desirable to harmonize ground rules in some of the areas of insolvency law, which would allow international insolvencies, including compositions, to be resolved in a more predictable fashion and without undesirable conflicts between the jurisdictions interested in the insolvency. . . . However, . . . it has also been pointed out in international discussions that it may be unrealistic to suppose that any principle of universality of insolvency proceedings could be attained at the global, or even at regional, level in the foreseeable future.

Id. The Report of the Secretariat on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency, A/CN.9/398, puts the possibility of harmonizing divergent insolvency laws most directly:

the substance of insolvency laws, rather than simply providing a means for the cross-border recognition and coordination of such cases, was dropped as quixotic at the time UNCITRAL began its work on the Model Law. A little more than a year after UNCITRAL promulgated the Model Law on Cross-Border Insolvency, however, Australia proposed and the Commission agreed to reconstitute the Working Group on Insolvency Law with the aim to tackle just such a project. What had transpired in the interim to convince UNCITRAL that the time was ripe for such an ambitious project, given the breadth of this project and earlier determinations of its infeasibility?

Systemic financial crises in Southeast Asia and South America during the mid-1990s caused the financial leaders of the developed nations to press for reform of domestic corporate, financial, and commercial laws on a global scale.¹²⁹ As a result, the Financial Stability Forum was created and various international organizations initiated various reform efforts associated with raising the level of the “global financial architecture.”¹³⁰ In this spirit, the legal staffs of the International Monetary Fund

A third possibility that might in due time be considered for work by the Commission is the formulation of a set of model legislative provisions on insolvency. While it was not the conclusion of the Colloquium, and it is not here proposed to draft a comprehensive insolvency code with a view to achieving substantive unification of law, work in this area of law may eventually be important not only for Governments concerned with modernization of law, but also for the commercial community and for legal practitioners. . . [S]uch a project could be designed in a manner that would take into account the different policy options that a State would wish to consider in drafting its insolvency law, and would present model provisions for implementing those various policy options.

Id. ¶ 19.

129. For the press release of the G-7 calling for the strengthening of the international financial architectures, see Press Release, G7 Statement (June 18, 1999), available at http://www.g8.utoronto.ca/summit/1999koln/g7statement_june18.htm. For a list of these ongoing projects, see Ongoing and Recent Work Relevant to Sound Financial Systems, Note by the Financial Stability Forum Secretariat (Mar. 21, 2006), available at <http://www.fsforum.org/Publications/OngoingnoteMay06.pdf>. For a review of the success of the standards and codes initiative, see Benu Schneider, *Do Standards and Codes Prevent Financial Crises? Some Proposals on Modifying the Standards-Based Approach*, UNCTAD DISCUSSION PAPERS NO. 177 (Apr. 2005), available at http://www.unctad.org/en/docs/osgdp20051_en.pdf.

130. The Financial Stability Forum “brings together senior representatives of national financial authorities (e.g. central banks, supervisory authorities and treasury departments), international financial institutions, international regulatory and supervisory groupings, committees of central bank experts and the European Central Bank.” See Fi-

(IMF),¹³¹ the Asian Development Bank (ADB),¹³² and the World Bank¹³³ each published reports on best practices in the area of domestic insolvency law.¹³⁴

Thus, in 1999 when Australia formally proposed that UNCITRAL reconstitute its Working Group on Insolvency Law in order to consider preparing a legislative guide for domestic legislatures to consider when reforming their insolvency laws, UNCITRAL did not start its work on the Legislative Guide on Insolvency Law on a clean slate. It began its work on the Legislative Guide in the midst of a burgeoning international law reform effort both on the topic of insolvency law and corporate and financial laws more generally. Some questioned whether UNCITRAL's involvement in drafting a legislative guide on the topic would be useful in that earlier reform efforts seemed to have completed the task. What value could UNCITRAL bring to the task? What added ground could it cover given the grave dissensus separating existing insolvency laws around the globe, including those of the developed nations? A comparison of the World Bank Principles, or the IMF's report on Effective and Efficient Insolvency Laws, demonstrates a strong correlation among the principles adopted in the reports issued by the IMF, ADB, and World Bank.¹³⁵

Although the Legislative Guide on Insolvency Law builds on these reports, it also extends well beyond the work of these international financial organizations. Part One of the Legislative Guide adopts eight "key objectives" of any "modern" insolvency law, which strongly resemble

nancial Stability Forum, Who We Are, available at http://www.fsforum.org/about/who_we_are.html (last visited Mar. 28, 2007).

131. INT'L MONETARY FUND [IMF], LEGAL DEP'T, *Orderly and Effective Insolvency Procedures*, available at <http://www.imf.org/external/pubs/ft/orderly/> (last visited Mar. 28, 2007).

132. INT'L INSOLVENCY INST. [I], *Law and Policy Reform at the Asian Development Bank* (Apr. 2000), available at http://www.iiiglobal.org/organizations/docs/113_Asian_Development_Bank_Insolvency_Law_Reforms.pdf.

133. THE WORLD BANK, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (Apr. 2001), available at <http://worldbank.org/GILD/PrinciplesAndGuidelines/201627/Principles%20and%20Guidelines%20for%20Effective%20Insolvency%20and%20Creditor%20Rights%20Systems.pdf>.

134. The reports issued by the IMF, ADB, and World Bank were not the first efforts to identify common ground and possible "best practices" in national insolvency laws. In the mid-1980s, the International Bar Association drafted the Model International Insolvency Cooperation Act (MIICA), to which these reports all make reference. See IBA Insolvency Projects, *supra* note 121.

135. See Susan Block-Lieb, Comparison of World Bank, IMF and ADB Reports on Insolvency Reform, July 22, 2002, available at http://law.fordham.edu/documents/fac-sb_matrix2002.pdf.

the recommendations made in these earlier reports.¹³⁶ But it would be a mistake to suggest that UNCITRAL had nothing to add on the topic of domestic insolvency law given the earlier reports on which these key objectives are so clearly based. The Legislative Guide, in Part Two, continues for another 200 pages to comment in detail on these eight broad policy norms and to provide nearly 200 legislative recommendations. The commentary and recommendations contained in the Legislative Guide on Insolvency Law are consistent with the best practices identified in the IMF and ADB Reports, and the Principles and Guidelines set forth in the World Bank report, but go well beyond the broad statements contained in these earlier reports. We talk about this horizontal move in the sections that follow.

B. Horizontal and Vertical Incrementalism

UNCITRAL's Working Group on Insolvency Law was created in order to deliberate on the need for and contents of a Model Law on Cross-Border Insolvencies. It promulgated the Model Law in 1997, which has since been implemented by legislation enacted in ten nations: Eritrea, Japan, Mexico, Poland, Romania, Montenegro, Serbia, South Africa, the United States, and the United Kingdom (including Northern Ireland and the British Virgin Islands).¹³⁷ With less than two years of respite, the Working Group was reconstituted in 1999 to consider the desirability of drafting an international instrument addressed at attempting to raise the level of domestic insolvency law, with a particular interest in the insolvency laws of developing and underdeveloped nations.¹³⁸

The move from the Model Law to the Legislative Guide represents a nearly perfectly horizontal move; although both address issues of insolvency law, there is little overlap between the two UNCITRAL documents. While the Model Law on Cross-Border Insolvency addresses questions of procedure, only occasionally does the Legislative Guide make procedural recommendations. Most of the recommendations in the Legislative Guide involve the substance of an insolvency law. While the Model Law on Cross-Border Insolvencies addresses the coordination and

136. Legislative Guide, *supra* note 28, at 9–20. The Key Objectives themselves constitute Recommendation 7. *See id.* at 20.

137. For a discussion of the status of UNCITRAL's Model Law on Cross-Border Insolvency, see UNCITRAL, 1997—Model Law on Cross-Border Insolvency, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited Mar. 28, 2007).

138. UNCITRAL, *Possible Future Work on Insolvency Law*, U.N. Doc. A/CN.9/WG.V/WP.50 (Sept. 20, 1999), *available at* <http://daccessdds.un.org/doc/UNDOC/LTD/V99/880/13/PDF/V9988013.pdf?OpenElement>.

recognition of insolvency proceedings pending in multiple countries—and thus transnational law—the Legislative Guide focuses nearly exclusively on questions of domestic insolvency law.

There are two occasions on which the Legislation Guide turns to questions of international law. First, the Legislative Guide expressly recommends the enactment of legislation to implement the provisions of the Model Law on Cross-Border Insolvency. Recommendation 5 provides that an “insolvency law should include a modern, harmonized and fair framework to address effectively instances of cross-border insolvency.”¹³⁹ Recommendation 5 goes on to recommend “[e]nactment of the UNCITRAL Model Law on Cross-Border Insolvency.”¹⁴⁰ The Model Law is incorporated within the Legislative Guide as an Annex to the latter.¹⁴¹ Second, although the drafters of the Model Law were unable to agree on any model law provisions regarding private international law or conflicts of law rules, the Legislative Guide contains four recommendations addressing applicable law in insolvency proceeding, including provisions on which insolvency law ought to govern.¹⁴²

UNCITRAL’s work on the topic of insolvency law did not cease with its adoption of the Legislative Guide. Following a colloquium jointly sponsored by UNCITRAL and INSOL International and held in Vienna in 2005, UNCITRAL reconvened the Working Group on Insolvency Law to continue its work on court-to-court protocols, corporate groups, and cross-border post-commencement financing.¹⁴³ Unlike the shift from the Model Law to the Legislative Guide, this new work builds vertically on earlier efforts of the Working Group, both the Model Law and the Legislative Guide.

1. Court-to-Court Coordination

Although the Model Law on Cross-Border Insolvency directs courts with jurisdiction over cross-border proceedings to “cooperate to the maximum extent possible with foreign courts or foreign representatives,”¹⁴⁴ it gave courts little guidance on how this coordination should take place other than to provide that “[t]he court is entitled to communicate directly with, or to request information or assistance directly from,

139. Legislative Guide, *supra* note 28, at 14.

140. *Id.*

141. *Id.* at annex, pt. 2, at 307–64.

142. *Id.*, Rec. 30–34, at 72–74. An initial draft of these Recommendations on Applicable Law was prepared by a group of experts that included representatives from the Hague Convention.

143. *Annotated Provisional Agenda*, *supra* note 53, at 2, ¶ 5.

144. UNCITRAL Model Law on Cross-Border Insolvency, *supra* note 28, art. 25(1).

foreign courts or foreign representatives”¹⁴⁵ and a list of forms of cooperation.¹⁴⁶ Nearly every year since 1999, UNCITRAL, in conjunction with INSOL International, has hosted a Multinational Judicial Colloquium in various locations around the globe.¹⁴⁷ Since being reconstituted, the Working Group has “facilitated informally” a compilation of “practical experience with respect to negotiating and using cross-border insolvency protocols” by consulting with judges and insolvency practitioners, and continuing and building on the multinational judicial colloquia.¹⁴⁸

2. Corporate Groups

The Legislative Guide was not completely silent on the topic of corporate groups. It provided three pages of commentary on the difficulty of addressing the topic of corporate groups, either with multiple insolvency proceedings in a single jurisdiction or multiple proceedings pending before courts across the globe,¹⁴⁹ but it contained no recommendations on the topic. To fill this gap, the current Working Group on Insolvency Law was directed by the Commission to consider the topic of corporate groups,¹⁵⁰ and it has met twice to consider the topic.¹⁵¹

145. *Id.* art. 25(2).

146. *Id.* art. 27. As noted earlier, others have sought to extend on UNCITRAL’s Model Law by promulgating additional recommendations for coordination in cross-border insolvency cases. *See supra* text accompanying notes 124–31 (discussing IBA Concordat on Cross-Border Insolvency and ALI Transnational Projects).

147. For information about these colloquia, see UNCITRAL, UNCITRAL Colloquia, available at <http://www.uncitral.org/uncitral/en/commission/colloquia.html> (last visited Mar. 28, 2007).

148. *Annotated Provisional Agenda, supra* note 53, at 3, ¶ 9(c).

149. Legislative Guide, *supra* note 28, at 249, pt. 2, § V (Management of proceedings); at 276–79, pt. C (Treatment of corporate groups in insolvency).

150. *Annotated Provisional Agenda, supra* note 53, at 3, ¶ 9(a).

After consideration, the Commission agreed that: (a) The treatment of corporate groups in insolvency was sufficiently developed for the topic to be referred to Working Group V (Insolvency Law) for consideration in 2006 and that the Working Group should be given the flexibility to make appropriate recommendations to the Commission regarding the scope of its future work and the form it should take, depending upon the substance of the proposed solutions to the problems the Working Group would identify under that topic.

Id.

151. For the documents recording that meeting, see UNCITRAL, Working Group V, 2001–2004: Insolvency Law, available at http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html (last visited Mar. 28, 2007).

3. Post-commencement Financing of Corporate Groups

The Legislative Guide contains five pages of commentary and five recommendations on the topic of the necessity and standards for providing access to fresh funds to an insolvency representative following the commencement of insolvency proceedings—a concept referred to in the Legislative Guide as post-commencement financing.¹⁵² The current Working Group on Insolvency Law has been directed to consider the circumstances under which the provision of post-commencement financing could be facilitated through domestic legislation, both in the case of a corporate group with multiple proceedings pending in the enacting state and in the case of a corporate group with multiple proceedings pending in a number of different countries.¹⁵³ The provision of post-commencement financing to a corporate group, whether in a domestic or cross-border setting, was covered neither in the Model Law nor in the Legislative Guide, and constitutes a natural extension of other issues currently being considered by the Working Group—court-to-court coordination and corporate groups.¹⁵⁴

IV. INCREMENTALISMS AND LEGITIMACY

An examination of both the source and consequences of incrementalism suggests interrelationships between this method of global lawmaking and the legitimacy of the international organization. Incrementalism is not merely a matter of adoption or enactment of strategies of nation-states, nor even the strategies of international organizations as they anticipate the steps that adopting states will be prepared to take. It is also a strategy adopted by international organizations to legitimate themselves and thereby, their products. Incrementalism in nation-states presumes that the global norms to be adopted have been developed by international organizations generally perceived to be legitimate and that the product of an international organization has been developed by means that are perceived as right and fair. Incrementalism applies not only to the international organization as a whole, as it seeks to ratchet up its cachet and

152. Legislative Guide, *supra* note 28, at 75–82, pt. 2, § II (Treatment of assets on commencement of insolvency proceedings); *id.* at 113–19, pt. D (Post-commencement finance), including Recommendations 63–68.

153. *Annotated Provisional Agenda*, *supra* note 53, at 3, ¶ 9(b) (“Post-commencement financing should initially be considered as a component of work to be undertaken on insolvency of corporate groups, with the Working Group being given sufficient flexibility to consider any proposals for work on additional aspects of the topic.”).

154. *Id.* at 2–3, ¶ 8 (describing work on corporate groups and post-commencement financing for corporate groups, as building upon and complementary to the work already completed by the Commission in the Legislative Guide).

reputation as a rightful locus of global norm-making, but also to its products in a given area of global lawmaking. Thus, we find it not surprising that UNCITRAL's boldest projects—its efforts to develop international laws governing electronic communications and e-commerce, and to build and articulate a global consensus on, not simply the coordination of insolvency proceedings that transcend borders, but the substance of domestic insolvency laws—are its most recent efforts. UNCITRAL may not have been viewed capable or qualified to take on global law reform of this magnitude without first having succeeded in promulgating conventions on international sales, transport, payments, arbitration and dispute resolution, and procurement and project finance.

In either case, it can be expected that an international organization will pursue what Ian Hurd labels "legitimation strategies."¹⁵⁵ These strategies will seek to build legitimation on three foundations: representativeness, such that the crafters of new global norms are seen to be representative of the jurisdictions, or more properly, the kinds of jurisdictions, to which they are promulgated; procedural fairness, such that participants in global reform efforts have their voices heard by rules that enable the weak and the strong, peripheral and core players, to participate in ways that seem fair; and effectiveness, such that prior accomplishments of an international organization are parlayed into probable future successes. Each of these criteria affects incremental steps in global norm-making.

If early drafts of global norms have been formulated by a biased subset of powerful countries only, or by countries in the North only, or by the representatives of only one legal family, then an international organization might well pursue a legitimation strategy of broadening its representativeness in order to demonstrate to all potential adopters that nations like theirs did in fact have their voices heard in the norm-making process. Sometimes international organizations may overreach and have to start again with a more legitimate decision-making body. For instance, the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958—commonly referred to as the New York Convention—may have overreached by generating a product that gave many nations too little opportunity to reflect their national differences. When UNCITRAL took over this earlier U.N. project, stepped back, and tried again with the Model Law on International Commercial Arbitration, it was much more successful, precisely because it allowed local flexibility in adoption and covered a narrower scope of arbitrations.¹⁵⁶ Similarly, if the rules of participation in the drafting chamber allow expert organiza-

155. HURD, *supra* note 11.

156. See *supra* text accompanying notes 56–72.

tions to overwhelm the policy and political concerns of delegates, a product may emerge that takes much bigger steps than many nation-states can manage. Arguably most important of all, legitimacy rests in some measure on prior success. While this is true for an international organization as a whole, it is also true for its products in a particular legal arena. A sensible legitimation strategy would therefore proceed with first steps that permit both consensual products from a representative body and probable adoption by a large number of nations, including nations with strong symbolic auspices. The insolvency cycles exemplify this pattern: beginning with a Model Law on a narrow front and, following its success, proceeding with a Legislative Guide on a wider front, and thereafter pressing forward with even more challenging issues. Beginning with procedure and broadening to substance.

First, examination of multiple steps within a particular area of law reveals that incrementalism is not all of a piece. It involves not one but multiple strategies. Examining the entirety of its record of law reform, we find that UNCITRAL works both vertically within issues to sharpen the focus and horizontally to broaden the scope of the reach of its international instruments on a subject. We also find that occasionally UNCITRAL has worked pyramidally to build, not simply on its own work product, but on the shoulders of law reform efforts promulgated by other international organizations, such as the United Nations, UNIDROIT, the Hague Convention, the World Bank, and the International Monetary Fund. Second, there are multiple incrementalisms. We have identified three. *Vertical* incrementalism follows a logic of "intensification of action." More intensive development of a topic can take several forms: a move towards more binding international instruments (e.g., from a set of recommendations or principles to a convention), an increased precision in the detail covered over successive rounds of norm-making, or a shift from procedural to substantive topics. *Horizontal* incrementalism follows a logic of "extensification of action." Here, the breadth of a topic or domain is widened. *Pyramidal* incrementalism explicitly acknowledges that global norm-making frequently involves competition or cooperation among a variety of international organizations, each of which may have offered one or another proposal for global norms. When successive products explicitly or even implicitly build on prior products, often produced by different international organization, then the subsequent steps towards an integration of products in a global consensus take on a pyramidal form. Multiplicities of building blocks are successively forged into more coherent products. We have seen that UNCITRAL has performed this function in many areas of law, not the least insolvency.

These two theoretical steps—that incrementalism take multiple forms and that incrementalism can be explained in part as a legitimation strategy for international organizations—introduce many questions.

We identify three forms of incrementalism, but have only begun to examine the implications of each. Take pyramidal incrementalism. This is a profoundly political move because frequently it is intricately involved with delicate mutual adjustments among multiple international organizations in a legal field, sometimes including professional associations and other private legislatures. Occasionally, it occurs by aggregating discrete endeavors among organizations that might have had nothing to do with each other directly. That the UNCITRAL Working Group on Insolvency succeeded in bringing together the distinctive contributions of the European Union, Hague Conference, Asian Development Bank, and International Bar Association with its Legislative Guide on Insolvency Law presents a case in point. Pyramidal incrementalism may also occur either by conciliating among competing views or alternative formulations, or by transcending or compromising over competing forms of global norms, such as principles, standards, recommendations, and draft model laws. It could proceed via a hostile takeover, where an international organization seizes the initiative from smaller, weaker organizations and appropriates their produces for its own purpose, or via a friendly merger, where an international organization gains the support and cooperation of its predecessors because it has assets they do not have.¹⁵⁷ We know much too little about the political dynamics of this kind of incrementalism.

Furthermore, it is clear that the various forms of incrementalism may engage each other in complex ways, but we cannot yet explain why in very detailed terms. We hypothesize that there are sequences of incrementalisms that arise in differing circumstances. UNCITRAL's initiatives on insolvency suggest one sequence: beginning with a topic (in this instance, one focused on procedure) on which earlier transnational (regional) work had been nearly completed, moving horizontally to a broader range of related substantive issues again by means of a pyramidal building of international consensus, then following by further efforts to dig deeper in issues on which consensus was not reached in the first or second effort at global lawmaking. UNCITRAL's work on e-commerce present another sequence: beginning with a topic at the broadest levels of generality, and then returning to that topic again and again to dig more deeply, intensifying and hardening its efforts over time. A pyramidal in-

157. See Terence Halliday, *Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead*, 32 *BROOK. J. INT'L L.* 1081 (2007).

crementalism might never occur if a pioneering organization seizes the initiative on a topic and other international organizations subsequently defer to it as the appropriate forum for global norm-making. Moreover, a horizontal initiative may overreach and the next step may be to narrow its breadth and soften its aspirations for hard law. Or, alternatively, incremental reform efforts may proceed too slowly to engage the approval of the international community.¹⁵⁸ We leave for subsequent research the task of identifying these sequences and explaining the circumstances likely to produce one sequence rather than another.

We have proposed that one set of explanatory factors will be legitimating the challenges of an international organization. This raises a number of questions regarding the relationship between incrementalism and legitimacy that are stimulated by our data, but go beyond the bounds of this paper.

For example, do international organizations, such as UNCITRAL, adopt characteristic patterns of incrementalism? If an organization is well established and accorded high generalized legitimacy by its key audiences, will it require fewer incremental steps than an international organization that is less favorably received by the international community? Can it move more rapidly to expand its work horizontally? Will it be less (or more) reliant on a pyramidal strategy? If an international organization is weaker or suffers from legitimation deficits, is it likely to confine its aspirations? This might suggest that there is an international division of labor in a field of global lawmaking where some organizations are well positioned, in part due to their "stock" of legitimacy, to perform integrative, and coordinating and consensus-building functions. Resolution 2205 (XXI) claims such a mandate, but was the mandate developed through international consensus, or was it simply asserted by the U.N. on behalf of UNCITRAL with UNCITRAL left to build its role as a coordinative body?

In addition, do attributes of an area of law lead to differing strategies by international organization? An entirely new area, such as electronic commerce, might necessarily begin with a narrow focus that has an affinity with vertical and horizontal incrementalism. A long-established area of law such as bankruptcy, which has stimulated a variegated international field of international organizations, each offering its particular product, might necessarily require that subsequent entrants to the field either narrowly focus on missing elements or accept that a broadened

158. See, e.g., Hathaway, *supra* note 2, at 531 ("The danger of this [sort of incrementalist] approach, however, is that it can stall at any point in the cycle.").

focus requires a pyramidal advance such as the Legislative Guide on Insolvency.

Does vertical incrementalism (e.g., in the direction of a harder global norm) or horizontal incrementalism (e.g., in reaching to hitherto undeveloped areas of law) require a re-examination of the legitimacy warrants of an international organization? This question in turn implies that incrementalisms of any kind may take the form of larger or smaller steps. Incrementalisms have formal properties pertaining to the size of the incremental step or the speed of movement from one stage to the next. UNCITRAL's Working Group on Insolvency Law took a quick and large step beyond the Model Law. How was this possible? In part because it had achieved quick success with the Model Law and that gave it a shot of legitimacy. In part because the procedural rules it adopted allowed experts and delegates to work effectively together. In even greater part, it can be argued that the quick expansive step towards the core topics of substantive and procedural bankruptcy law was made possible by the diverse efforts of other international organizations. UNCITRAL had a great deal to work with, including some sense of how much convergence might be possible, thanks to the initiatives of the IMF, World Bank, and Asian Development Bank. Pyramidal incrementalism, in other words, leveraged horizontal incrementalism.

IV. CONCLUSION

So the dance continues—up and across the dance floor, arm and arm with other international organizations in an elaborate roundelay, building on earlier performances. Consensus building—for that is what produces global law—takes time and political skill. Once we conceptualize incrementalism in these terms, a theoretical and empirical agenda opens up that includes but far exceeds insolvency lawmaking. By distinguishing among types and formal properties of incrementalism, and by linking them with the problem of legitimacy for international organizations, we offer a conceptual apparatus conducive to explaining why international organizations take the steps they do in crafting global law.