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# Legitimacy, Technology, and Leverage: The Building Blocks of Insolvency Architecture in the Decade Past and the Decade Ahead

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# LEGITIMACY, TECHNOLOGY, AND LEVERAGE: THE BUILDING BLOCKS OF INSOLVENCY ARCHITECTURE IN THE DECADE PAST AND THE DECADE AHEAD\*

Terence C. Halliday\*\*

I participate in this conference as a thorn among roses. Since I am a social scientist, and more precisely, a sociologist of law, my concern is less with doctrine and more with institutions. I shall be asking: How did the advances of the past ten years come about? What are the preconditions for “maintaining the momentum,” as Ian Fletcher puts it?<sup>1</sup> And, not least, what are the conditions under which the writing of norms or design of insolvency systems will actually be implemented? The ultimate test of all this diligent construction of an insolvency architecture comes at the moment of practice. In the classic terminology of sociolegal scholarship, under what conditions will “law-on-the-books” become “law-in-action?”<sup>2</sup>

Today I shall sketch the outlines of a theory of institutional development. This draws in part upon my book, *Globalization, Law and Markets*, which I am currently completing with economic sociologist, Bruce Carruthers. In this case the institution is the framework or set of institutional configurations I shall call the global insolvency architecture. By “development” I refer to the process by which disparate, scattered, and ad hoc efforts become integrated into a coherent framework of institutional cooperation that purports to provide a comprehensive set of norms for governing national and cross-national bankruptcy.

I shall develop my argument through four steps. First, I shall look back over the past decade and argue that the development of the insolvency field that we celebrate at this conference can be understood through a political logic of bringing into alignment three elements of an effective

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1. Ian F. Fletcher, *Maintaining the Momentum: The Continuing Quest for Global Standards and Principles to Govern Cross-Border Insolvency*, 32 BROOK. J. INT'L L. 767 (2007).

2. See generally RICHARD LEMPert & JOSEPH SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE (1986). See also JOHN R. SUTTON, LAW/SOCIETY: ORIGINS, INTERACTIONS, AND CHANGE 11 (2001).

architecture: legitimacy, technology, and leverage. Second, I shall look forward and point to challenges that the advance of the international bankruptcy field will confront as it seems to build upon the solid foundation already in place. Third, I bring us back to the ultimate test: the likelihood that even the most elegant and seamless of norms and structures will be effective in practice. I shall pose this as the enduring problem of the implementation gap. Finally, I shall raise some questions about the variability of bankruptcy regimes as they confront varieties of capitalism.

These observations derive from a research program I have been undertaking for a number of years. It has three elements: (1) a quantitative, cross-sectional, and time-series analysis of all bankruptcy reforms from 1973 to 1998; (2) an intensive study of bankruptcy initiatives by international organizations; and (3) three case studies of bankruptcy reforms in China, Indonesia, and Korea since the Asian Financial Crisis.<sup>3</sup>

#### I. THE PAST TEN YEARS: AN INSTITUTIONAL THEORY OF LEGITIMATION AND POWER

In 1995 there was no comprehensive, coherent global set of standards for national bankruptcy regimes. As we turned the millennium in 2000 at least four potentially competing sets of standards were in the public domain—the World Bank *Principles for Effective Insolvency and Creditor Rights Systems (Principles)*,<sup>4</sup> the International Monetary Fund's (IMF) *Orderly and Effective Insolvency Procedures*,<sup>5</sup> the Asian Development Bank's (ADB) standards,<sup>6</sup> and the European Bank for Reconstruction and Development's (EBRD) surveys<sup>7</sup>—with others pending. By 2005 these four had essentially been unified in a single global standard represented by the integration of the United Nations Commission on Interna-

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3. See Bruce G. Carruthers & Terence C. Halliday, *Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes*, 31 LAW & SOC. INQUIRY 521 (2006); Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135 (2007) [hereinafter Halliday & Carruthers, *Recursivity of Law*].

4. World Bank, *Principles for Effective Insolvency and Creditor Rights Systems* (rev. 2005), available at [http://www.worldbank.org/ifa/rosc\\_ocr.html](http://www.worldbank.org/ifa/rosc_ocr.html).

5. International Monetary Fund (IMF), *Orderly and Effective Insolvency Procedures: Key Issues* (1999), available at <http://www.imf.org/external/pubs/ft/orderly/index.htm>.

6. Asian Development Bank (ADB), *Law and Policy Reform at the Asian Development Bank*, at 10–85 (Apr. 2000), available at [http://www.adb.org/Documents/Others/Law\\_ADB/lpr\\_2000\\_1.pdf](http://www.adb.org/Documents/Others/Law_ADB/lpr_2000_1.pdf).

7. European Bank for Reconstruction and Development (EBRD), *Transition Report 1999: Ten Years of Transition* (1999).

tional Trade Law's (UNCITRAL) *Legislative Guide on Insolvency (Legislative Guide or Guide)*<sup>8</sup> with the World Bank *Principles*. How was it possible for the world's disparate bankruptcy specialists, competing nation-states, and sometimes contending international organizations to get from the inchoate state of 1995 to the global consensus of 2005? That question can be answered at many levels. Let me offer a sociological perspective.

The propagation of an effective global standard by an international organization requires three elements. The organization and its product must be seen as *legitimate*. The organization must select or create a *technology* that is fitted to the task. And the legitimate technology must be disseminated with a *leverage* appropriate for implementation. We interpret the movement towards a single global standard in the bankruptcy area as a series of trial and error steps towards normative models that combined legitimacy, technology, and leverage. Let me explain.

#### A. Legitimacy

If the purpose of global actors is to facilitate the adoption of global norms by nation-states, then they must be seen as legitimate.<sup>9</sup> It is clear that most international organizations (IOs) most of the time either do not wish to rely on force or coercion or do not have the capacity to do so. If the objects of action by international organizations can be persuaded of the rightness of prescribed action, then compliance is more likely and implementation more probable.

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8. United Nations Commission on International Trade Law (UNCITRAL), *Legislative Guide on Insolvency* (rev. 2005), available at [www.uncitral.org/pdf/english/texts/insolven/05-80722\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf).

9. See generally Bruce Cronin & Ian Hurd, *Introduction to THE UNITED NATIONS SECURITY COUNCIL AND THE INSTITUTION OF INTERNATIONAL AUTHORITY* ch. 1 (Bruce Cronin & Ian Hurd eds., forthcoming) (on file with the *Brooklyn Journal of International Law*) [hereinafter Cronin & Hurd, *Introduction*]; Ian Hurd, *Legitimacy*, in *ENCYCLOPEDIA PRINCETONIENSIS: THE PRINCETON ENCYCLOPEDIA OF SELF-DETERMINATION* (Wolfgang F. Danspeckgruber ed., forthcoming) (on file with the *Brooklyn Journal of International Law*); STIJN SMISMANS, *LAW, LEGITIMACY, AND EUROPEAN GOVERNANCE: FUNCTIONAL PARTICIPATION IN SOCIAL REGULATION* (2004); Ian Hurd, *Legitimacy, Power, and the Symbolic Life of the UN Security Council*, 8 *GLOBAL GOVERNANCE* 35 (2002) [hereinafter Hurd, *Legitimacy, Power*]; Elizabeth Heger Boyle & John W. Meyer, *Modern Law as a Secularized and Global Model: Implications for the Sociology of Law*, 49 *SOZIALE WELT* 213 (1998).

Scholars of international organizations identify three such mandates.<sup>10</sup> First, IOs are more legitimate when their membership and decision-making comprises representatives of the entities that are the objects of normmaking. This *representative* basis for legitimacy depends on the activation of criteria, which are quite diverse, for persuading prospective audiences that future products of an organization have been formulated by actors that share their interests or attributes. Second, IOs are seen to be more legitimate when their internal decision-making proceeds by standards of *procedural fairness*. All actors incorporated into the deliberative process in principle should be aware of the rules of deliberation and be treated fairly in their application. Third, in a kind of circular reasoning, IOs are more legitimate when they are seen to be *effective*. If an IO has previously shown itself to be successful in achieving its goals, in production of standards and in their adoption, then the IO is more likely to be considered legitimate in prospective endeavors.

International organizations engage in a kind of internal calculus—they weigh their legitimation warrants against legitimation deficits. Each global actor either has, or may be able to construct, elements of legitimacy that nation-states, and other audiences, will accept as legitimate. These legitimation warrants variously include expertise, representativeness, or prestige. Legitimation warrants adhere not only to attributes of organizations or their deliberative processes. As Susan Block-Lieb and I have argued,<sup>11</sup> a powerful legitimation warrant can be internal to global templates or scripts. Global scripts, such as UNCITRAL's *Legislative Guide*, may vindicate themselves by a rhetoric that impels acceptance by its readers. In this sense IOs employ the scripts to legitimate rhetorically their claim for approval and adoption. They must frame the rhetoric of norms to appeal simultaneously to diverse, and often dissenting, constituencies.

But alongside these potential legitimation warrants exist legitimation deficits. Either by virtue of their goals, or their reputations, or their rela-

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10. The most compelling and theoretically incisive work can be found in IAN HURD, *AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL* (2007); Cronin & Hurd, *Introduction*, *supra* note 9; Ian Hurd, *Breaking and Making Norms: American Revisionism and Crises of Legitimacy*, 44 INT'L POL. 194 (2007), available at [faculty.wcas.northwestern.edu/~ihu355/Home\\_files/breaking%20making.pdf](http://faculty.wcas.northwestern.edu/~ihu355/Home_files/breaking%20making.pdf); Hurd, *Legitimacy, Power*, *supra* note 9; Ian Hurd, *Security Council Expansion and Institutional Legitimacy: Five Hypotheses in Search of a Test*, GLOBAL GOVERNANCE (forthcoming 2008) (manuscript available at [http://faculty.wcas.northwestern.edu/~ihu355/Home\\_files/final%20manuscript.doc](http://faculty.wcas.northwestern.edu/~ihu355/Home_files/final%20manuscript.doc)).

11. See Susan Block-Lieb & Terence C. Halliday, *Legitimacy and Global Lawmaking* (Fordham University School of Law, Legal Studies Research Paper No. 952492, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=952492](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952492).

tionship with delegitimizing actors, or disreputable past practices, or their offensive ideologies, or incapacity, among others, international organizations carry delegitimizing attributes that disqualify them or diminish their capacity to exercise influence.

As a result, a central dynamic of reaching a consensus around global norms turns on efforts by international organizations not only to balance their own legitimation warrants and deficits, but also to seek compensatory alliances, coalitions, and cooperation with organizations that are perceived as legitimate.

### *B. Technologies*

For social scientists, a social technology is defined as a systematic social means of achieving a particular outcome. Technologies emerge from organizations and they are expressed in many ways—as codified standards, managerial protocols, regulatory regimes, or regularized practices. International organizations are production centers of technologies. Some they borrow. Others they invent. All are intended to encapsulate a set of understandings or agreements and to package them in a form that will be persuasive to potential audiences or constituencies.

In international lawmaking we observe three aspects of technologies that make a difference in their form and function. First, technologies in law vary by how binding they are. In the terminology of legal scholarship, are they products of hard law or soft law?<sup>12</sup> In UNCITRAL's case, for instance, it has a repertoire of technologies that range from those closer to the hard law end of a continuum, such as conventions, to those that are progressively softer, such as model laws or legislative guides. In the insolvency field we have protocols, model laws from professional associations, principles and best practice, and guidelines, among others. In the drafting of norms for national bankruptcy systems all the products have leaned to the soft rather than hard law end of the continuum in part because consensus on transnational hard law would have been impossible.

Second, legal technologies in global normmaking vary by their level of generality or specificity. A lively debate exists among scholars over the relative merits of technologies that produce standards versus those that produce rules. At one end of a continuum lie scholars and norm-

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12. See Ken Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L GOVERNANCE 421 (2000).

producers who resist national and global harmonization of law.<sup>13</sup> At the other end of the continuum lie scholars who insist that the great diversity of fast-changing markets with huge economic stakes requires that global regulation be expressed through binding principles that may be implemented by many varieties of non-binding rules.<sup>14</sup> The choice can be highly consequential in practice. In the bankruptcy field, the World Bank, IMF, and ADB took the more abstract route. So, too, did INSOL in its "Statement of Principles" for out-of-court workouts.<sup>15</sup> By contrast, UNCITRAL's *Legislative Guide* combines not only high-level goals and objectives but many recommendations that are quite precise.<sup>16</sup>

Third, legal technologies vary in their relative weighting of diagnosis and prescription.<sup>17</sup> All formulations of norms for national legal systems proceed on some kind of diagnosis. Sometimes that diagnosis is assumed and scarcely articulated (e.g., that a country lacks an independent judiciary). In other cases the diagnosis is systematically conducted and sometimes publicized in full or in part, as we see in the "Legal Transition" surveys of the EBRD<sup>18</sup> or the ADB survey of eleven nations.<sup>19</sup> Legal technologies more often, but not always, include a prescriptive element. The IMF, World Bank, ADB, and UNCITRAL technologies are precisely of this kind. The weighting of diagnosis and prescription vary significantly across technologies. The EBRD instrument was all diagnosis and no prescription. The IMF "Blue Book" kept diagnosis implicit and was mostly prescriptive.<sup>20</sup>

### C. Leverage

The capacity of IOs to influence nation-states and local actors depends on what kinds of leverage they can exercise (i.e., the mixture of mecha-

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13. See Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures* 143 U. PA. L. REV. 595 (1995); Robert E. Scott, *The Politics of Article 9*, VA. L. REV. 1783 (1994).

14. See John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*, 27 AUSTL. J. LEGAL PHIL. 47 (2002).

15. INSOL Int'l, *Statement of Principles for a Global Approach to Multi-Creditor Workouts* (2000), available at <http://www.insol.org/pdf/Lenders.pdf>.

16. See UNCITRAL, *Legislative Guide on Insolvency*, *supra* note 8; Block-Lieb & Halliday, *supra* note 11.

17. See Halliday & Carruthers, *Recursivity of Law*, *supra* note 3.

18. See EBRD, *Transition Report 1999: Ten Years of Transition*, *supra* note 7.

19. See ADB, *Law and Policy Reform at the Asian Development Bank*, *supra* note 6, at 10–85.

20. See IMF, *Orderly and Effective Insolvency Procedures: Key Issues*, *supra* note 5.

nisms and power).<sup>21</sup> Social science scholarship on global business regulation points to various forms of leverage.<sup>22</sup> The most visible is *economic coercion*, notably through the use of conditionalities by international financial institutions which demand legal changes in commercial law and institutions as a condition of financial assistance. More common is *modeling*, when IOs offer nation-states model laws or model bankruptcy systems to which they may adapt their own institutions. Not infrequently, leverage proceeds through *persuasion*, when IOs and professionals in their circle host conferences, write articles, and give speeches in regional meetings about the merits of particular scripts or other national models that adhere to those scripts. Persuasion can be coupled with systems of reward or *incentives*; sometimes financial, as in foreign aid or technical assistance loans, and sometimes moral, when IOs suggest that a country's reputation will be enhanced or diminished by its conformity to global standards. Occasionally *reciprocity* also appears, when one country is persuaded to take a course of action that conforms reciprocally with another; as when two neighbors who share strong trading relationships decide to implement a global norm that ensures their respective courts each treat the other symmetrically. Organizational isomorphism proposes that several processes are in play, such as coercion, imitation, and persuasion.<sup>23</sup> In transnational relationships these must be specified and extended.

International organizations have portfolios of leverage.<sup>24</sup> The IMF has economic coercion and UNCITRAL does not. The United States may employ reciprocity whereas INSOL is reliant on persuasion. Moreover the type of leverage is situation-specific. Conditionality can only be used by the IMF and World Bank when countries need their funds. Reciprocity only works when two countries have strong ties, commercial or otherwise. The availability of instruments for leverage depends also the attributes of nations, whether they want or are willing to accept the conditions of donors. Not all forms of leverage are positive: the powerful economic coercion available to the IMF and World Bank often generates a backlash. Persuasion by UNCITRAL may be friendly but not potent.

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21. See generally Terence C. Halliday & Pavel Osinsky, *Globalization of Law*, 32 ANN. REV. SOC. 447 (2006).

22. See generally JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000).

23. See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. (1983).

24. See generally Halliday & Carruthers, *Recursivity of Law*, *supra* note 3.



Here then are three elements of global institution-building. The development of the insolvency field—and by extension other global fields of law—proceeded in a process of trial and error, competition and negotiation, among organizations as they searched for: (a) strong warrants of legitimacy; (b) a technology that looks likely to work; and (c) forms of leverage that will convert global standards into national laws, and ultimately local practices.

Look again at the development of the bankruptcy field in these terms. The EBRD's legal transition survey, begun in the mid-1990s, was essentially a diagnostic instrument constructed by a very small group of mostly in-house experts.<sup>25</sup> It relied almost entirely on persuasion of nation-states to take it seriously, something it did by ranking countries against each other and effectively shaming them into reforms. But it had several defects. Its legitimation warrants were limited—it relied almost entirely on a few technical experts and its authority was regional—to Central and Eastern Europe and Central Asia. Its technology was primitive and not at all defensible by social science standards. Moreover its technology was not accompanied by an articulated normative standard. Its leverage for enactment was potentially strong—through persuasion and even financial incentives.

The ADB's report of 1999 had relatively narrow legitimation warrants; it relied principally on ADB lawyers, a consultant, and various law firms in eleven countries.<sup>26</sup> Moreover, it was restricted to only a part of the Asian region. Its good practice standards balanced diagnosis—what was right or wrong with a country—with prescription, i.e., the standards themselves. Its leverage was a combination of modeling; it set out a model of a “good” bankruptcy system and persuasion, i.e., encouraging or shaming countries to conform to this model.

The IMF “Blue Book” of 1999 was developed by Legal Department lawyers in consultation with five distinguished international practitioners.<sup>27</sup> Compared to the ADB and EBRD it was stronger on its expert auspices but weak on any pretense of representiveness. Moreover, the IMF's use of conditionality ensured that any norms it produced would be

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25. See, e.g., Anita Ramasastry, *What Local Lawyers Think: A Retrospective on the EBRD's Legal Indicator Surveys*, in EBRD, *LAW IN TRANSITION: TEN YEARS OF LEGAL TRANSITION*, at 14 (Autumn 2002), available at <http://www.ebrd.com/pubs/legal/lit022.pdf>; Anita Ramasastry, Stefka Slavova, & Lieve Vandenhoeck, *EDRB Legal Indicator Survey: Assessing Insolvency Laws After Ten Years of Transition*, in EDRB, *LAW IN TRANSITION: SOUTH-EASTERN EUROPE*, at 34 (Spring 2002), available at <http://www.ebrd.com/pubs/legal/lit021.pdf>.

26. See ADB, *Law and Policy Reform at the Asian Development Bank*, *supra* note 6.

27. See IMF, *Orderly and Effective Insolvency Procedures: Key Issues*, *supra* note 5.

greeted with resistance, manifest or latent, by many developing countries, a deficit the IMF legal staff fully understood. Its technology took the form of a prescriptive standard without any accompanying diagnostic instrument, although the IMF does undertake diagnoses of nation-states, either through Article IV reviews or “Reviews of Standards and Codes.” In neither case did it make public its diagnostic instruments. Its prescriptive norms had the merit of offering alternatives to countries and not demanding that “one-size-fits-all.” The IMF had extraordinary leverage in financial crises, as we saw in Indonesia and Korea, where it compelled far-reaching reforms.<sup>28</sup> It presented a model with variants in a form that might be persuasive, particularly to countries that might anticipate requiring its funds at a later stage. But the IMF realized all too fully that its combination of legitimacy, technology, and leverage would not prevail as a global standard.

The World Bank was rather more equivocal on this score. As with the IMF, its legitimacy rested heavily on expertise, not only pulling in a small group of experts, but in taking its *Principles*, through many iterations, from one forum of specialists and government officials, in one after another region of the world. But to many observers, including key leaders of the global insolvency initiatives, its expert strength was accompanied by weakness on each of the three aspects of legitimacy. Moreover, it had significant legitimation deficits. These included a generalized resistance to the World Bank because of its use of coercive economic leverage and a sense by many that it was unduly close to the United States, that it was, in a word, exporting U.S. approaches to bankruptcy. Its technology—principles—seemed well suited to the diversity of potential adopting nations, but they were subject to criticism on a variety of grounds. The World Bank also had accompanying diagnostic instruments, but it did not and does not make them public, although some of the results of its “Reports on the Observance of Standards and Codes” (ROSCs) are posted publicly.<sup>29</sup>

It was for all these reasons that some countries and some leaders of international professional groups turned to UNCITRAL. It seemed to offer the optimal balance of legitimation, technology, and leverage. Its legitimacy was high on each of the three attributes of representativeness, procedural fairness, and effectiveness. It had a stock of technologies that could be adapted to whatever levels of hard or soft law, principles, or rules, seemed apposite. It could rely on leverage through modeling and

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28. See Halliday & Carruthers, *Recursivity of Law*, *supra* note 3.

29. See World Bank, Reports on the Observance of Standards and Codes (ROSC), <http://www.worldbank.org/ifa/rosc.html> (last visited June 7, 2007).

persuasion. On these bases, all asserted at the outset of the Commission's deliberations, and variously adapted during the Working Group's deliberations, UNCITRAL produced its *Legislative Guide*.

Yet UNCITRAL itself does not have quite the leverage nor technical resources of its less legitimate UN sisters—the IMF and World Bank. This would seem to work against enactment and implementation. But precisely at this point there may be a prospect of an alliance that will balance its legitimacy with the leverage of the International Financial Institutions (IFIs). From 2002 to 2005, friction occurred between the World Bank and UNCITRAL secretariat and many of its delegates. Rather than channeling its efforts through UNCITRAL, as had other international organizations, the Bank proceeded with what appeared to be a rival set of norms. Admittedly these were more expansive than UNCITRAL's mandate, including institutional aspects of insolvency systems not treated by UNCITRAL. But the rivalry over the substantive heart of the *Legislative Guide* and *Principles* respectively aggravated many leaders of the global reform movement. Even the U.S. Treasury and the U.S. State Department fretted that rival standards would confuse adopting nations and impede convergence.

Through negotiations over the past two years an agreement has been reached. UNCITRAL would publish its *Guide* independently. The Bank would publicize its *Principles*, without its accompanying commentary. The two would be substantively reconciled in a document that would show where World Bank *Principles* coincided with UNCITRAL recommendations. In practice, the Bank and IMF agreed on a diagnostic instrument—its insolvency ROSC—that was also reviewed by UNCITRAL. In theory, the Bank would use the *Legislative Guide* as a prescriptive backdrop to countries that were impelled or persuaded to reform their laws.

By 2005, therefore, an inchoate and difficult field of practice had gone from global disorganization to convergence on a single set of global norms. This feat occurred because financial crises had pressed the international and professional communities to push towards an international financial architecture in which insolvency regimes were a constitutive element. The logic of this advance can be seen as a process of trial and error, experimentation and adaptation, to attain a standard promulgated by organizations that could optimize legitimacy, a suitable technology, and appropriate leverage.

## II. THE NEXT TEN YEARS: ELABORATING LEGAL TECHNOLOGIES

In one sense, the UNCITRAL *Legislative Guide* is a signal achievement because it obtained a global consensus from the world's most le-

gitimate transnational organization on a set of norms for national bankruptcy systems. In another sense, the work has just begun. Let me raise several issues that will be critical in maintaining momentum over the next decade.

#### *A. Legitimacy*

In the final analysis, legitimacy is a subjective state. It signifies whether a particular audience believes in the “rightness” of an organization or its actions. It depends upon constituencies accepting that certain norms are authoritative and should be recognized as such. In the case of the *Legislative Guide*, this would manifest itself in efforts by national lawmakers to review their laws against this new standard and to amend them accordingly. In the composition of its Commission and Working Group, its procedures, and its past successes, UNCITRAL has proceeded along a path that will increase the probability that the *Guide* will be greeted as authoritative by national lawmakers and professionals alike. But whether in fact that legitimacy will be recognized remains to be evidenced—and legitimacy alone will not suffice, as we shall see below when we consider implementation. Moreover it will remain unclear for some time whether UNCITRAL’s association with the IMF and World Bank will prove costly from the vantage point of developing nations.

Legitimacy may become an issue in the efforts of the American Law Institute (ALI) and International Insolvency Institute (III) to generalize the cross-border facilities of NAFTA to the rest of the world.<sup>30</sup> This project has significant auspices. The ALI is an established and prestigious institution in U.S. law reform circles, and the III is a young but prestigious organization of insolvency practitioners, scholars, and judges. ALI has a track record in producing normative instruments, some of which have been highly influential. The fact that these principles include the world’s most powerful economy and govern relations among three quite different countries may also add cachet. But to be accepted universally, the product of such an expert enterprise may also run into some of the very legitimation issues that bedeviled the precursors to UNCITRAL’s *Legislative Guide*. For instance, its close proximity to the United States may be a deficit, engendering instinctive resistance from countries that chafe at perceived U.S. efforts to make the world conform to its image. In part its legitimacy will depend on how well it can be shown—for Mexico and for Canada especially—that these principles have worked. I

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30. American Law Institute (ALI), *Transnational Insolvency: Cooperation Among the NAFTA Countries, Principles of Co-operation in NAFTA Cross-Border Insolvency Cases* (2003).

am not yet aware of the evidence on this account. Moreover, ALI's process and products have been criticized by scholars of private legislatures, not least for its work on Article 9 of the UCC.<sup>31</sup>

Yet counting against these reservations it may be that legitimacy's elements play differently in courts than legislatures. In contrast to adoption of global norms by a legislature, in which most divergent interests in a society can be brought into play, courts can proceed without such a democratic mandate and at a lower decibel level. Indeed an ALI/III partnership may be far more persuasive to courts than any other branch of government. Even so, courts are also political institutions, never entirely insulated from local politics, and very much part of local politics in developing countries. Courts also must be seen to be legitimate in their respective contexts. Hence their discretion for adopting rules that affect local creditors and workers, state and community interests, national prestige and political patronage, may not be so great in practice.

### *B. Technology*

UNCITRAL's *Guide* adopts a soft law instrument that combines several levels of norms, ranging from high-level principles to statutory language in many recommendations. By adopting the soft law approach in the highly flexible guide-format, UNCITRAL has been able to take on issues that previously were thought to be intractable.

Furthermore, Susan Block-Lieb and I have shown that UNCITRAL's secretariat adroitly manipulated the formal properties of the *Guide* to cope with wide diversity in the world's legal systems.<sup>32</sup> In its glossary the *Guide* does not identify with any particular legal system. In its commentary the *Guide* frequently presents options that reflect some of the variations across insolvency regimes worldwide. And, when a global consensus was not possible, the *Guide*'s recommendations used combinations of rule-types that constitute a hierarchy of generality or specificity to lower or raise the threshold of recommendation in accordance with the degree of diversity to be managed.

This combination of soft law and a repertoire of rule-types appears highly respectful of national sovereignty. It places before national legislatures the governing principles that animate the law as a whole; it presents alternatives among which legislators may choose; and in cases where legislatures choose to step outside the *Guide*, that choice is framed by reference points towards which legislators can consciously orient

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31. See Alan Schwartz, *The Still Questionable Role of Private Legislatures*, 62 LA. L. REV. 1147 (2002); Schwartz & Scott, *supra* note 13.

32. See Block-Lieb & Halliday, *supra* note 11.

themselves—for or against. Together these attributes of the *Guide* appear conducive to a favorable response by legislators. This certainly will not produce unification. But it may facilitate convergence.

Two problematic features of the *Guide* remain. One is its lack of a diagnostic instrument. The advantage of a diagnostic instrument is plain: it can sharply display to policymakers and officials where and how the country does and does not conform to global standards. If coupled with a prescriptive standard, this provides an impetus for reform. UNCITRAL has compensated for this by linking the *Guide* to the World Bank's ROSC. However, it is not yet clear whether the Bank has tightly coupled its ROSC to the *Guide* in such a way that deficiencies that appear in a country's ROSC can then be remedied in relation to specific recommendations or options in the *Guide*. This is both a technical matter as well as a matter of institutional will: will UNCITRAL and the Bank proceed as partners or in parallel? The theory of legitimacy and technology would predict that both institutions will be better off working together than if either institution defects from their agreement to cooperate.

A second limitation of the *Guide* concerns what it leaves out.<sup>33</sup> The largest gap concerns institutions. Of the six core features of a bankruptcy system—substantive law, procedural law, professions, courts, regulatory agencies, and out-of-court mechanisms—UNCITRAL treats the first three in detail but the last three scarcely at all. Yet all scholars of law-in-action, not to mention practitioners, know that the most pristine law-on-the-books amounts to nothing if institutions are not in place to put it into practice. In this the Bank provides a complementary treatment, particularly of courts. However, at present the World Bank *Principles* on courts, regulatory agencies, and out-of-court mechanisms are at a fairly high level of generality—and with a thrust, it has been said by potential consumers, to be too reminiscent of the United States. As an alternative, some scholars argue<sup>34</sup> that benefits would accrue to the presentation of principles in terms of several operative alternative systems that exist in practice and would which be acceptable under the principles. The *Guide* does this in a number of cases—presenting several options and discussing their relative benefits, an approach also seen in the IMF Blue Book. This suggests that it is timely for a more considered treatment of courts, regulatory agencies, and out-of-court mechanisms with the finesse

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33. UNCITRAL historically has not seen institution-building as part of its mission. Moreover, “limitation” may not be the appropriate term because arguably UNCITRAL could only achieve the production of the *Legislative Guide* by taking some contentious matters off the table.

34. See Katharina Pistor & Chenggang Xu, *Incomplete Law*, 35 N.Y.U. J. INT'L L. & POL. 931 (2003).

UNCITRAL has used in its substantive and procedural provisions, a task that UNCITRAL cannot do itself.

### C. Leverage

If UNCITRAL, the IMF, and the World Bank in fact do develop a cooperative relationship, by working back and forth between the *Guide* and the ROSCs, then a gradient of leverage is possible for these global norms. At the soft end, the *Guide* and *Principles* offer a prescriptive model or standard that is available for consideration by national reformers. In the middle of the gradient, technical assistance by international institutions provide an economic and expert incentive to implement the norms; and in emergency situations, such as a financial crisis, the IFIs have available economic levers to compel national lawmakers to take the global norms seriously.

Braithwaite and Drahos maintain that global business regulation is facilitated when webs of expertise are mobilized through webs of influence.<sup>35</sup> What webs are available to propagate these global norms? Historically UNCITRAL has suffered from an incapacity of resources. While it has produced a succession of global standards, it has not been given the resources to disseminate and help implement its products. To correct this problem, in the last two years the Secretariat has created a Technical Assistance section, led by the Senior Legal Officer who drafted the *Guide*, and added a staff lawyer to provide technical assistance to countries that are appraising UNCITRAL products. Even so, resources available to the Secretariat remain far below what would be necessary for it to make a global impact.

For this, UNCITRAL will need to rely on two interconnected webs of influence. A powerful alliance has already been forged between UNCITRAL and international professional associations. INSOL has been a close partner in the first two of UNCITRAL's successful insolvency initiatives and it appears it will continue to play such a role in its third initiative now beginning on corporate groups and inter-court cooperation. The International Bar Association's (IBA) delegates, and those of the American Bar Association (ABA), have been intimately involved in the drafting of the *Guide* and the International Insolvency Institute has maintained a close involvement with the Working Group. UNCITRAL's impact in substantial part will depend on how actively INSOL's national affiliates and the IBA's Committee J on Insolvency and Creditors'

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35. BRAITHWAITE & DRAHOS, *supra* note 22.

Rights<sup>36</sup> energize their members to mobilize domestically on behalf of insolvency reforms. Will these organizations have the same capacity for collective action at the level of the nation-state as they have in global arenas? The answer is probably no. The global influence of these organizations has been possible because a small number of delegates from each have committed themselves over several years to close cooperation with UNCITRAL's Working Group and its informal expert groups. This has required no substantial problem of collective action since they appear to have acted pretty much autonomously, borrowing their organization's prestige but operating independently of it. To mobilize domestically has greater demands of collective action, and requires a strong message to be conveyed within associations from their global normmakers to local prospective lawmakers. Both are demanding and cannot be taken for granted.

A more powerful web of influence is available through the World Bank and regional development banks. Both the World Bank and the EBRD have staffers dedicated to insolvency reforms. They provide diagnoses of insolvency systems, offer technical assistance, and develop further standards. They also have resources. The ADB was an early and major mover in the field of insolvency reforms and continues to lend advice to particular countries, as it recently has at the penultimate moment of China's bankruptcy reforms. Yet the two regional banks were not active parties in the later development of the UNCITRAL *Guide* and it may be that they are less invested in the outcome. The Bank, we have seen, has had an equivocal attitude to the *Guide*. If, then, after all the effort of forging an apparent global consensus on a single standard, the regional development banks and the World Bank are lukewarm about urging the *Guide* on their member countries, then it risks sitting on the shelf. By contrast, the OECD, based in Paris, has had a continuing interest in insolvency since the collapse of the Soviet Empire. Through its Forums on Asian Insolvency Reforms, held each year for Asian countries, it has featured UNCITRAL and the *Guide* with increasing prominence, most notably in its April 2006 conference in Beijing.<sup>37</sup> Some nation-states are similarly mobilizing through their aid programs, most notably Australia.

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36. See Int'l Bar Ass'n (IBA), Section on Insolvency, Restructuring and Creditor's Rights Projects, [http://www.ibanet.org/legalpractice/Insolvency\\_Projects.cfm](http://www.ibanet.org/legalpractice/Insolvency_Projects.cfm) (last visited June 7, 2007).

37. See World Bank, Global Insolvency Law Database, Forum on Asian Insolvency Reform V, Beijing, China (Apr. 27–28, 2006), <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE/GILD/0,,contentMDK:21031110~pagePK:64065425~piPK:455253~theSitePK:215006,00.html> (describing meeting held in Beijing, China, jointly sponsored by the OECD, the World Bank, the ADB, the government of



We confront, therefore, two potential scenarios. In one, the flexible and legitimate technology embodied in the *Legislative Guide* gets leveraged through the persuasion, modeling, and even financial incentives of professional associations, international financial institutions, and international governance organizations. Legitimacy, technology, and leverage will conjointly and significantly raise the probability of national convergence around UNCITRAL's norms. In another scenario, the differing priorities of international financial institutions, and problems of mobilization by professional associations, will lead to a dissipation of the effort that brought the *Guide* to fruition. It is a social science problem to explain why one path will be taken rather than another. It is a pragmatic problem to choose whether momentum will be maintained or will falter.

There are two further issues that will be critical in determining the reform trajectory of the next decade. One concerns diagnostic capacities. The other concerns best practices.

#### *D. Diagnostics*

A great deal of law reform proceeds on the basis of diagnosis—of evaluations about what works and what doesn't.<sup>38</sup> In many respects, by the standards of social science scholarship, the quality of diagnosis by international organizations has not kept pace with the quality of global standards and norms.

The reasons are not surprising. Few players in the international insolvency field have any training in social science research methodology. Insolvency reform organizations have had virtually no contact with the networks of social science specialists on law across the world. The results are what might be predicted: the quality of diagnosis too often is at a level comparable to the likely results if social scientists were to draft statutes.

The problems are manifest. These include: lack of precise indicators for evaluation; sampling bias in who gets asked what; too few cases are held to be representative of substantial diversity; entire legal systems are arbitrarily assigned numbers that are statistically meaningless; and cross-sectional and time-series comparisons are thereby highly suspect.

Law Departments of IFIs do have the expertise and capacity to appraise law-on-the-books. But the appraisal of law-in-action, or of practice more broadly, falls far short of this. Conventionally IFIs save costs by variously (a) asking one law or accounting firm with which they do

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Japan, and government of Australia, in cooperation with the Development Research Institute and the government of China).

38. See Halliday & Carruthers, *Recursivity of Law*, *supra* note 3.

business to report on an entire country; (b) asking a single academic or professional to do likewise; (c) conducting ad hoc interviews with a few practitioners and elevating them to a national profile; or (d) engaging outside consultants to undertake (a) through (c) on their behalf. The main exception is the World Bank which conducts its ROSCs by spending one or two weeks of intensive interviewing in a country.

Characteristically, IFIs seldom or never talk to debtors or small creditors or any parties to bankruptcies away from the capital city of a developing country.

Unless this weak hand of IOs is significantly strengthened, then the quality of technical assistance, reform advice, and adaptation by countries to global norms will suffer badly.

#### *E. The Fallacy of "Best Practices."*

A persistent fallacy stalks the world of global law reform and business regulation. It is the notion that there are "best practices" that apply equally well in all situations. The implausibility of this concept becomes more obvious when IOs advocate "one-size-fits-all" formulations for countries worldwide. This is so nonsensical on its face that IFIs now routinely deny that they engage in this practice. Yet it is difficult to see the difference between "best practices" and "one-size-fits-all."

What is wrong with these concepts? Perhaps the point is best made with a metaphor. No self-respecting wine lover would ever admit to the proposition that pinot noir grapes will flourish equally well everywhere. If you plant pinot noir in Provence or upstate New York or Fiji you will get at best an inferior, and at worst, an im potable wine. There are only certain regions of the world where pinot noir flourishes—in Burgundy of course, in parts of California and Oregon, in some regions of New Zealand, but not others. Moreover, even in Burgundy, pinot noir in the bottle will reflect even minor differences in terrain, soils, and exposure to sunlight and wind—that is, the effects of *terroir*. In wine, as in law local context makes a discernible difference—the vine, the winemaker, the soil, the climate, the caves, the barrels, the techniques of winemaking, transport, storage, and exposure to changes in temperature. It is nonsense to expect the universality of taste of a given grape, irrespective of these 1,001 contexts of its growth and cultivation.

Law, too, is implanted in 1,001 different soils: from within a legal culture or from outside it; in contexts where people respect law and those where they don't; in places where law has long-regulated behavior and situations where it is a new basis of social regulation; in locations where it conflicts with other legal systems and those where it complements current legal systems; in cultures where recourse to courts is acceptable and

those where it is shameful; in places where judges are inferior officials from families at the edge of ruling elites to places where judges are honorable, high-status professionals; in political systems where it is laughable to imagine that judges could restrain a powerful ruler to those where it is thought to be their very obligation; in social systems where law is expected to be just and those where it has never been so; in countries where lawmakers intend implementing reforms and those where they have no such intent; and in places where the machinery of government has the capacity to implement reforms and those where it does not.

Exactly the same set of so-called global “best practices” implanted in these radically different situations will produce notably different outcomes. This is so for at least two reasons—the dynamics of law reform in a given country and a failure to match insolvency systems with different forms of markets.

I close by commenting briefly on each.

### III. THE IMPLEMENTATION GAP AND THE RECURSIVITY OF LAW

The ultimate test of the form and content of global norms, such as insolvency standards, depends not only on domestic enactment but on local implementation and usage.<sup>39</sup> This confronts all international agents of reform with the enduring problem of the implementation gap. Two sets of factors contribute to implementation gaps in the insolvency field.

On the one hand, an implementation gap can be predicted from particular configurations of legitimacy, technology, and leverage exercised by international organizations. In cases where international financial institutions use coercive powers to impose rigid global norms on a nation-state it can be expected that implementation will itself become an arena of resistance. Even in cases where a marked asymmetry of power occurs between global institutions and nation-states—for instance, a financially desperate nation-state in financial crisis urgently needs huge loans to forestall economic collapse—and they appear entirely vulnerable to foreign pressure, supposedly weak nations show surprising capacities to foil international organizations.<sup>40</sup> While capital-deprived developing nations

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39. On implementation issues in Asian insolvency reforms, see Terence C. Halliday, Fifth Forum on Asian Insolvency Reform (FAIR), *Lawmaking and Institution-Building in Asian Insolvency Reforms: Between Global Norms and National Circumstances*, (Apr. 2006), available at <http://www.oecd.org/dataoecd/42/47/38184739.pdf>; Terence C. Halliday & Bruce Carruthers, Fourth Forum on Asian Insolvency Reform (FAIR), *Institutional Lessons from Insolvency Reforms in East Asia*, (Nov. 2004), available at <http://www.oecd.org/dataoecd/50/7/33935734.pdf>.

40. Terence C. Halliday & Bruce Carruthers, *Foiling the Hegemons: Limits to the Globalization of Corporate Insolvency Regimes in Indonesia, Korea and China*, in LAW

may be compelled to reform their law-on-the-books, they can effectively retreat to ground where they have all the advantages, viz., implementation or putting law into practice. Through adroit combinations of delay, playing international organizations off against each other, nullifying ostensibly compliant provisions of statutes with obscure regulations, and ignoring the law, these and other weapons of the weak may quash in practice what weak nation-states could not resist in enactment.

This is not only a matter of unwillingness to implement global norms. Ample research shows that a translation process occurs when global norms encounter local situations.<sup>41</sup> The process of translation itself is mediated by professionals and officials with quite different capacities or willingness to capture the underlying principles or spirit of global norms and make them meaningful in another setting. In practice, of course, these intermediaries also face legitimacy problems because, to be effective, they must find ways to present something foreign as domestically acceptable. They are not always willing or able to do this. They also have an array of technologies available to them. Both implementation or resistance can be effected by more or less creative ways of manipulating these technologies in a way that Campbell calls bricolage.<sup>42</sup>

On the other hand, law reform in any country follows a recursive process.<sup>43</sup> The dynamics of recursivity in bankruptcy reforms reveal that several mechanisms widen or narrow the implementation gap in domestic lawmaking.

First, implementation often fails because the law itself is incomplete and indeterminate.<sup>44</sup> Of course, law by its nature is indeterminate. But arguably its determinacy is more in question when new concepts, doctrines, and theories are being imported from foreign sources. Statutory

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AND GLOBALIZATION IN ASIA: FROM THE ASIAN FINANCIAL CRISIS TO SEPTEMBER 11, (Christoph Anton & Volkmar Gessner eds., forthcoming 2007) [hereinafter Halliday & Carruthers, *Foiling the Hegemons*].

41. See JOHN L. CAMPBELL, INSTITUTIONAL CHANGE AND GLOBALIZATION (2004); SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006); Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38 (2006).

42. See CAMPBELL, *supra* note 41.

43. For a detailed account of recursivity in global lawmaking, see Halliday & Carruthers, *Recursivity of Law*, *supra* note 3. For the application of recursivity to domestic lawmaking in the insolvency field, see BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES (1998) [hereinafter CARRUTHERS & HALLIDAY, RESCUING BUSINESS].

44. See Pistor & Xu, *supra* note 34.

enactment of bankruptcy law itself may be written in ambiguous terms with gaps and inconsistencies. Depending on the sophistication of the judicial system and regulatory agencies, further cycles of reform may render meanings more precise or compound the ambiguity. For instance, China's new Enterprise Bankruptcy Act, which becomes effective on June 1, 2007, has been drafted in a very open format which leaves many issues unresolved.<sup>45</sup> In part this has occurred because political struggles behind the new law were not resolved definitively. Passage of the legislation could only occur if ambiguities and gaps remained. The task of resolving these now moves to "Interpretations" by the Supreme People's Court and rulemaking by various agencies of the State Council. But these may multiply rather than reduce the meanings of the law.<sup>46</sup>

This brings us to a second reason for failed implementation: contradictions contained within the law. In attempts to implement global standards, domestic policymakers not infrequently build in concepts that are in tension with extant concepts, doctrines, and usages. These then confront domestic political struggles which are often handled by building in concessions to conflicting political actors without forging an effective consensus. Such a struggle has been occurring in China's bankruptcy reforms, for instance, between those top leaders who favor a *socialist* market economy versus those who prefer a socialist *market* economy.<sup>47</sup> In the face of such ideological tensions, a vague law that incompletely reconciles foreign and domestic interests may be the only hope of legislative enactment. But by pushing clarification of the ambiguities to competing state agencies—financial regulators or regulators or state-owned enterprises—and courts, the struggle breaks out again, often with inconsistent results.

Third, a mismatch of actors frequently occurs between those who make the law and those who are involved in practice. Creditors and professionals are usually heavily involved in lawmaking but debtors are not—and labor, too, is often missing in bankruptcy law reforms.<sup>48</sup> If debtors are ignored, as they were by the IMF and World Bank in the Indonesian reforms, then they have all the more reason to resist in practice, as they

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45. Terence C. Halliday, *Policy Brief: The Making of China's Corporate Bankruptcy Law* (Foundation for Law, Justice and Society, Oxford University, forthcoming 2007) (on file with the *Brooklyn Journal of International Law*) [hereinafter Halliday, *Policy Brief*].

46. Compare the analysis of reforms in China's criminal procedure law. See Sida Liu & Terence C. Halliday, *Contesting the Limits of State Power: Recursivity in the Peoples' Republic of China Criminal Procedure Law, 1979-2006* (East Asia Workshop, Univ. of Chicago, May 11, 2006) (on file with the *Brooklyn Journal of International Law*).

47. See Halliday, *Policy Brief*, *supra* note 45.

48. See CARRUTHERS & HALLIDAY, *RESCUING BUSINESS*, *supra* note 43.

also effectively did in Indonesia.<sup>49</sup> Talk of creditor rights by international organizations, without a commensurate respect for debtor rights, gets the parties to bankruptcies off on a bad footing. If international organizations care as much about law-in-practice as law-on-the-books, they will need to elicit the cooperation of all parties to bankruptcy proceedings, especially as some of those parties are powerful in local politics, not to mention in practice.

Fourth, implementation problems often occur because there are diagnostic struggles over the nature of the problems to be corrected by law reform. Each party to bankruptcy reforms—international financial institutions and ministries of justice, workers and managers, creditors and debtors, lawyers and judges—has views about what is wrong that needs fixing. I have already said a good deal about the importance of diagnosis. Suffice it here to say that it is not simply a technical matter of defensible evaluation. It is also a political matter. Every party in domestic politics has an interest in defining the bankruptcy problems in ways that their prescriptions are designed to remedy. Hence effective implementation requires some consensus among international organizations and domestic constituencies over the definition of problems and their relative priority. Frequently IFIs and nation-states disagree. Without agreement reforms are likely to be stillborn.

#### IV. VARIETIES OF CAPITALISM, VARIETIES OF LAW

Let me conclude more by assertion than argument. For national bankruptcy regimes, I have proposed that the concept of “best practices” is fallacious. It is extremely rare that a single practice in law will be best in all circumstances. This notion has no validity on its face and cross-national research shows it has no prospect of implementation in practice. This same critique can be made for global norms more generally. The more rule-like those norms and the less flexible the alternatives they provide, the more probable it is that they will fail at the point of implementation. Square pegs cannot be forced into round holes.

I believe it is time that international organizations take more seriously the scholarship of political economists and recognize that there are several varieties of capitalism.<sup>50</sup> They contrast a coordinative form of capitalism that is characteristic of most Continental countries with a liberal

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49. See particularly their methods of resistance to the out-of-court efforts of the Jakarta Initiative Task Force. See Halliday & Carruthers, *Foiling the Hegemons*, *supra* note 40.

50. See, e.g., Peter A. Hall & David Soskice, VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE ch. 1 (2000).

form of capitalism that is exemplified by Britain and United States. Plausibly this theory can be extended to other regions of the world where we will discover distinctive forms of market organization and distinctive configurations of governance over markets. Much of this variation will turn on the relative maturity of legal institutions in a nation-state and the historical primacy of law as a means of regulating social relationships. In several regions law has never been particularly salient, legal institutions have not been much respected, and lawyers and judges have not been considered prestigious occupations. Commercial transactions have been regulated in a variety of other ways.

It may now be the case that increasing integration of global trade will demand more law-like ordering of commercial relationships. Many developing countries now recognize that they must at least provide the appearance of legalism in their frameworks for commercial transactions. But the extent to which legal certainty is required for expansion of trade is by no means empirically established. In fact there are glaring examples in East Asia to the contrary, China not the least amongst these.<sup>51</sup>

A more sophisticated way forward, I propose, is to develop a contingent set of relationships between types of markets and types of insolvency systems. Put another way, it is now time for scholars and international agencies to begin developing a theory of the conditions under which certain kinds of bankruptcy systems will best fit certain kinds of markets. If we can identify family resemblances of states and markets, then we can also identify clusters of insolvency systems.<sup>52</sup> The task then is to match particular types of insolvency systems with the markets to which they are best adapted. This is no easy matter. That is one reason why it has not already happened. Such a matching would require careful attention to the affinities of legitimacy, technologies, and leverage in global and local arenas. But as we push forward into the next decade I propose that such a refinement of our collective enterprise represents not only an exciting intellectual frontier but a pragmatic necessity.

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51. See John K.M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, in *LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA* (Christoph Antons ed., 2003); Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 *LAW & SOC'Y REV.* 829 (2000).

52. By an insolvency system I refer to the bundle of law and institutions that include: (1) substantive bankruptcy law; (2) procedural bankruptcy law; (3) bankruptcy courts; (4) out-of-court mechanisms; (5) bankruptcy professions; and (6) government bankruptcy agencies.