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# Who governs? Delegations and delegates in global trade lawmaking

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## Abstract

Who governs in the international organizations (IOs) that promulgate global norms on trade and commercial law? Using a new analytic approach, this paper focuses on previously invisible attributes of a global legislature – the state and non-state delegations and delegates that create universal norms for international trade and commercial law through the most prominent trade law legislature, the UN Commission on International Trade Law (UNCITRAL). Based on ten years of fieldwork, extensive interviews, and unique data on delegation and delegate attendance and participation in UNCITRAL's Working Group on Insolvency, we find that the inner core of global trade lawmakers at UNCITRAL represent a tiny and unrepresentative subset of state and non-state actors. This disjunction between UNCITRAL's public face, which accords with a global norm of democratic governance, and its private face, where dominant states and private interests prevail, raises fundamental questions about legitimacy and efficacy of representation in global lawmaking.

**Keywords:** delegates, delegations, global governance, global lawmaking, international organizations, international trade law.

## 1. Introduction

As the global texture of transnational commercial laws grows increasingly dense, the questions raised by Braithwaite and Drahos (Braithwaite & Drahos 2000), and others, take on renewed theoretical and pragmatic importance. Who makes the rules governing international trade and finance? In a global market characterized by radical differences in economic power, what opportunities are there for weak or poor states or civil society groups to advance their interests in global lawmaking (de Sousa Santos & Rodríguez-Garavito 2005; Cohen 2008)? How are business and other non-state stakeholders integrated into the building of the global trade order (Bernstein & Cashore 2007; Black 2008)?

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This article focuses on an understudied and underappreciated genus of international organizations (IOs) that create global trade law – the transnational quasi-legislatures of the world that generate new conventions, model laws, legislative guides, and other normative codes, to govern trade among nations and often the commerce within them. In these international trade law organizations (ITLOs), representatives of states, and sometimes non-state actors, sit together in a parliament-like chamber over months or years and produce law-like texts, which the deliberative body intends to be adopted by member states. We focus on arguably the most influential of these organizations, the United Nations Commission on International Trade Law (UNCITRAL), and examine closely one aspect of its politics.<sup>1</sup>

A black box exists in research on global legislatures, ITLOs, and IOs more generally (but see Koppell 2010).<sup>2</sup> Little is known about the delegations that embody the representation of state and non-state actors and that craft global norms for international trade in global legislatures.

This paper focuses on the first and foundational question – the attributes of a delegation (a formal group given standing in IO deliberations) and the delegates (individuals) that comprise it.<sup>3</sup> We proceed on the premise that delegations and their constituent delegates are the principal means by which states and non-state actors influence outcomes in global legislatures.<sup>4</sup> If they are not present, they exert little influence.

Two questions immediately arise: who is present? And what does “present” mean? We ransack an original data set on the identity and attributes of delegations and delegates to answer both questions. We shall demonstrate that being “present” is significantly more complex than might be supposed. By distinguishing between the attributes of delegations and delegates, and showing the complex relations between them, we simultaneously unravel the complexity of attendance and offer methods for delegation analysis that may be applied to any ITLOs or IOs that rely on deliberative chambers and delegations for the formulation of global norms.

The article begins with theoretical framings of “who governs” in global lawmaking; describes UNCITRAL, its proceedings and the data we analyze; presents empirical findings in detail; and concludes with implications of the findings for the fundamental question of “Who Governs?” To anticipate the conclusion, those who govern global trade lawmaking are a tiny subset of state delegations and delegates who are heavily skewed towards the Global North, together with well-organized non-state actors that are also anchored in advanced economies. While UNCITRAL characterizes its own identity as a representative body, and emphasizes inclusiveness of states as a foundation of its global authority, we discover a tiny number of delegates and delegations which comprise the IO’s deliberative core.

## 2. Theory

While the significance of delegates, delegations, and their attributes are not directly addressed in theories of IOs or global normmaking, it is possible to extrapolate from those theories likely expectations about the participation of delegations and delegates and, thus, their probable impact. These theories may be broadly divided into those that emphasize the global economic and geopolitical power of states, and those that also recognize the distinctive powers of IOs, epistemic communities, and international civil society.

On the one hand, world systems' theorists (Grieco & Ikenberry 2003; Wallerstein 2005) and theorists of international political economy or at least its "Third Generation" economistic variant (Helleiner 2009) hold views consistent with an expectation that the delegations with the greatest likely influence on deliberative proceedings will be those that represent the most powerful trading and banking nations, such as the United States, Germany, Japan, and Britain; multilateral international financial institutions, such as regional development banks, the International Monetary Fund, and the World Bank, that arguably act as agents for powerful states; and international private banking interests. For these actors, trade lawmaking offers yet another way to tip the global marketplace in a direction that favors their economic and financial interests.

Similarly, it should follow from realist and neo-realist theory in international relations that states at the center of the world economy will exercise disproportionate influence in trade law legislatures. If UNCITRAL's products were perceived to influence the financial fortunes of powerful states, then realists would anticipate a minimal impact of poor or weak states and most non-state actors, a considerable impact of multilateral bodies, such as the International Monetary Fund (IMF), which might be viewed as an agent of a powerful state actor, and the strongest impact of states that are geopolitically influential (Waltz 1979; Gruber 2000; O'Neill *et al.* 2004; Stone 2011).<sup>5</sup>

On the other hand, several bodies of theory converge on expectations that IOs, including global legislatures, will be influenced by actors other than states, and that ITLOs produce emergent outcomes that cannot be readily extrapolated from the power of the most powerful states in global markets or politics. Governance theory comes more closely to bear on the incorporation of diverse constituencies into global lawmaking. Increasingly it emphasizes a normative consensus that has emerged on the necessity of grounding global authority on a broad-based foundation of legitimacy where states, publics, and salient parties are integrated into lawmaking (Payne & Samhat 2004; Held & Koenig-Archibugi 2005). From this perspective it would be predicted that a deliberative process, fully representative of nations and interested non-state actors, would produce norms with a higher probability of adoption by nation-states and implementation in actual practice. UNCITRAL, in this scenario, would cultivate a broad-based representation of state and non-state delegations, including both powerful nations in the global economy and those for which adoption of global norms might become a national priority.

For global governance scholarship, as well as much IO theory in general, this embrace of diverse nations, expertise, and interests easily transposes into the key of political legitimacy. For some scholars, a co-regulatory approach (Bowman & Hodge 2009) will produce greater legitimacy and subsequent effectiveness when governments and industry and experts and civil groups work cooperatively. The legitimacy of hard and soft law relies on representation and participation. Both require the inputs of a broad range of governments and experts (Karlsson-Vinkhuyzen & Vihma 2009; Börzel & Risse 2010). Thus, global organizations can "play a role in constructing their own legitimacy claims" (Black 2008, p. 146), by integrating a diversity of delegations into deliberations where both representation and participation are manifest.

Constructivist IO theory similarly holds that IOs exert an influence of their own and are not simply ciphers of powerful states (Barnett & Finnemore 2004).<sup>6</sup> Constructivists would attend to overlaps and cross-cutting ties between delegates and delegations of state and non-state actors in the expectation that emergent properties of social identity, social

organization, and interests that transcend any particular actor are likely to be evident in the deliberative process.

Here, constructivists would find common ground with scholars on international civil society and professions (Price 2003; Teegen *et al.* 2004). Part of the dynamic of IO lawmaking can be expressed through efforts of civil society groups to be admitted to global deliberations and to be influential once there. Because global policymaking occurs on issues that are often technically complex, and as lawmaking often privileges legal experts (Cohen 2008), it should follow that ITLOs will want to import expert bodies into proceedings, just as professional bodies themselves may seek to mobilize their distinctive technical authority for global policy formation. A prominent role for professions would also be predicted by world polity theory on global norms (Meyer *et al.* 1997).

Both sets of theories hold implications for our assessment of delegations' capacity for participation and, ultimately, influence within an ITLO.

For example, realist IR theory, economic international political economy (IPE) theory, and world systems theory all emphasize the primacy of the state as the essential actor on the international stage and diminish, to various degrees, the autonomy or independence significance of IOs. In this view, the deliberative chamber merely reflects a microcosm of global realpolitik, of the concentration of wealth and economic power in the world economy. Delegations would be presumed to be more influential when their states are at the center of the world economy. Non-state delegations would be presumed to obtain a derivative influence when they, too, are centered in powerful states or their delegations are populated by the individuals from those states. Concomitantly, less powerful delegations and ITLO officials would be presumed to defer to more powerful state and non-state delegations.

The second group of theories (constructivism, cultural IPE, global governance, professions) would argue, alternatively, that delegations have discernible properties beyond mere extrapolations from the power of the states sending delegations or hosting IOs. If the attributes of states are held relatively constant, such as the economic power of all G-8 states, these theories would predict that there will be consequential variations among the properties of state delegates and delegations, variations that result in differing participatory capacities and, ultimately, probabilities of influence. Similarly, they would predict that there will be similarities among the properties of distinct sorts of state delegates and delegations and, thus, that the wealth or economic power of the state sending the delegation need not limit the influence of the delegation. Moreover, constructivist theory would further ask whether our data hold implications regarding the ITLO – its authority and legitimacy.

It is, therefore, necessary to isolate those properties of delegates and delegations and examine whether their variation, even within classes of states or non-state actors, will likely lead to differential effects on outcomes of an ITLO deliberative body.

### **3. United Nations Commission on International Trade Law (UNCITRAL)**

The UN General Assembly adopted a resolution to establish its Commission on International Trade Law in 1966. In justifying the creation of UNCITRAL, the General Assembly “*Reaffirm[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.” The UN Resolution justified the need for yet another ITLO devoted to

“the progressive harmonization and unification” of trade law on the grounds that the UN was uniquely positioned both to provide “broader participation in this field on the part of many developing countries” and to “co-ordinate, systematize and accelerate” the “process of harmonization and unification of the law of international trade” (Block-Lieb & Halliday 2007b, p. 856).<sup>7</sup>

Over the past 45 years, UNCITRAL has produced conventions, model laws, legislative guides, and other international instruments on many areas of procedural and substantive law, including international commercial arbitration and conciliation, e-commerce, international payments, procurement and infrastructure development, international transport of goods, secured transactions, and insolvency. The breadth of topics that UNCITRAL addresses has grown enormously since its inception and numbers of its products appear to have had a significant impact on national lawmaking and practice. In some cases, these are international treaties with far-reaching influence on international trade, such as the Convention on the International Sales of Goods (referred to as the CISG), which has 78 state signatories or the Convention on the Contracts for the International Carriage of Goods, Wholly or Partly by Sea (now known as the Rotterdam Rules), which promises to become the global standard governing liability for goods traveling to markets across the world’s oceans. In addition, UNCITRAL’s stature has been magnified since the Asian financial crisis, when the G-22 set out an ambitious agenda for domestic reform of financial systems, which UNCITRAL appropriated for itself as the lead global normmaker in various areas of commercial law, such as insolvency and secured transactions law.

UNCITRAL’s products are developed through three stages: working groups (WGs), in which policy decisions and drafting of an instrument take place; the Commission, which formally sets the substantive agenda of UNCITRAL and approves products from WGs; and the UN General Assembly, which ratifies Commission decisions, usually with congratulations and no substantive amendment. Representation could, in principle, be incorporated into any of the three stages and, indeed, forms UNCITRAL’s principal claim to legitimacy. In practice, both the WG and the Commission are constituted as representative bodies. The General Assembly, fully representative of the world’s nations, caps the deliberative process by placing its powerful symbolic imprimatur on UNCITRAL products.

The Commission has a Secretariat, based in Vienna, comprised of some 20 legal experts (former private practitioners, judges, law professors, legal civil servants). Drawn principally from advanced economies, UNCITRAL’s lawyer–civil servants have dual responsibilities: several have Commission-wide responsibilities for coordinating technical assistance; all serve WGs as the primary drafters of WG texts, recorders of all deliberative proceedings, convenors of expert consultations between official WG meetings, and exponents of completed products for global dissemination. Between meetings, delegates and secretaries of WGs may convene informal expert groups to review drafts or propose new drafting language.

There are currently six active UNCITRAL WGs, whose topics range from insolvency and secured transactions to electronic commerce, procurement, online dispute resolution, and international arbitration and conciliation. Each WG sits as a global deliberative body for one or two weeks twice a year in Vienna and New York. Although they could decide matters by majority vote, WGs have, since UNCITRAL’s inception, deliberated on the basis of “consensus.” WGs are comprised of three classes of delegations: 60 state delegations from the current members of the Commission; all other states that are invited

as observer state delegations; and non-state delegations, invited at the discretion of the Secretariat, and which usually comprise international industry and expert groups with special interest in the topic (Block-Lieb & Halliday 2006). The presiding chair treats all three classes of delegations alike during proceedings, although decisions are made by state delegations only. Once translated into the six official UN languages, draft documents from WG sessions are posted on the UNCITRAL website for delegates and any other interested party to review before (or after) WG sessions.

The Commission, in consultation with the Secretariat, determines the focus of the Commission's broad topical agenda, which is reflected in the general programs of work by the six WGs. While the Commission sets a WG mandate, the scope and focus of particular programs of the groups' work tends to emerge from within WGs themselves, usually as a consensus view of WG deliberations, in consultation with the WG Secretary and the UNCITRAL Secretary. The Commission, often with little emendation, conventionally endorses the specific work product emanating from WGs.

#### 4. Data

This study relies on data collected during an intensive case study of one of UNCITRAL's most active WGs – Working Group V on insolvency law (Block-Lieb & Halliday 2007a,b; Halliday & Carruthers 2009). Of UNCITRAL's six WGs currently in action, WG V has been notable for its rapid drafting and adoption of a Model Law on Cross-Border Insolvency (the Model Law) in 1997 (UNCITRAL 1997) and its completion of a Legislative Guide on Insolvency Law in 2004 (UNCITRAL 2004), a practice guide for cross-border cooperation by judges in 2009 (UNCITRAL 2009), a 2010 addendum to the Legislative Guide on Insolvency Law to cover the treatment of enterprise groups (UNCITRAL 2010), and a statement on judicial perspectives on the Model Law (UNCITRAL 2011).

Our data are drawn from three sources on the drafting of the Legislative Guide. First, from 1999 to 2004 the WG V met eight times for a week at a time, usually twice a year, once in Vienna and once in New York at the UN. We have analyzed all attendance data of delegates and delegations at those meetings, including type of delegation (state/non-state, advanced/developing/transitional country), name of delegate, occupation of delegate, and ministry from which state delegates are sent. Second, two of the authors observed six of the eight sessions, compiling a record of all speakers and speech-turns, and conducted extensive formal and informal interviews over eight years with delegates and UNCITRAL staff. Third, we have analyzed in detail the substantive content and formal structure of the final product – the Legislative Guide on Insolvency (Block-Lieb & Halliday 2006). This article relies primarily on the first set of data – on attributes of delegations and delegates – although we also refer briefly to the second set and draw upon the substantive outcomes in our concluding observations.

Attendance of delegations and delegates is not a simple matter. Two delegations, for instance, might attend a majority of sessions, but their profiles of attendance differ sharply. In one, a delegation attends all consecutive sessions at the beginning, middle, or end of deliberations and, thereby, builds up incremental knowledge and experience about decisions and directions that form the basis for subsequent discussions and decisionmaking. In another, a delegation attends a time or two, misses one or two sessions, returns for a session, misses another, returns again, and so on. In the latter case, delegations cannot



participate as effectively. Even if they have taken extraordinary steps to inform themselves of what transpired in their absence, their absences diminish their integration into a normmaking community, and attenuate the ties and trust that frequently build up among key normmakers during negotiations.

To some degree, the attributes of delegations and delegates vary independently of each other. Because social relationships occur more naturally among individuals than among groups, the likely influence of a delegation depends importantly on the consistency of attendance by delegates within a delegation. For example, it is possible for a delegation (a formal group) to be present at every session, but for its constituent delegates (the people who comprise the group) to turn over completely. In that case, consistency of a delegation's attendance matters relatively little because each new delegate must begin learning from the outset and has little experience to draw upon, even if well briefed by a previously attending peer. Certainly such delegates will have more attenuated relationships with other delegates and the Secretariat. As a result, it can be expected that consistent delegations that also include delegates whose own attendance is consistent are more likely to exercise influence on normmaking outcomes.

Further, the extent and contours of influence are likely to reflect *who* the delegates are within a delegation. This is partly a matter of delegation size and partly of delegation composition.

Participatory impact relates to backgrounds and life experiences of individual delegates who can speak with more or less authority based on their career trajectories and current occupational statuses. WG V deliberated on the contours of corporate insolvency law, a topic that involves detailed legal and financial considerations embedded in larger social and political decisions about which interests to preserve and which to jettison in the context of a firm's financial distress. In the insolvency field, at least, lawmakers might include not only legislators, civil servants, and judges, but lawyers, accountants, and insolvency practitioners who preside over everyday implementation of global norms. Hence, it can be expected that a delegation might increase its impact if its membership is occupationally diverse, that is, if it includes specialists from both the public and private or state and non-state sectors. This will be most salient for state delegations, but it may also strengthen non-state delegations, where, for instance, a judge or law professor complements a private practitioner.

Closely related is an indicator of density. Each delegation is permitted four members. The more consistently a delegation brings a more diverse group of stakeholders in lawmaking and implementation, the greater its probable impact should be.

These attributes of delegations and delegates can vary independently. For maximal impact, however, it might be anticipated that the delegations that combine attributes will magnify their influence. Consistent with this expectation, the strongest probable influence of a delegation qua delegation<sup>8</sup> will combine (i) high and consecutive attendance of delegations; (ii) high and consecutive attendance of particular delegates; (iii) the conjunction of consistently attending delegates and delegations; (iv) occupationally diverse delegations; and (v) full or dense delegations. Put another way, influence will be diminished, as each of these properties may be lost to a delegation.

We examine data in turn on (i) attributes of delegations; (ii) attributes of delegates; (iii) combinations of delegation and delegate attributes; (iv) the density and diversity of delegations; and (v) cumulative combinations of these factors. We conclude by specifying which delegations dominated the process of deliberations in UNCITRAL's WG V and



then examine the correspondence between this finding and findings reported elsewhere on other UNCITRAL WGs.

## 5. Findings

### 5.1. Delegations

UNCITRAL invites three broad categories of delegations. First, at the core are the 36 (until 2004) and later 60 (2004 and thereafter) states that are members of the UNCITRAL Commission. Official state delegations come from a representative sampling of the world's regions and levels of economic and legal development. Under the terms of UNCITRAL's original mandate, member states are selected by lot, subject to "the adequate representation of the principal economic and legal systems of the world and of developed and developing countries,"<sup>9</sup> and serve for staggered six-year terms.

Second, UNCITRAL's Secretariat invites all other states that are members of the General Assembly to WG sessions as observer states. Observer states attend and participate on exactly the same terms as UNCITRAL member states. In WG V, approximately 10 to 20 observer nations attended regularly.

Third, the UNCITRAL Secretariat seeks representation from international industry groups, multilateral organizations, and other trade bodies that have a putative interest in these particular trade law proceedings. The interest groups that attended the WG on Insolvency fell into four classes: (i) international financial institutions (e.g. IMF, World Bank); (ii) international economic governance organizations (e.g. Organisation for Economic Co-operation and Development [OECD], Common Market for Easter and South Africa [COMESA]); (iii) international professional associations of lawyers and insolvency practitioners (e.g. International Bar Association [IBA], the International Federation of Insolvency Practitioners [INSOL], the International Insolvency Institute [III], and an international section of the American Bar Association [ABA]); and (iv) ITLOs, such as the International Institute for the Unification of Private Law (UNIDROIT) or the Hague Conference on International Private Law.

As in national lawmaking, certain interests were not directly represented in the WG: although invited, representatives of business, such as the International Chamber of Commerce, did not attend; representatives of labor (the International Labour Organization) were invited, but only attended once; and trade creditors had no direct representation.<sup>10</sup>

Non-governmental organizations accepting the Secretariat's invitation can attend and participate effectively on nearly the same terms as state delegations. The Chair recognizes requests to intervene in the order in which flags are raised; in judging whether a consensus had been reached, however, the Chair may ignore non-state delegates' requests for changed language unless seconded by a state delegation.

Our data show that 127 delegations attended WG V at least once, but 70 of these attended only once or twice, and only 36 attended more than half the sessions. We define these 36 as "high attendance delegations." Even fewer, only 24, have near perfect attendance, coming seven to eight times. It is likely that brief attendance serves a scanning or oversight function. A quick appraisal of proceedings enables diplomats at the permanent missions in New York or Vienna to prioritize their commitments to UN-related proceedings. It also permits delegations to take the pulse of the WG and decide whether the subject matter area merits passive monitoring or active involvement.

**Table 1** High-attendance delegations

	Advanced	Developing/transitional
State	Australia (8), South Korea (8), Switzerland (8), Germany (8), Spain (8), Sweden (8), Canada (8), France (7), Austria (7), Italy (7), Japan (7), Singapore (7), USA (7), Denmark (6), Ireland (6), & the UK (6) (16 total)	Thailand (8), Mexico (7), China (7), India (6), Russia (6), Philippines (6), Turkey (6), Brazil (5), Cameroon (5), Iran (5), Nigeria (5), Sudan (5), & Turkey (5) (13 total)
Non-state	IMF (8), IBA (8), INSOL (8), WB (7), ABA (7), GRIP (7), & III (7) (7 total)	

*Note:* “High attendance” indicates a delegation that sent at least one representative to more than half of the UNCITRAL meetings (i.e. five or more meetings).

Who are the High-attendance delegations? Numerically and proportionately, Table 1 indicates that advanced economies and Developing/transitional economies are about evenly balanced among the state delegations in attendance (16 advanced to 13 developing/transitional). Most of the delegations from developing/transitional countries attend five or six times and are, thus, concentrated at the lower end in the frequency of high-attending delegations. Six of these are disproportionately *big* economies and enjoy membership in the G-20: Brazil, China, India, Mexico, Russia, and Turkey. Developing/transitional delegations come from all regions of the world.

All the high-attendance delegations that are non-state actors are either international financial institutions (IMF, World Bank) or professional associations (IBA, III, ABA, INSOL, and Groupe de Réflexion sur L’insolvabilité et sa Prévention [known as GRIP]). The international financial institutions (IFIs) attended partly because UNCITRAL proceedings built on their prior normmaking (Halliday & Carruthers 2009, ch 3), and partly because they have mandates to evaluate and promulgate norms for insolvency systems across their member countries. The professional associations represent the greatest concentrations of insolvency expertise in INGOs among lawyers, accountants, and insolvency practitioners.

When non-state actors are included, which are all based in countries with advanced economies, the numerical and disproportionate balance tips in favor of advanced economies (23 advanced to 13 developing/transitional). Whether advanced or developing economies, however, the high-attenders do represent most of the world’s largest economies. Their states account for more than 50 percent of world gross domestic product (GDP).

## 5.2. Delegates

The overall number of delegates who attend at least once is very high ( $n = 559$ ). However, almost three-quarters of these delegates come only once or, in an unknown number of cases, they signal to UNCITRAL that they intend to attend, but do not appear at all. In part, the record for those that do appear at least once can be attributed to the scanning or surveillance function of permanent mission diplomats in Vienna and New York. When only delegates who are not part of UN missions are considered, the overall number of delegates drops from 559 to 333. Even then the distribution remains quite similar: more than 80 percent of delegates come only once or twice.

**Table 2** High-attendance delegates ( $n = 27$ )

	Advanced	Developing/transitional
State	Andrew Sellars (Australia), Jean-Luc Vallens (France), Stephan Guido (Germany), Myer Sigal (USA), Harold Burman (USA), Burton Lifland (USA), Tina Brozman (USA), Junichi Matsushit (Japan), Annie Drymala (Canada), Lucio Ghia (Italy), Alexander Markus (Switzerland), David Moran Bovio (Spain), Soo-Geun Oh (S. Korea), Richard Favier (UK) (14)	Wisit Wisitsora-at (Thailand), Jorge Pinzon (Colombia) (2)
Non-state	Neil Cooper (INSOL), Ronald Harmer (INSOL), Ben Floyd (IBA), Daniel Glosband (IBA), Bruce Leonard (III), Susan Block-Lieb (ABA), Chris Redmond (ABA), Gordon Johnson (WB), Adolfo Rouillon (WB), Isabelle Didier (GRIP), Marc Andre (GRIP) (11)	

*Note:* “High attendance” indicates a delegate who attended more than half of the UNCITRAL meetings (i.e. five or more meetings).

The data also show that a tiny proportion – about 5–10 percent ( $n = 27$ ) – attend more than half of the time and only 12 attend virtually every session (seven to eight times). This finding brings us much closer to delegates at the core of the deliberative body.

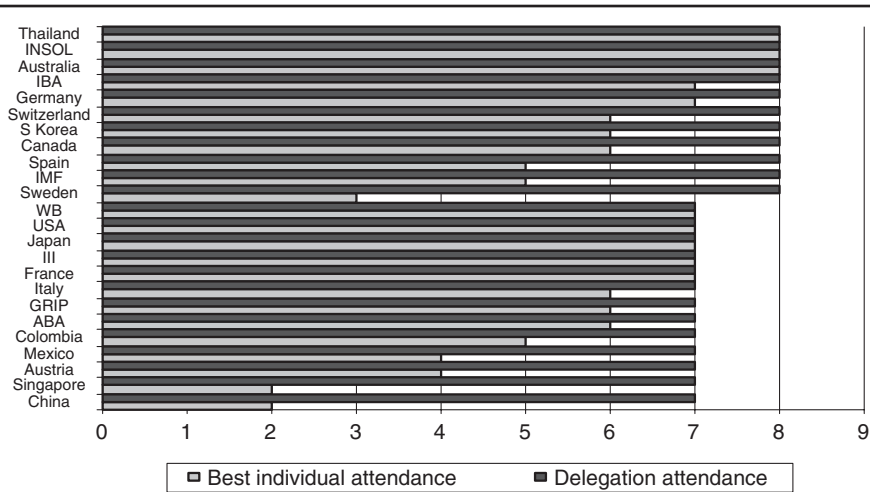
It is instructive to examine the 27 most consistent, high-attendance delegates (who attended more than half the sessions) (Table 2). These high-attendance delegates are overwhelmingly from advanced economies. Several delegations have more than one consistent delegate (US, INSOL, IBA, ABA, GRIP), with the professional associations preponderant. The single highest concentration of consistent delegates is the US delegation (four). If we classify delegates by country of citizenship/domicile, the countries with the highest number of consistent delegates are the US (nine of 27, 33 percent), France (three), UK (two), and Canada (two).

Regional combinations are revealing: there is a strong North American contingent (US, Canada), a strong British Commonwealth presence (UK, Canada, Australia), a strong EU contingent (UK, France, Germany, Italy, Switzerland, Spain), but weak Latin American, Asian, Australasian, and African contingents. Considerable balance can be observed between common law delegations (ABA, Australia, Canada, the US, UK) and civil law delegations (France, Germany, Japan, Switzerland, Spain, South Korea, GRIP, Colombia).

### 5.3. Delegations plus delegates

The delegations with the highest capacity for influence are likely to be those *high-attendance* delegations with delegates whose personal attendance is high. However, there are two different profiles of delegate/delegation attendance.

One has a high turnover of delegates within delegations. Analysis reveals that the turnover of delegates in many delegations is high indeed. By defining the unit of analysis as a person/session,<sup>11</sup> 11 of the high-attendance delegations experience between 20 and 42 person/session attendances. Surprisingly, high numbers come not only from countries with advanced economies, but from countries with developing or transitional economies, most notably China, Colombia, Thailand, and Cameroon, which between them rate some

**Table 3** High-attendance delegations and attendance by most consistent delegate\*

\*Only delegations attending seven or eight meetings represented on graph.

115 person/session attendances at the WG. There are at least two explanations: On the one hand, some countries choose to expose a larger number of their officials to international negotiations as a form of socialization in global lawmaking and education. That is, they are there to learn, not to draft. On the other hand, there is imputation, not always undeserved, that some countries use attendance at UN meetings as a kind of UN-tourism, a reward of a foreign trip at state expense for privileged officials.

A second profile combines high-attending delegations with their most consistent delegates. Table 3 reveals that a tiny number of delegations combine both high attendance and high consistency: Thailand, INSOL, Australia, IBA, Germany, World Bank, US, Japan, III, and France attended either eight out of eight, seven out of eight or seven out of seven times. These 10 delegations either had the same delegate present for every session or every session but one. Except for Thailand, all are from advanced economies. Four of the ten of the most active, consistent delegations are NGOs or IFIs. On proportional grounds, then, advanced economies overwhelm and non-state actors, principally professional associations, are disproportionately active. When we compare types of delegations by the average number of meetings attended by the most consistent delegate, the gap between advanced countries (5.4 sessions out of 8), INGOs (6.6/8) and developing/transitional countries (3.2/8) becomes more apparent. On average, in the high-attendance delegations from developing/transitional countries, the most consistent delegate came to fewer than half of the WGs meetings.

In sum, the combined data on high-attendance delegations and high-attendance consistent delegates indicate that a small number of delegations and delegates lies at the core of WG proceedings. These delegations have the highest likely capacity for influence over global normmaking.

#### 5.4. Density and diversity in delegations

We have identified high-attendance delegations, high-attendance and high-Consistency delegates, and combinations of the two. However, delegations might strengthen their

**Table 4** High-density delegations among high-attendance delegations

	Advanced	Developing/transitional
State	Germany, Italy, Japan, South Korea, Spain, Sweden, USA (7/16)	Cameroon, China, Colombia, Russia, Sudan, Thailand (6/13)
Non-state	IBA, III, INSOL, the World Bank (4/7)	

*Notes:* “High attendance” indicates a delegation that sent at least one representative to more than half of the UNCITRAL meetings (i.e. five or more meetings).

“High density” indicates those sending three or more delegates to meeting.

influence in other ways. A delegation might add depth to its bench by consistently bringing several delegates to each meeting. These delegates might complement each other’s experiences, skills, and perspectives. We define such a high-*density* delegation as a delegation that regularly sent three or more persons to each meeting. This does not signify that each delegate attended consistently nor does it say anything about their attributes.

Table 4 shows that approximately half of the high-attendance delegations had a high density of delegates. High-density delegations were preponderantly from advanced economies (Europe, East Asia, US) and the professions (III, INSOL, IBA). Yet four developing and two transitional countries also had high-density delegations.

Our data also enable us to specify the variety in backgrounds of delegates in high-density delegations. If a state delegation incorporates different backgrounds, skills, and experiences from different parts of the insolvency system – judges as well as practitioners, officials from lawmaking ministries or regulatory agencies as well as professors – it can increase its authority in the deliberative process, enrich the discourse around normmaking, and become more persuasive. For simplicity, we divide high-attendance delegations into high-*diversity* and low-*diversity* delegations. We find that advanced economies (Denmark, Germany, Italy, Japan, South Korea, Spain, Sweden, US) are more likely to bring diverse delegations and that civil law countries do so more often than common law countries, except for the US. Several non-state delegations also have diverse delegations (III, INSOL, World Bank).

### 5.5. Cumulative impact of attributes

When we compare those delegations that combine high attendance with high delegate consistency and diversity we observe a striking convergence on a very small number of delegations and delegates. In Table 5, Column 1 (High attendance, High consistency), just 10 delegations combine both. If we examine which of those delegations also have a higher density of delegates (Column 2), we see the same delegations (i.e. Germany, IBA, US, III, INSOL, Japan, Thailand, World Bank), with the exception of Australia and France, which consistently sent just one delegate. Similarly, if we observe which high-attending/high-consistency delegations were also high diversity-delegations (Column 3), it can be seen again that the overlap is very substantial – indeed, 7 of the same 10 delegations. Finally, since we have identified the 27 highest-attending delegates, we can observe which coincide with delegations that score highly on other attributes. It will be seen (Column 4) that 16 of the highest attending delegates are within this cluster.

**Table 5** Combinations of attributes: high-attendance delegation, high-consistency delegation, high-diversity delegation, high-attending delegate<sup>15</sup>

High attendance + High consistency	High attendance + High consistency <i>plus</i> High density	High attendance + High consistency <i>plus</i> High diversity	High attendance + High consistency <i>plus</i> High attending delegate
Australia			Australia
France			France
Germany	Germany	Germany	Germany
IBA	IBA		IBA (2)
III	III	III	III
INSOL	INSOL	INSOL	INSOL (2)
Japan	Japan	Japan	Japan
Thailand	Thailand	Thailand	Thailand
World Bank	World Bank	World Bank	World Bank (2)
US	US	US	US (4)

## 6. Delegations, participation, and outcomes

### 6.1. Summary of findings

We find that large numbers of delegations (127) and delegates (559) attended UNCITRAL's Working Group on Insolvency at least once, but a small number of delegations (36) and smaller number of delegates (12–27) formed its working core. The high-attending, highly consistent delegations were predominantly from advanced economies; they represented a diversity of national approaches to bankruptcy; and they included both state and non-state actors. The high-attending delegates were overwhelmingly from advanced economies and substantially from professional NGOs and IFIs. Most economically powerful states (US, Germany, Japan, UK, China, France, etc.) sent delegations consistently, indicating that UNCITRAL matters to them enough to warrant the investments that frequent and consistent attendance requires.

A handful of delegations (Australia, France, Germany, IBA, III, INSOL, Japan, Thailand, World Bank, US) appeared best positioned to participate effectively because they combined: high attendance of delegations; high consistency of delegations; high density of delegations; high diversity of delegations; and high consistency of delegates. The US combined these attributes of delegations and delegates most markedly. Moreover, US citizens comprised the largest number of individual delegates (9 of 26); and a US-centered cluster of state and non-state actors formed something of a like-minded bloc (US, IBA, ABA, World Bank). Nevertheless, the core delegations do represent a variety of alternative insolvency systems in advanced economies. Together with a small number of high-attending delegates (12), this cluster of delegations and delegates was best positioned to form the nucleus of influential normmakers.

It appears that few principals of state or non-state delegations either considered it worthwhile or could afford consistently to send delegations to most meetings. The contrast between the total number of delegates who attended and those who attended consistently is even more pronounced. By default, therefore, the delegation and delegate data suggest that global norms for insolvency were shaped by a tiny number/cluster of delegations and delegations unrepresentative of the diversity of economies, regions, or

varieties of law in the world. Our qualitative evidence, reported elsewhere, shows that delegations had no influence on drafting if they did not attend regularly.<sup>12</sup>

If powerful state and non-state delegations hope to influence proceedings, they will attend the proceedings, consistently, in force, and with delegates from diverse backgrounds. The data show that the high-attendance delegations disproportionately are from economically powerful states, such as the US, France, Japan and Germany, and powerful IOs, such as the World Bank. It is clear from the size and consistency of the attendance of these delegations that their principals did not suppose that UNCITRAL would produce norms to their liking without effective representation and participation. They presumed attendance mattered and acted accordingly. Their consistent, expanded presence also demonstrates that UNCITRAL's normmaking in this field mattered to them, whether for domestic consumption, but more probably, for reasons of international trade competitiveness. Nonetheless, a small number of developing and transitional countries (China, Thailand, Colombia) also positioned themselves to field strong delegations by one or another measure. China was in the process of drafting a comprehensive bankruptcy law and putting into place a corporate bankruptcy system; Colombia sent its Commissioner of Corporate Affairs, responsible for the entire bankruptcy system, as its lead delegate, again with the expectation that Colombia might be revising its laws.

Professions integral to corporate bankruptcies had a powerful interest in the establishment of laws and regimes consistent with their expertise and competitive advantage. Non-state delegations from international professional associations maintained a strong presence, often through delegates with consistent attendance records and sometimes with a diverse range of such delegates.

## 6.2. Participation

Presence *per se* does not confer influence. It is conceivable that a delegate with a perfect attendance record or a delegation with density and diversity contributed little or nothing to deliberations. Although we do not have comprehensive data on participation during proceedings, we can report tentatively on incomplete data.

In four of the eight WG sessions from 1999 to 2002, we coded every speaker in each session in the order in which they spoke (Halliday & Carruthers 2003). Each intervention or "speech-turn" is counted as one participation. We found that six of the 10 high-attendance delegations whose delegates attended frequently and consistently were also the delegations with the greatest number of speech turns. The delegations from France and the US intervened the most; together they account for almost one-quarter of the total interventions recorded. Otherwise, it was the professional associations (IBA, III, INSOL) that were both frequent and consistent attenders and that participated extensively; 26 percent of all speech-turns come from just four professional associations (ABA, IBA, III, INSOL). Thus, only six delegations accounted for more than 50 percent of all interventions. Obversely, four of the delegations that attended frequently and consistently (Japan, Germany, Thailand, World Bank) did *not* participate at anything like the levels that their delegation/delegate attributes might predict.

Speech-turn data, of course, do not account for content or rhetoric. Moreover, the data do not exhaust varieties of participation, many of which occur outside formal sessions. These include informal caucusing in corridors, attendance at expert group meetings at the invitation of the WG Secretary, annotations on drafts prepared by the WG



Secretary, among others. Nevertheless, the conjunction of delegation attributes with delegation participation rates sharpens and narrows expectations about which delegations likely exerted most impact on the final product. Those were the US and France and the professional associations of lawyers and insolvency practitioners.

Moreover, the potential for influence by delegations from rich economies and of professions is multiplied by crossovers. Rich countries obtain additional, effective, de facto representation when citizens participate in non-state delegations and the costs of those participations are externalized to the non-state bodies. Similarly, professions may be “double-represented” when they sit both in their non-state delegations and comprise one or more delegates in state delegations.<sup>13</sup>

### 6.3. Other working groups

Are the patterns these data display unique to corporate bankruptcy law and WG V on Insolvency? To obtain comparisons, we collected comparable data from a cognate area of domestic law, secured transactions, and its WG VI; and from a long-established but contrasting body of international law, carriage of goods by sea in international transport law, and its WG III. Preliminary findings show significant similarity in patterns of delegation and delegate representation and participation.

In WG III on international transport law, 149 delegations attended at least once, but only 56 were high-attending; 739 delegates attended at least once, but only 50 were high-attending. Only 21 delegations also had high-attending delegates (the comparable number for Insolvency was 10). In that sense, the WG III core group was twice as large as that of the Insolvency WG V, but, nonetheless tiny in comparison to the 149 delegations that appeared at least once in WG III. One significant difference can be observed between these two WGs. Whereas high-attendance delegations were predominately from advanced economies in WG V deliberations on insolvency, more balance was evident in the international transport WG III, where 30 of the 56 high-attendance delegations were from advanced economies and 26 from developing and transitional economies. Moreover, in the final negotiating sessions of WG III a powerful African bloc of states emerged to demand significant concessions in their states' interests, a phenomenon not seen in the insolvency or secured transaction WGs. Like insolvency lawmaking, however, international transport lawmaking also relied substantially on non-state delegations. A non-state delegation (Comité Maritime International) produced the first draft of a convention for the WG and 11 non-state delegations, most industry groups, participated extensively in proceedings.

In WG VI on secured transactions law, 161 delegations attended at least once, but only 41 were high-attending; 473 delegates attended at least once, but only 30 were high-attending. Remarkably, in identical numbers to insolvency, there were only 10 high-attending delegates in high-attending delegations and these were entirely from advanced economies, with North America (US, Canada) dominating. Unlike insolvency, however, almost half of the high-attending delegations were from developing and transitional economies. Like insolvency, and arguably even more intensively than insolvency, expert professional and industry delegations played a critical role in proceedings (Cohen 2008; McCormack 2011).

## 7. Conclusion

These data on delegations and delegates shed light on an invisible component of a much larger whole – the inner circles of global legislatures. Concomitantly, they offer a partial

answer to the fundamental problem of who crafts global norms, and present a methodological approach for predicting the final shape of those norms.

Consistent with the cluster of theories emphasizing state power and economic interests, we find that the economies at the center of the world system are also at the core of deliberations on global norms governing trade and finance. That deliberative core includes a bloc centered on at least several of the world's leading economies – US, France, Germany, Japan, and Australia. Thus, the centrality to proceedings of these powerful states lends support to putative realist views that would imagine UNCITRAL to be a forum for geopolitically influential states.

Another cluster of theories we proposed (constructivism, cultural IPE, global governance, professions) would be more sympathetic to the expectation that delegations and delegates within IOs, and indeed IOs themselves, exert an influence that can reinforce or confound measures of state power. Contrast France and the US with the other three major economies in the inner core of delegations/delegates to UNCITRAL's WG on Insolvency. Japan and Germany, while seated at the table of the most frequent attenders, said little or nothing during proceedings or through informal channels outside the UN chamber. In other words, attributes of the delegates and delegations of these several advanced economies led to widely varying degrees of participation and influence.

This cluster of theories points to the likely influence of professions and other non-state actors. Attendance data and supporting qualitative evidence demonstrate that the three delegations of professionals (IBA, INSOL, and III), which shared collegial training and practice with most delegates in the other most participatory delegations, were arguably the critical technical drivers of the deliberative process. They attended consistently and with a large and diverse group of delegates; they intervened frequently, and, not least, they held the ear of the US delegation.

What are the implications of these findings for the legitimacy of this global legislature?

UNCITRAL, like other global lawmaking bodies, must constantly tend to its legitimacy on the reasonable premise that global authority stems from a belief by nations and interested parties that it is representative in composition, fair in proceedings, and effective in previous lawmaking (Hurd 2007). On its face, UNCITRAL's potential inclusiveness of all states and many non-state actors appears to democratize global lawmaking and establish political legitimacy, as governance normative theory would advocate. UNCITRAL brought a diverse array of states and a substantial array of non-state actors in the door of this WG at least once. UNCITRAL also managed to integrate several non-state actors – the three professional associations and the World Bank – whose expertise and subsequent sponsorship might prove decisive in drafting, adoption, and implementation.

In practice, however, the delegation/delegate analysis shows that the promise of representativeness, which would carry heavy political legitimacy, falters when actual attendance and participation are measured more precisely. Not only do our data show that WG V was populated predominately by a few powerful countries at the core of the world economy, but they also indicate the “double representation” of these countries through the inclusion of professional and IO non-state actors that themselves were hosted by a very few countries (UK, US, Canada), from the same core of the world economy.

But legitimacy rests upon perception. By this account, UNCITRAL's *perceived* representativeness may matter more than whether a representative cross-section of nations –

by whatever measure – in fact attended a majority of WG sessions through a broad range of delegates who themselves attended WG sessions with frequency and consistency. If the frequent attendance of some transitional/developing countries can be viewed as a vote of confidence in UNCITRAL deliberations, perhaps the legitimacy of an IO depends more on whether an opportunity to be heard is offered than whether this opportunity is, in fact, exercised by a broad range of state delegations.

In this paper we have specified very precisely, and to a greater degree than has previously been the case, those attributes of delegations and delegates that affect their profiles of participation. That participation underwrites their bids to influence global lawmaking. We have seen that the drafting in WG V predominately was in the hands of a tiny handful of state and non-state delegations from advanced economies.

Does this finding predict whose norms prevailed? To answer this question we step beyond the current paper to our wider findings reported elsewhere.<sup>14</sup> The preponderance of advanced economy actors in the delegations provides fuel to the conclusion that yet again the world's most powerful economies and their technical specialists imposed a solution on the remainder of the world. There is evidence from our interviews and participant observation that some developing and transitional countries did not believe their interests were being sufficiently addressed. But this opinion was far from uniform. And, notwithstanding the fragility of any consensus reached by such a large group, it is doubtful that delegations from developing/transitional nations could have altered significantly the terms of the Legislative Guide, given the relative weakness of their delegations on most of the attributes we measure. Consensus is blocked by raising a formal objection at a WG session. Most developing nations did not have the resources to counter consistent, well-staffed delegations, nor the legal capacity effectively to engage specialists from the Global North on their own grounds (Busch *et al.* 2008).

At the same time, the Legislative Guide on Insolvency delivers a very substantial potential benefit to developing countries because its recommendations offer an alternative route to save companies in the face of hard budget constraints (Carruthers *et al.* 2001). In their domestic lawmaking, countries as diverse as South Korea, China, and Brazil embraced the underlying logic of reorganization because it appeared to save jobs and save businesses (Halliday & Carruthers 2007). The Guide also serves to constrain the World Bank and IMF; both have agreed that the recommendations set forth in the Guide constitute international standards for judging insolvency laws around the world and have incorporated these standards into their Reports on Observance of Standards and Codes (ROSC) on insolvency law. While developing countries participated relatively little, therefore, it is possible that some decided there was no need to fret the details because the fundamental reorganization premise of the global norms suited them, so long as it offered sufficient flexibility to be implemented in ways that fit local circumstances.

In sum, a handful of delegations and delegates from advanced economies and international professional associations forged an emergent set of norms which coincided with the underlying fundamental principle common to each of those delegations/delegates in this nucleus group (*viz.*, rehabilitation of failing businesses where possible), but which contradicted the substantive law or systemic features of none. Members of the high-attendance delegations from Mexico, Russia, Germany, Japan, the UK, and China may not have intervened at WG sessions because they did not need to. Their presence at WG V sessions maintained a monitoring or protective brief. UNCITRAL was not simply a cipher through which a single powerful state drove its agenda, but rather a deliberative

chamber in which first-world nations glossed over their differences in favor of what they shared in common.

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## Notes

- 1 Other global legislatures in trade law include The International Institute for the Unification of Private Law (known as UNIDROIT) and the Hague Conference on Private International Law. The World Bank and International Monetary Fund (IMF) also work on law-like texts, usually through expert deliberations.
- 2 We use the term “international organizations” to encompass transnational normmaking bodies of all sorts, not the narrower definition of IOs as intergovernmental bodies only.
- 3 We focus here on a delegation’s formal participation in legislative deliberations, recognizing that informal and behind-the-scenes participation is both likely to occur and to be effective, a topic we address in a book-in-progress: Block-Lieb and Halliday, *Global Legislators*.
- 4 Of course, in theory it is possible to imagine hidden hands behind the scenes that manipulate a Secretariat without being present, but our extensive research on UNCITRAL provides no empirical support for such a theory.
- 5 In fact, realists might go a step further and argue that delegations of powerful actors at UNCITRAL are unnecessary because they can get their way elsewhere.
- 6 Not all constructivists view an IO’s autonomy as conducive to a positive influence in the global field. Some law and economics scholars, relying on public choice and related theories, admit the influence of IOs, but view this influence as negative.
- 7 Official Records of the General Assembly, Twenty-first Session, Resolution 2205 (XXI), A/RES/2205(XXI), 17 December 1966, available online at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/08/IMG/NR000508.pdf?OpenElement>.
- 8 That is, holding constant the power of the state or non-state actor that sends the delegation.
- 9 Resolution 2205 (XXI), *supra* note 10 at Part II, ¶ 1.
- 10 Although secured creditors were not directly represented in the Working Group, indirect representation of secured creditors occurred both through international financial institutions and international professional associations.
- 11 That is, each time a single person (e.g. the Australian delegate) attends a single session (e.g. December 2002) this is counted as one attendance. A single person attending all eight sessions would be counted as eight.
- 12 Block-Lieb and Halliday, *Global Legislators*.
- 13 We are indebted to Carol Heimer for this observation.
- 14 Block-Lieb and Halliday, *Global Legislators*.
- 15 If we relax the criterion of selection (e.g. delegations with high attendance and high consistency of at least one delegate), we find: (i) most consistent delegate in a high-attendance

delegation attended six out of eight times: Switzerland, South Korea, Canada; (includes three of high attendance delegates); (ii) most consistent delegate in a high-attendance delegation attended six out of seven times: Italy, GRIP, ABA (include five of high-attendance delegates).

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